No. 25-1388

IN THE

Supreme Court of the United States

UNITED BIOLOGICS, L.L.C., doing business as United Allergy Services,

Petitioner,

v.

AMERIGROUP TENNESSEE, INC., doing business as Amerigroup Community Care, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a unanimous panel of the Sixth Circuit correctly applied this Court's precedent in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), to the facts of this case, and whether that issue warrants certiorari review when the panel provided an independent basis for its decision that does not rely on *Illinois Brick*.

RULE 29.6 DISCLOSURE STATEMENT

AMERIGROUP Tennessee, Inc., which changed its name to Wellpoint Tennessee, Inc., effective July 19, 2023, is a wholly-owned subsidiary of Wellpoint Corporation (formerly AMERIGROUP Corporation). Wellpoint Corporation is a wholly-owned subsidiary of ATH Holding Company, LLC. ATH Holding Company, LLC is a wholly-owned subsidiary of Elevance Health, Inc. No publicly held corporation owns more than 10% of Elevance Health, Inc.'s stock. Shares of Elevance Health, Inc.'s common stock are publicly traded on the New York Stock Exchange (NYSE) under the symbol "ELV." As such, Elevance Health, Inc.'s common stock may be acquired in the ordinary course of business through open market purchases.

Physicians' Medical Enterprises, LLC, d/b/a PME Communications, is wholly owned by PME-HC, LLC. No publicly held company owns 10% or more of PME-HC, LLC. PME-HC, LLC has no parent company.

No publicly held company owns 10% or more of Allergy Associates, P.A., d/b/a The Allergy, Asthma, and Sinus Center, P.C.'s stock. Allergy Associates, P.A. has no parent corporation.

RELATED PROCEEDINGS

The following proceedings are directly related to the case:

Academy of Allergy & Asthma in Primary Care v. *Amerigroup Tennessee, Inc.*, No. 24-5153 (6th Cir.) (opinion issued Oct. 10, 2025; rehearing en banc denied Jan. 13, 2026); and

United Biologics, LLC v. *Amerigroup Tennessee, Inc.*, No. 3:19-cv-00180 (E.D. Tenn.) (order granting motion to dismiss issued Jan. 27, 2022).

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioner United Allergy Services ("UAS") offers a business model for allergy care that simultaneously encourages doctors to overbill for medically unnecessary treatment and discourages meaningful oversight of whether patients complete that treatment. This business model has (unsurprisingly) flopped in Tennessee and elsewhere. UAS's serial antitrust lawsuits, including this one against Respondents, have likewise failed.

Here, as the courts below held, UAS's effort to invoke federal antitrust law faced an immediate stumbling block: UAS does not and cannot provide medical treatment to patients. Instead, its business model involves entering into supply contracts with primary care doctors, who then offer to provide allergy treatment to their patients as an alternative to the patient obtaining that care from an allergist. This means that UAS itself does not compete directly with allergists, or with the insurance companies that reimburse allergists for providing treatments. Because it is no more than a supplier to potential direct competitors in the market for allergy services, UAS's asserted injury is both indirect and speculative. A unanimous panel of the Sixth Circuit properly held that, under both *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), and traditional principles of proximate cause, UAS's alleged antitrust injury is too attenuated to bring a federal antitrust suit.

Although antitrust law is a misfit for UAS's grievances, other potential claims for the misconduct alleged in UAS's complaint are not—including state tort law. UAS sought relief under those theories too, and those claims survived a motion to dismiss. Ultimately, however, the summary judgment record established beyond genuine dispute that no misconduct occurred. Instead, UAS's failure was attributable to the inherent flaws in its business model. That conclusion is now final and not subject to further review by this Court or any other.

In its petition, UAS tries to persuade this Court to intervene by spinning this case as presenting a broad legal question about whether *Illinois Brick* can bar the "target" of a "boycott" from suit under federal antitrust law. For multiple reasons, there is no basis for this Court's review.

First, the outcome of UAS's federal antitrust claim does not turn on the answer to the question presented, which addresses only *Illinois Brick*. Separate and apart from the Sixth Circuit's *Illinois Brick* holding, the court affirmed dismissal of UAS's federal antitrust claims because UAS's alleged damages are too speculative under ordinary proximate-cause principles. The petition never challenges that separate holding, meaning any opinion this Court renders on *Illinois Brick* could not affect the judgment below.

Second, UAS builds its entire petition around a factual premise unsupported by the complaint that the Sixth Circuit did not address below. In the *petition*, UAS casts itself and primary-care physicians as a "joint venture" that competed directly in the market for allergy testing and immunotherapy. But that is both a new argument in this Court and wrong. As the complaint alleged, UAS served as an upstream *supplier* to doctors who might have competed with allergists. UAS's complaint never made a joint-venture allegation, and the Sixth Circuit did not address whether a "direct competitor" would pass muster under *Illinois Brick*.

Third, this case does not implicate a circuit split. UAS's petition principally points to the Second Circuit's decision in *Mosaic Health, Inc.* v. *Sanofi-Aventis U.S., LLC*, 156 F.4th 68 (2d Cir. 2025), *cert. pending*, No. 25-1070, but that case involved a distinct fact pattern and can easily be distinguished. UAS's half-hearted effort to involve other circuits in the split is no more persuasive.

Fourth, the Sixth Circuit's application of *Illinois Brick* is correct. This Court's cases draw a bright line allowing direct purchasers to sue for antitrust violations, but not indirect purchasers who are downstream from the violation. The same principle applies to indirect suppliers like UAS who are upstream from direct competitors, as the Sixth Circuit held. Tellingly, the petition cites no cases in which this Court (or any court of appeals) has permitted a federal antitrust suit by an indirect, upstream supplier like UAS.

Finally, the question presented is not important. To the extent there is any tension in the circuits, it is exceedingly shallow and undeveloped, and no panel of any circuit has yet considered whether the decisions are truly in conflict. Nor is review essential to ensure that genuine misconduct can be adequately addressed. The decision below did not foreclose other claims that can remedy an alleged injury resulting from true malfeasance. Here, however, UAS's state law claims failed on the merits after full discovery.

The petition should be denied.

STATEMENT OF THE CASE

1. Many Americans suffer from seasonal allergies.[1] Pet. App. 187-188 (FAC ¶ 14). The only way to cure

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[1] Because the district court dismissed the federal antitrust claims on a Rule 12 motion, *see* Pet. App. 152-181, the Statement generally draws from the facts alleged in the operative complaint, except when discussing the state-law claims dismissed at summary judgment.

these allergies is through skin testing followed by individualized immunotherapy, typically administered through shots. *Id.* at 187-188 (FAC ¶¶ 13-14, 20, 24, 25). Patients generally must receive shots two to three times each week for several years for treatment to be effective. *Id.* at 195-197 (FAC ¶¶ 26-27). Most patients undergoing allergy immunotherapy see board-certified specialists. *Id.* at 188-189 (FAC ¶ 16).

Founded in Texas in 2009, UAS sells technical services and equipment to primary care physicians to facilitate at-home, patient-administered allergy treatment. *Id.* at 184-185, 190-191, 195-196, 225-226 (FAC ¶¶ 3, 19, 26, 84). Its business model requires physicians to perform testing and prescribe treatment, after which patients inject themselves with shots. *See id.* at 195-196, 199, 225-226 (FAC ¶¶ 26, 31, 84). UAS does not and cannot offer medical treatment to patients directly; it contracts with physicians to provide them with supplies and technicians so the physicians can offer allergy treatment to patients. *See id.* at 190-191 (FAC ¶ 19).

In 2013, UAS expanded into Tennessee, where it entered into contracts to provide supplies and technicians to medical providers. *See id.* at 190-191, 198-199 (FAC ¶¶ 19, 30). Under those contracts, providers paid UAS a fixed fee. *Id.* at 190-191 (FAC ¶ 19). UAS did not employ any physicians or staff authorized to practice medicine in Tennessee. *See id.* at 190-193 (FAC ¶¶ 19, 22).

Patients who received allergy treatment from the providers did not pay UAS for that treatment, directly or indirectly. *See id.* at 192-193 (FAC ¶ 22). Rather, providers' medical practices billed patients and their insurers, following standard health-plan billing protocols. *Id.* at 193-194 (FAC ¶ 23). Third-party insurers, private and public, generally reimbursed the providers. *See id.* at 192-193 (FAC ¶ 22).

UAS's business model did not succeed, in Tennessee or elsewhere. From the start, insurers and others were concerned that primary care physicians supplied by UAS were overbilling and underdelivering. Tennessee's Medicaid program investigated and determined that doctors working with UAS had submitted inflated bills, including by billing for "the maximum allowable" amount for "every patient across the board." *Id.* at 106. In response to these and other issues, the Tennessee legislature capped publicly funded allergy immunotherapy claims and revised billing guidelines. *Id.* at 111, 115; *see also id.* at 131 ("decisionmakers took action to stop paying doctors that, they determined, were likely providing unnecessary and unsafe medical care").

Rather than taking ownership of its business failures, UAS blamed others in multiple federal lawsuits—filed in its own name and in the name of a nonprofit it formed and funded—asserting that various groups of defendants in different states had conspired to harm it. *See United Biologics d/b/a United Allergy Servs.* v. *Am. Acad. of Allergy Asthma & Immunology*, 819 F. App'x 204 (5th Cir. 2020) (per curiam) (affirming judgment as a matter of law for defendants on federal antitrust claims in suit alleging conspiracy by doctors and advocacy group); *Acad. of Allergy & Asthma in Primary Care* v. *Superior HealthPlan, Inc.*, No. 5:17-cv-1122, 2022 WL 18076843 (W.D. Tex. July 14, 2022), *R. & R. adopted*, 2022 WL 18034365 (W.D. Tex. Oct. 18, 2022) (alleging conspiracy among health insurance companies to deny insurance relating to UAS's services; voluntarily dismissed); *Acad. of Allergy & Asthma in Primary Care* v. *Quest Diagnostics, Inc.*, No. 5:17-cv-01295, 2022 WL 980791 (W.D. Tex. Mar. 31, 2022) (alleging Quest Diagnostics was part of a nationwide conspiracy to convince health insurance companies to deny insurance claims related to UAS's services; voluntarily dismissed); *Acad. of Allergy & Asthma in Primary Care* v. *Louisiana Health Serv. and Indemnity Co.*, No. 2:18-cv-00399, 2023 WL 8185692 (E.D. La. Nov. 27, 2023) (granting summary judgment to defendants on antitrust claims against insurers), *appeal pending*, 5th Cir. No. 23-30925. No court has entered judgment in UAS's favor in any of these cases.

2. This lawsuit is one of the many in which UAS seeks to blame others for its marketplace failure. In 2019, UAS filed a complaint in the Eastern District of Tennessee bringing federal antitrust and state tort claims against the four Respondents: Allergy Associates, P.A., d/b/a The Allergy, Asthma and Sinus Center, P.C.; Physicians' Medical Enterprises LLC d/b/a PME Communications, LLC; and Ned DeLozier (together, "the Center"); and AMERIGROUP Tennessee, Inc., d/b/a Amerigroup Community Care ("Amerigroup"). D. Ct. ECF No. 1. UAS alleged that Respondents had conspired to deny claims for treatments by medical providers for whom UAS was a supplier, causing those medical practices to terminate or not renew their contracts with UAS. Pet. App. 182, 234-235, 242-243 (FAC ¶¶ 1, 101, 123).

UAS brought suit under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Pet. App. 234-242. The Act provides a cause of action for a party injured "by reason of" an antitrust violation. 15 U.S.C. § 15(a). Over the course of the litigation, the lower courts have addressed whether the complaint adequately pleads three distinct elements of that cause of action. *First*, a plaintiff must have "antitrust injury," meaning they must have suffered the kind of injury that the antitrust laws are meant to prevent. *See Associated Gen. Contractors of California* v. *California State Council of Carpenters*, 459 U.S. 519 (1983) (*AGC*). *Second*, a plaintiff must overcome the "bright-line" rule articulated in *Illinois Brick* preventing parties "who are two or more steps removed from the antitrust violator in a distribution chain" from suing. *Apple Inc.* v. *Pepper*, 587 U.S. 273, 280 (2019). *Third*, a plaintiff must show that any injury was proximately caused by the alleged anticompetitive conduct. *See Holmes* v. *Sec. Inv. Protection Corp.*, 503 U.S. 258, 268 (1992).

The district court dismissed the federal antitrust claims on the grounds that UAS failed to show an antitrust injury under *AGC* and Sixth Circuit cases applying it. Pet. App. 162-176. It concluded that UAS had not alleged that it competed with the Center in the relevant market: allergy-testing and immunotherapy services provided to Tennessee patients. *Id.* at 164-165. Because UAS's model required *physicians* to provide allergy testing and treatment, patients could not stop receiving allergy services from the Center and turn to UAS for those services instead. *Id.* at 168-170. It is the primary-care physicians—not UAS—who directly compete with the Center to provide allergy testing and treatment, and thus it is primary care physicians who directly bore the asserted underpayments and were harmed by the allegedly harassing efforts described in the complaint. Any affected physicians could bring their own lawsuits for the full undercharge—namely, the unreimbursed amount—creating a risk of duplicative recovery. *Id.* at 173-176.

On the state tort claims, however, the district court denied the motion to dismiss. *Id.* at 181. After discovery concluded, the district court granted summary judgment to Respondents on the state tort claims. *Id.* at 98-151. The undisputed facts showed that UAS lacked evidence that its damages were proximately caused by any alleged misconduct. *Id.* at 99, 129-135. The undisputed facts also showed that UAS lacked evidence of "malice" in Amerigroup's coverage decisions. *Id.* at 129-140, 146-150. Moreover, the undisputed facts established inappropriate billing for allergy treatment by physicians who had contracted with UAS. *Id.* at 105-106; *see also id.* at 113 ("Amerigroup's investigation revealed numerous issues with billing, allergy-testing, and immunotherapy services of physicians who contracted with [UAS].").

3. UAS appealed. C.A. Dkt. 28. After calling for and receiving supplemental briefing on *Illinois Brick*, C.A. Dkt. 59, a Sixth Circuit panel consisting of Chief Judge Sutton and Judges Kethledge and Murphy unanimously affirmed the judgment in Respondents' favor. Pet. App. 1-62.

The Sixth Circuit first addressed the antitrust injury analysis undertaken by the district court. Ultimately, however, the Sixth Circuit found the question of antitrust injury was difficult to resolve in the context of this suit and instead affirmed the dismissal of UAS's federal antitrust claims on two alternative grounds. *Id.* at 22-23.

First, it explained that there is "a specific 'rule' " that applies "when antitrust violators harm multiple parties along a vertical 'chain' of distribution." *Id.* at 24 (quoting *Apple*, 587 U.S. at 279). Under that rule, which originated in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick*, only direct purchasers may sue for antitrust violations. Pet. App. 24-25.

The court then determined that the same rule applies to indirect *sellers* just as it applies to indirect purchasers. *Id.* at 26. Buyers can violate the Sherman Act by lowering prices and reducing output below the competitive level. *Id.* at 17-18. Even if a buyer cartel's " 'undercharge' (the difference between the higher market price and the lower cartel price) will harm not just direct sellers from whom it buys * * * but also indirect sellers from whom the direct sellers buy," only the direct seller can sue under *Illinois Brick*. *Id.* at 27 (citing *Zinser* v. *Cont'l Grain Co.*, 660 F.2d 754, 760-761 (10th Cir. 1981); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1158-59 (5th Cir. 1979); IIA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 346g, at 228-229 (5th ed. 2021)).

The Sixth Circuit further explained that indirect purchasers and sellers cannot avoid *Illinois Brick* by calling their damages "lost profits" rather than an under- or over-charge. Pet. App. 26-27. *Illinois Brick* is "a bright-line rule" that "bars indirect purchasers from suing altogether—even if they seek these 'lost profits as opposed to overcharge damages.' " *Id.* at 27 (quoting *Howard Hess Dental Labs. Inc.* v. *Dentsply Int'l, Inc.*, 424 F.3d 363, 375 (3d Cir. 2005)). Here, "the complaint leaves no doubt that the physicians—not UAS—directly suffered the [alleged] harms." *Id.* at 27, 29. The court noted that if both the primary-care physicians and UAS could sue for the alleged antitrust violations, there would be a " 'risk of duplicative recoveries' for the same injury." *Id.* (quoting *Illinois Brick*, 431 U.S. at 730).[2]

The Sixth Circuit recognized the importance of "not overread[ing] *Illinois Brick*," because the case does not " 'bar multiple liability that is unrelated to passing an overcharge down a chain of distribution.' " *Id.* (quoting *Apple*, 587 U.S. at 287). Sometimes an antitrust violator will contract directly with two parties, forcing one to pay an overcharge and another to sell at an undercharge. *Id.* "In that scenario," the court explained, "both may sue for their discrete damages" because "[n]either qualifies as an indirect purchaser or seller." *Id.* (citing *Apple*, 587 U.S. at 276-277, 287-288). But that exception did not apply here. *Id.*

Second, the Sixth Circuit explained that, independently of *Illinois Brick*, UAS's suit failed a traditional proximate cause analysis. "[E]ven apart from *Illinois Brick*'s rule, UAS seeks 'highly speculative' damages." Pet. App. 31 (quoting *AGC*, 459 U.S. at 542); *see also id.* at 37. UAS sought lost profits based on no longer being able to contract with physicians because of Respondents' alleged conduct. *Id.* at 31. But those physicians may have chosen not to buy UAS's services " 'for any number of reasons unconnected to' that conduct." *Id.* (quoting *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006)). Thus, even applying

[2] As the Sixth Circuit pointed out, at least one of UAS's Tennessee customers did sue to recover the full amount of his unreimbursed claims. Pet. App. 30 (citing *Sewell v. Amerigroup Tenn., Inc.*, No. 2:17-cv-00062, 2018 WL 6591429 (M.D. Tenn. Dec. 14, 2018)).

general proximate-causation principles, UAS had not adequately alleged a cause of action.

On the state law claims, the court affirmed summary judgment for Respondents. *Id.* at 41-59. UAS had not produced evidence that the Center proximately caused any physicians to breach, terminate, or refuse to renew their at-will contracts with UAS. *Id.* at 50-53, 58. Indeed, the court determined that UAS "points us to no evidence to suggest that the Center's actions were a but-for cause (let alone a substantial factor) in any physician's decision to terminate a contract or refuse to renew one." *Id.*

Judge Kethledge wrote a short concurrence noting that the panel opinion "offers a careful synthesis of the Supreme Court caselaw," which "directs * * * the outcome we reach here." *Id.* at 60. But he questioned whether that outcome necessarily advanced antitrust policy goals in this particular case. *Id.* at 61-62. At the same time, he acknowledged "concerns" about allowing parties "harmed indirectly to bring antitrust claims," and recognized that "legal rules" cannot be manipulated "to reach an outcome in a particular case." *Id.*

4. UAS petitioned for rehearing en banc. Pet. App. 63. No judge requested a vote on the petition, and it was denied. *Id.* at 64.

Judge Bush issued a statement respecting denial of rehearing en banc where he agreed that the panel's decision "reasonably appl[ied] Supreme Court precedent" and that "this case does not warrant en banc review." *Id.* at 66, 86. He thought, however, that this case presented a question about how to apply *Illinois Brick* in the context of an alleged group boycott of plaintiffs operating "essentially as part of an apparent joint venture"—despite the fact that UAS had never alleged that it was operating in a joint venture with physicians. *Id.* at 66.

Judge Murphy concurred in the denial of rehearing, joined by Chief Judge Sutton and Judge Kethledge. *Id.* at 89. Judge Murphy reiterated that this Court's cases interpreting the Sherman Act create a clear rule *categorically barring* indirect purchasers from bringing antitrust claims, which "the circuit courts all agree * * * applies in the *opposite* direction" to bar suits by indirect sellers. *Id.* at 89 (emphasis in original); *see also id.* at 92 (noting that this Court's opinion in *Apple* uses the phrase "bright-line rule" six times). Judge Murphy pointed out that *Illinois Brick* is not and cannot be "a mere 'pleading' limit that plaintiffs can readily avoid by seeking lost profits rather than overcharge (or, as here, undercharge) damages." *Id.* at 90. He described the panel's holding as not a "particularly debatable" application of *Illinois Brick*. *Id.* at 89.

No judge on the Sixth Circuit stated a disagreement with the district court's dismissal of UAS's antitrust claims.

UAS's petition for certiorari followed.

ARGUMENT

I. THE PETITION IGNORES THE INDEPENDENT GROUND FOR THE RULING BELOW.

UAS asks this Court to address whether *Illinois Brick* bars the "target of a group boycott" from recovering "lost-profit damages." Pet. i. But the decision below ruled in favor of Respondents on two grounds, and the petition does not seek review of the second. The court explained that "even apart from *Illinois*

Brick's rule," Respondents were entitled to judgment in their favor. Pet. App. 31. This Court does not answer non-dispositive legal questions, where a ruling in the petitioner's favor on the question presented would have no impact on the judgment of the court of appeals. *Amgen, Inc.* v. *Sanofi*, 598 U.S. 594, 615 (2023) ("[W]e review judgments of the lower courts, not statements in their opinions."). That is the situation here.

This Court has drawn a distinction between the *Illinois Brick* analysis and the question of whether a party's injury was proximately caused by the defendant's conduct. *Illinois Brick*, 431 U.S. at 728 n.7; *see also Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 476 (1982). *Illinois Brick* articulates a bright-line rule, s*ee Apple*, 587 U.S. at 279, and "never spoke of proximate cause at all." IIA Areeda & Hovenkamp, *Antitrust Law* ¶ 346c (Supp. 2026). The proximate-cause analysis, by contrast, draws on traditional common-law principles. *See AGC*, 459 U.S. at 538-545. A plaintiff must adequately plead that it satisfies *both* to survive a motion to dismiss. *See Illinois Brick*, 431 U.S. at 728 n.7; Pet. App. 23-28.

The Sixth Circuit held that UAS's complaint was deficient under both *Illinois Brick* and the traditional proximate-cause analysis. Specifically, the court concluded that UAS's damages are too speculative "*even apart from Illinois Brick*'s rule." Pet. App. 31 (emphasis added). UAS's suit sought to recover lost profits it might have made from sales to "*prospective* physicians who refused to contract with [UAS] because of the insurers' anticompetitive conduct." *Id.* As "[w]ould-be" competitors providing allergy services directly to patients, even those doctors "generally may not sue unless they establish that they took concrete steps to enter the market." *Id.* "[I]t would make no sense," the court explained, "to allow a further-removed indirect seller (UAS) to sue if these unidentified physicians cannot." *Id.* For UAS to recover lost profits, it "would have to prove that the physicians refused to enter the market as 'the result of the alleged' anticompetitive conduct." *Id.* (quoting *Holmes*, 503 U.S. at 273). But these theoretical physicians "could have refrained from doing so 'for any number of reasons unconnected to' that conduct." *Id.* (quoting *Anza*, 547 U.S. at 458). And UAS cannot recover such "highly speculative" damages. *Id.*

The court clearly understood this conclusion to be separate from its *Illinois Brick* analysis. Indeed, it recognized that "[e]ven if the categorical rule from *Illinois Brick* does not apply," "a plaintiff still might not satisfy proximate causation under all the facts." *Id.* at 27 (citing *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127, 138-143 (2d Cir. 2021)). Some injuries, the court elaborated, "might not fall within *Illinois Brick*, but * * * would not satisfy proximate causation all the same." *Id.* at 28. To illustrate, the court pointed to "potential purchasers who do not buy at a cartel price but who would have bought at the market price." *Id.* Those plaintiffs would not fall within *Illinois Brick* because "they sit at the correct level of the distribution chain." *Id.* But standard causation principles would "bar[] them from suing given the speculation required to decide whether they would have bought." *Id.* (citing Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J. L. & Econ. 445, 463 (1985)). Notably, traditional proximate cause is a fact-bound inquiry: "[n]o single formula captures the required proximity." *Id.* (quoting IIA Areeda & Hovenkamp, *Antitrust Law* § 339a, at 147).

The Sixth Circuit's independent and alternative proximate-cause holding means that the question presented would have no impact on the outcome of this case. The petition focuses exclusively on the Sixth Circuit's application of *Illinois Brick* and does not ask this Court to review or revisit the court's conclusion that UAS's claims independently failed on a proximate-cause analysis. *See, e.g.*, Pet. 14 (claiming the decision below "entrenches a split on the scope of *Illinois Brick*"); *accord* Pet. i, 1-3, 13-15. As a result, any opinion as to *Illinois Brick* would be purely advisory because it would have no effect on the Sixth Circuit's judgment in this case. Both constitutional and prudential considerations counsel against certiorari in these circumstances. *See, e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (noting "an advisory opinion" has been "disapproved by this Court from the beginning").

II. THE PETITION ASKS THIS COURT TO RULE ON A QUESTION THE SIXTH CIRCUIT DID NOT ADDRESS AND RELIES ON A FORFEITED ARGUMENT.

The petition asks this Court to address a question the Sixth Circuit never decided: whether *Illinois Brick* applies to direct competitors (or "rivals"). *See, e.g.*, Pet. 17, 20, 22, 26-27, 29. This Court should not grant certiorari to review a question that the court of appeals did not pass upon. In any event, UAS is not a direct competitor in the market for allergy treatment—and its central argument otherwise is both forfeited and wrong.

The Sixth Circuit's *Illinois Brick* analysis did not address the issue of whether direct competitors would satisfy the *Illinois Brick* test. *See* Pet. App. 29-41. Instead, it considered and decided the issue of whether an indirect supplier to a direct competitor may sue under *Illinois Brick*. To be sure, the Sixth Circuit considered UAS's contention that it was a potential competitor in its discussion of antitrust injury. *See* Pet. App. 20-22. Even there, the court did not ultimately determine whether UAS is or is not a competitor to the Center. *Id.* at 23. But, when considering *Illinois Brick*, the court did not address whether the analysis would apply any differently in the context of a direct competitor. *See* Pet. App. 29-41.

There is an obvious reason why. UAS alleged anticompetitive effects in the markets for "allergy testing and immunotherapy." *See, e.g.*, Pet. App. 187. UAS does not—and cannot—compete in those markets because it does not employ physicians who are legally able to provide those services to patients. *See* Pet. App. 190-191; *supra*, p. 5. Patients could not abandon the Center for UAS, no matter how much the Center charged or what insurers reimbursed.

Apparently recognizing that it gets nowhere as a supplier to primary-care physicians, UAS's petition builds its case around the notion that it is instead in a joint venture with doctors who do compete in those markets. *See, e.g.*, Pet. 13, 14, 17, 30, 33. But UAS did not plead a joint-venture theory in its complaint, Pet. App. 182-249, or preserve a joint-venture theory of injury in its briefing below. *See* C.A. Dkts. 28, 51, 61.[3] The joint-venture characterization appeared for the first time in Judge Bush's statement respecting the denial of rehearing en banc. *See, e.g.*, Pet. App. 66. UAS's new joint-venture theory is thus forfeited. *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 37, 38 (2015) (arguments not presented to lower courts are forfeited, and absent "unusual circumstances" this Court will not consider them).

Nothing in the complaint suggests that UAS was actually in a joint venture with physicians. A joint venture typically has two features: profits are divided by shares; and the participants exercise joint control. *See, e.g.*, *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 3 (2006) (joint venture involves pooled resources and shared risks and profits). The complaint does not allege either was true here and in fact admitted that UAS charged providers a set fee, an admission that cannot be reconciled with UAS's brand-new joint venture argument. *See* Pet. App. 190-191 (FAC ¶ 19) (UAS charged providers a set fee); *id.* at 192-194 (FAC ¶¶ 22-23). Indeed, the complaint never even uses the phrase "joint venture."[4]

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[3] Quite the opposite. In its opening brief before the Sixth Circuit, UAS specifically stated that its expansion into Tennessee "converted" "primary care doctors * * * into competitors." C.A. Dkt. 67 at 8.

[4] Presumably, UAS never made this argument before Judge Bush raised it *sua sponte* during en banc review because it understood the physician contracts specifically barred it. A UAS-physician contract produced during discovery expressly stated that "[n]othing in this Agreement will be deemed to create a[] * * * joint venture or other similar relationship." D. Ct. ECF 275-1 at JA-20.

In short, the question of whether a joint venturer in direct competition with the defendants can sue under *Illinois Brick* was neither pressed nor passed upon below. This means that the petition repeatedly exaggerates the stakes of this case. A true direct competitor or joint venturer could raise arguments not made below and could distinguish the decision below on this basis. Nor would the decision foreclose the hypothetical suit by Uber repeatedly posited by UAS. *See* Pet. 2, 31. For one thing, Uber is a direct purchaser in the hypothetical market for taxi driver services, so it is differently situated than UAS here. For another, Uber is a two-sided platform like the one this Court considered in *Apple*, which introduces distinct considerations not present here. *See* Pet. App. 27. There is no basis for this Court to weigh in on these questions when the Sixth Circuit did not.

III. THERE IS NO SPLIT ON THE QUESTION PRESENTED.

UAS tries hard to manufacture a circuit split by describing fact-specific decisions at a high level of generality. It claims that the decision below "squarely conflicts" with the "Second Circuit's recent decision in *Mosaic,*" that same court's older decision in *Crimpers Promotions*, and a collection of other "lower-court precedent." Pet. 15. But UAS misreads the cases it relies on to justify its argument for a split.

A. The Sixth and Second Circuits are not in conflict on the question presented.

1. UAS's claimed split between the Sixth and Second Circuits based on the *Mosaic* decision ignores that decision's reasoning and context. No panel of either court—or any court of appeals—has expressly acknowledged a split on the question presented.

Mosaic involved the federal 340B program, which requires participating drug manufacturers to offer to sell their drugs to certain types of health centers at a discount. *See Astra USA, Inc.* v. *Santa Clara Cnty.*, 563 U.S. 110, 113 (2011). After acquiring the drugs at a discount, the health centers can sell them to their patients at non-discounted prices and keep the profit; those health centers sometimes enter into contracts with outside pharmacies relating to dispensing drugs to health center patients. *See Mosaic Health, Inc.* v. *Sanofi-Aventis U.S., LLC*, 714 F. Supp. 3d 209, 215 (W.D.N.Y. 2024) (describing the "typical arrangement involving a contract pharmacy").

In *Mosaic,* "health centers * * * operating safety-net clinics" filed an antitrust suit against drug manufacturers seeking damages "for losses incurred as a result of 'lost access' " to contract-pharmacy drug sales, based on the manufacturers having imposed restrictions on the use of contract pharmacies. *Mosaic Health*, 156 F.4th at 73, 80. The Second Circuit, in two curt paragraphs, held that *Illinois Brick* did not bar that claim because the claim did not "implicate the concerns at the heart of *Illinois Brick*"—"duplicative recoveries" and "multiple levels of distribution." *Id.*

UAS's claim of a circuit split overreads *Mosaic*. UAS portrays *Mosaic* as if it announced the broad rule that antitrust claims for lost profits always fall outside *Illinois Brick*. Pet. 15. But *Mosaic* did not say anything like that.

The Second Circuit's analysis in *Mosaic* depended on the unusual context of the 340B program. 340B drug discounts are directly "conveyed from the drug company to the" health centers through discounted drug sales. *See* Amended Complaint at 15, *Mosaic Health, Inc.* v. *Sanofi-Aventis U.S., LLC*, No. 6:21-cv-06507 (W.D.N.Y. Oct. 22, 2021), ECF No. 41; *Mosaic Health*, 156 F.4th at 73. Manufacturer policies that limit health centers' use of contract pharmacies have a direct financial impact on those health centers, which can buy fewer discount-priced drugs to resell to patients at non-discounted prices under the policies. No upstream or downstream party can assert that same injury, because no entity other than the health centers themselves can obtain discounted pricing under the 340B program. 42 U.S.C. § 256b(a)(1), (a)(4)(A). As a result, the Second Circuit concluded that there is " 'not the slightest possibility of a duplicative exaction.' " *Mosaic Health*, 156 F.4th at 80 (quoting *McCready*, 457 U.S. at 475).

The court did *not* say that every antitrust case seeking lost profits would be free from the "concerns at the heart of *Illinois Brick*" that motivated its decision in *Mosaic*. And the Sixth Circuit concluded that this case involves those exact risks. Pet. App. 29-30. As the Sixth Circuit explained, UAS's "harms are 'two * * * steps removed from the antitrust violator[s]' because its harms flow out of the injuries inflicted on its 'customers' up the chain: the physicians." Pet. App. 32 (quoting *Apple*, 587 U.S. at 280). Specifically, UAS seeks to recover lost profits resulting from its existing customer physicians allegedly treating fewer patients and providing fewer services, and from its prospective physician customers allegedly choosing not to enter the allergy-treatment market at all. Pet. App. 30. Those physicians "directly suffered" from the alleged antitrust conspiracy and could (and sometimes did) bring their own claims "to recover the full amount" of their losses. Pet. App. 29. UAS meanwhile was only "indirectly injured by a downstream restraint that affected 'different levels of a distribution chain.' " Pet. App. 39 (quoting *Apple*, 587 U.S. at 287). The court therefore held that UAS's lost profits claims would "risk" duplicative recoveries, Pet. App. 34 (noting that "duplicity" of recoveries "might arise" with UAS's lost profits claim), and would require a court to apportion " 'highly speculative' damages." Pet. App. 31. That is, UAS's lost profits claim *would* "implicate the concerns at the heart of *Illinois Brick*." *Mosaic Health*, 156 F.4th at 80.

That makes all the difference. *Mosaic* involved a lost profits claim the Second Circuit understood did not threaten duplicative recovery. This case does. There is no basis for UAS's assertion that "[t]his case would * * * have come out the other way in the Second Circuit." Pet. 17. The two decisions do not create any circuit conflict.[5]

UAS invokes a portion of Judge Bush's en-banc-stage concurrence as suggesting a split on the question presented, Pet. 15 (citing Pet. App. 83), but the cited portion of the concurrence does no such thing. Judge Bush was not addressing lost profits, any other claim for damages, or the question presented here. Pet. App. 83. That part of the concurrence solely discusses whether *Illinois Brick* applies to claims for injunctive relief. *Id.* But UAS does not seek this Court's review of that question—likely because it forfeited

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[5] For the same reason, there is no split with the Third Circuit's decision in *Howard Hess*, 424 F.3d 363 (3d Cir. 2005). Notably, although the *Mosaic* petitioners rely on that case heavily, UAS does not even include it in the claimed split. *See* Pet. 15-19.

that request below. *See* Pet. App. 95 (Murphy, J., concurring in the denial of rehearing). That question is therefore not before this Court. *See* Sup. Ct. R. 14.1(a). And, to the extent Judge Bush suggested any tension with *Mosaic* on the question presented, that suggestion rested entirely on the unaddressed, unpreserved, and mistaken premise that UAS was engaged in a "joint venture" with physicians. *See* Pet. App. 69-70; *supra*, pp. 17-18.

2. The petition also invokes an earlier Second Circuit decision in its quest for a circuit split. But *Crimpers Promotions Inc.* v. *Home Box Office, Inc.*, 724 F.2d 290 (2d Cir. 1983) is no help to UAS in this regard. As the court below correctly recognized, that case is readily distinguishable. Pet. App. 40-41. Unlike UAS, the plaintiff in *Crimpers* was not "a 'supplier' of a competitor, to whom [antitrust] standing is generally denied." 724 F.2d at 294 (citation omitted); *see also* Pet. App. 21. Rather, it sought to "compete with defendants." *Crimpers*, 724 F.2d at 294. And the injury it alleged was its own: the costs it "incurred" trying to become a competitor by hosting a tradeshow that was boycotted at defendants' urging. *Id.* at 293-294. That injury was "distinct and different" from any injuries suffered by suppliers of the defendants' competitors, *id.*, and it was not "a 'remote' consequence of defendants' acts," *id.* at 294 ("The injury to [the plaintiff] was not a 'remote' consequence of defendants' acts as would have been the case, for example, if the low prices allegedly paid by [the defendant's] had put a producer out of business and a supplier of the producer sued."). The Second Circuit thus found "no danger of double recovery in recognizing Crimpers' standing." *Id.* at 293.

Again, this case is different. No matter how UAS attempts to belatedly recast itself (at 17) as part of a joint venture in direct competition with Respondents, that was not the issue addressed below. *See supra*, pp. 16-19. It is a *supplier* to certain Respondents' direct competitors—the physicians. *See supra*, pp. 5, 17-18; Pet. App. 7, 21. And unlike the plaintiff in *Crimpers*, UAS's damages are derivative of injuries allegedly suffered by those physicians because they are what physicians would have paid UAS under its supply contracts. That is precisely the kind of injury for which antitrust "standing is generally denied." *Crimpers*, 724 F.2d at 294.

The upshot is that there is no disagreement between the Second and Sixth Circuits.

B. None of UAS's other cases show a split.

The other cases UAS cites likewise fall well short of demonstrating a split. Start with *Novell, Inc.* v. *Microsoft Corp.*, 505 F.3d 302 (4th Cir. 2007)—the only other case UAS singles out for special attention. There, the Fourth Circuit devoted little attention to *Illinois Brick*, relegating it to a short footnote. *Id.* at 311 n.17. That makes sense. The court explained that the difficulties of identifying and apportioning damages that can defeat antitrust claims "often involve potential plaintiffs *indirectly* injured by the allegedly anticompetitive behavior." *Id.* at 319 (citing *AGC*, 459 U.S. at 545 then *Illinois Brick*, 431 U.S. at 737-738). But it found no such problem in *Novell* because some of Microsoft's anticompetitive conduct—including withholding technical information from Novell's software developers and negotiating with computer manufacturers to ensure that Novell's products would not be preinstalled on new PCs—"ha[d] no more direct victim than *Novell*." *Id.* at 318. The court accordingly held that there was little risk that any recovery would need to be apportioned among more directly injured parties, particularly given the unique economic "characteristics of the PC operating-systems market." *Id.* at 318-319 (emphasis omitted).

Here, by contrast, the court held that UAS's alleged injuries were derivative of injuries first suffered by physicians and that allowing suit would require courts to confront the very apportionment and duplicative-recovery concerns that were absent in *Novell*. *Novell* is therefore distinguishable and does not establish the split that UAS claims.

UAS's remaining circuit court cases do even less. They either do not meaningfully engage with *Illinois Brick*, apply it only in dicta, or do not discuss it at all. *See, e.g.*, *Andrx Pharms., Inc.* v. *Biovail Corp. Int'l*, 256 F.3d 799, 817 (D.C. Cir. 2001) (discussing *Illinois Brick* in passing); *Am. Ad Mgmt., Inc.* v. *Gen. Tel. Co. of California*, 190 F.3d 1051, 1053-54, 1059-60 (9th Cir. 1999) (citing *Illinois Brick* in passing in a case where the plaintiff was an agent of the defendant); *Reazin* v. *Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951 (10th Cir. 1990) (holding that targeted victim of anticompetitive scheme had antitrust standing without citing *Illinois Brick*); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 606 (7th Cir. 1997) (stating in dicta that *Illinois Brick* would not apply to "a refusal to enter into direct contractual negotiations," which is not alleged here). Those cases therefore do not establish a conflict either. Nor do UAS's unpublished district court cases. *See* Pet. 19.

Simply put, UAS has not identified any disagreement among the courts of appeals that warrants this Court's intervention.

IV. THE DECISION BELOW CORRECTLY APPLIES *ILLINOIS BRICK*.

The Sixth Circuit correctly held that UAS's antitrust claims fail as a matter of law under *Illinois Brick*'s bright-line rule. Its application of this Court's precedent is not even "particularly debatable." Pet. App. 89 (Murphy, J., concurring in the denial of rehearing).

1. The court properly applied *Illinois Brick* to the facts alleged in UAS's complaint. As this Court recently reiterated, *Illinois Brick* "drew a bright line that allowed direct purchasers to sue but barred indirect purchasers from suing." *Apple*, 587 U.S. at 282; *see also id.* at 279-282, 285 (reiterating that *Illinois Brick* adopted a "bright-line rule" six times). The law is clear: If "there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue," *id.* at 282, but "indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue," *id.* at 279. UAS does not dispute that the same rule applies in the opposite direction—that is, it applies upstream the same way it does downstream. *See generally* Pet.; *see also* Pet. App. 26 (majority opinion) (collecting cases), 93 (Murphy, J., concurring in denial of rehearing en banc) (noting that "*Illinois Brick* should apply not just when buyers sue sellers but also when sellers sue buyers" is "a fact that seemingly nobody disputes").

Under *Illinois Brick*, indirect sellers who are two or more steps removed from those directly injured by antitrust violations cannot sue. Here, "[t]he complaint leaves no doubt that the physicians—not UAS—suffered" the alleged injuries. Pet. App. 29. The Sixth Circuit correctly held that UAS is therefore barred from attempting to recover damages for those injuries. The court was also correct that if UAS's suit were to proceed, Respondents could be exposed to duplicative damages. Pet. App. 34; s*ee also id.* at 30 (noting that at least one physician identified in the complaint sued to recover the full amount of his unreimbursed claims, *i.e.*, the entire undercharge). Dismissal of UAS's claims is consistent with *Illinois Brick* and the policy principles underlying the limitations on antitrust recovery.

2. UAS's counterarguments are unavailing. Its criticisms of the Sixth Circuit's decision rest on two premises: one, that UAS and its clients were joint venturers; and two, that *Illinois Brick* only applies to cases involving overcharges, not cases involving lost profits. Both premises are wrong.

First, as discussed above, the allegations in the operative complaint do not and cannot establish that UAS is anything other than an upstream supplier to the physicians that actually compete with the Center. *Supra*, pp. 16-19. Once you reject the joint venture characterization as inconsistent with how UAS pled this case, UAS's arguments fall away.

Second, indirect sellers and buyers cannot sidestep application of *Illinois Brick* by labeling their damages as "lost profits" instead of overcharges or undercharges, or by categorizing the alleged anticompetitive activity as a "group boycott" instead of cartel pricing. Pet. App. 26-27 (citing *Howard Hess*, 424 F.3d at 373-374). For good reason. The policy concerns animating *Illinois Brick* may apply whether the indirect seller labels its claim as one for lost profits or as an undercharge. *Id.* at 35. *Illinois Brick* would not have any force if it could be avoided "through artful pleading." *Id.* at 32 (citing *Merican, Inc.* v. *Caterpillar Tractor Co.*, 713 F.2d 958, 967 (3d Cir. 1983)).

That *Illinois Brick* most often arises in seller overcharge cases does not mean it is limited to that context. "So long as *Illinois Brick* stands, the courts cannot allow evasion of its policies by artfully transforming a monopsony undercharge claim into a plan to destroy * * * upstream producers." IIA Areeda & Hovenkamp, *Antitrust Law* § 346g, at 228; *see* Pet. App. 36 (quoting the same). Here, "whether the defendants' conduct is labeled a boycott, a cartel, or anything else, [UAS's] harms are 'two * * * steps removed from the antitrust violator[s]' because its harms flow out of the injuries inflicted on its 'customers' up the chain." *Id.* at 32 (quoting *Apple*, 587 U.S. at 280). And "the distinction between a markup and a commission is immaterial." *Apple*, 587 U.S. at 283 (quotation omitted). Thus, *Illinois Brick* applies.

It is also immaterial that the complaint describes UAS as the intended "target" of the alleged anticompetitive conduct. *See* Pet. App. 36. As this Court has explained, intent is not "a panacea that will enable any complaint to withstand a motion to dismiss." *AGC*, 459 U.S. at 537*; see also Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 12 (2010) (in RICO context, "the focus is on the directness of the relationship between the conduct and the harm," not foreseeability). The "availability of the [private antitrust] remedy to some person who claims its benefit is not a question of the specific intent of the conspirators." *McCready*, 457 U.S. at 479.

That approach makes good sense. A " 'target' theory of antitrust liability would nullify the doctrine of *Illinois Brick*." Pet. App. 36 (quoting *Motorola Mobility LLC* v. *AU Optronics Corp.*, 775 F.3d 816, 822 (7th Cir. 2015) (Posner, J.)). As Judge Posner has explained, a manufacturer's cartel almost always ultimately targets retail buyers, setting higher prices based on what it expects those indirect purchasers to pay. *Motorola*, 775 F.3d at 823. But the retail buyers, as indirect purchasers, cannot avoid *Illinois Brick* by claiming that the cartel intended their downstream harms. *Id.* at 822. The same goes for indirect sellers like UAS. *See* Pet. App. 36 (citing IIA Areeda & Hovenkamp, *Antitrust Law* § 346g, at 228). Again, UAS has not asked the Court to apply *Illinois Brick* any differently in the context of upstream suppliers rather than downstream purchasers. *Supra*, p. 26. And being an intended victim of antitrust violations is not a silver bullet to defeat *Illinois Brick*'s "bright-line" rule. *See Apple*, 587 U.S. at 280; *cf. McCready*, 457 U.S. at 479.

3. Nor do the cases upon which UAS chiefly relies (at 22-24) establish that the Sixth Circuit overread *Illinois Brick*. *See* Pet. App. 38-41.

McCready dealt with an injury that flowed directly from the decision of the antitrust violator, with whom the plaintiffs dealt directly. 457 U.S. at 468; Pet. App. 38. There, an insurer conspired with a psychiatric-services association to exclude competing psychological services from coverage. Pet. App. 38 (citing *McCready*, 457 U.S. at 468). This Court expressly held that *Illinois Brick* did not apply, noting that "permitting [the plaintiff] to proceed in the circumstances of this case offers not the slightest possibility of a duplicative exaction from [the defendants].” 457 U.S. at 474-475. The plaintiff had directly paid for her psychologist’s services, which the defendant—her health insurer—had refused to reimburse. *Id.* The psychologist, this Court emphasized, “can link no claim of injury to himself” because he had “been fully paid for his service.” *Id.* at 475.

UAS’s injury, however, is purely derivative and indirect; it arises only after non-antitrust violators (its provider-customers) make an intervening decision not to contract with it. As the Sixth Circuit explained, “*McCready*’s holding does not matter here because UAS sits one step removed from the primary-care physicians on the *same supply side* of the insurers.” Pet. App. 38 (emphasis in original). It analogized UAS to a medical supplier that sold services to the psychologists in *McCready* to help them serve patients. *Id.* “[N]othing in *McCready* suggests that this type of indirect seller could sue in addition to the psychologists themselves.” *Id.* at 38-39. Even if the psychologists could have sued, they were “competitors whom the conspirators hoped to eliminate from the market.” 457 U.S. at 479. And, as discussed, UAS is not a competitor in the relevant market. *Supra*, pp. 16-19.

The other case UAS chiefly discusses is *AGC*, which held that the plaintiffs *lacked* an antitrust injury. 459 U.S. at 539. There, plaintiff unions had sued an association of contractors for allegedly conspiring with its members to coerce buyers to do business with non-union firms instead of union firms. *Id.* at 527-528. UAS argues that this Court’s opinion made it clear that union contractors and subcontractors—rather than the unions themselves—could sue. Pet. 23. Even if that’s true, those union contractors and subcontractors competed with the alleged violators. But the actual plaintiffs in *AGC* were "neither a consumer nor a competitor in the market in which trade was restrained"—just like UAS. *AGC*, 459 U.S. at 539. *AGC* gets Petitioner nowhere.

The decision below constitutes a straightforward application of this Court's cases. And it advances the fundamental principles underlying this Court's decisions limiting recovery for alleged antitrust violations. *See* Pet. App. 25 (discussing policy reasons for *Illinois Brick*'s rule).

4. Finally, it is worth noting that no judge below disputed that this Court's existing precedent leads to the dismissal of UAS's antitrust claims. *See* Pet. App. 60 (Kethledge, J., concurring) ("I agree that the existing caselaw directs—albeit by analogy—the outcome that we reach here."); *id.* at 66 (Bush, J., statement respecting denial of rehearing en banc) ("I respect the panel's decision as reasonably applying Supreme Court precedent"). Both Judges Bush and Kethledge suggested a *change* to this Court's precedent that Petitioner has not requested. *Cf. id.* at 97 (Murphy, J., concurring in denial of rehearing en banc) ("If the Supreme Court means to replace [the *Illinois Brick* rule] with an 'open-ended balancing test[],' it can tell us."). But the petition does not ask this Court to reconsider any of its existing precedent. *See* Pet. i. There is no reason for this Court to grant review on the application of those precedents to the facts here.

V. THE QUESTION PRESENTED DOES NOT WARRANT THIS COURT'S REVIEW.

Finally, the question presented is not fit for this Court's review for three independently sufficient reasons: *one*, any alleged split among the lower courts is underdeveloped; *two*, the summary judgment record makes clear this case is a poor vehicle to review the question presented; and *three*, the question presented is not important.

A. Any split is not ripe for this Court's review.

Even if the Court were to conclude that some tension exists among the lower courts, review would still be premature. The supposed split UAS identifies is shallow. At most, it involves the Second Circuit versus Sixth Circuit. It is also brand new: Both decisions were issued in the last year in rapid succession. And the alleged disagreement arises in highly fact-specific applications of *Illinois Brick* and traditional proximate-cause principles rather than from clearly conflicting legal rules. Additional percolation would allow the courts of appeals to address the issue in a wider range of factual settings and to determine the range of potential application of *Illinois Brick*.

That process is particularly appropriate because the decision below applied longstanding concerns regarding indirect injury, duplicative recovery, and damages apportionment to the claims of an indirect supplier. Other courts confronting similar claims may find that reasoning persuasive. By contrast, the Second Circuit's two-paragraph *Illinois Brick* discussion leaves much about its reasoning for future cases to develop. Further development in the lower courts would therefore help determine whether any genuine conflict exists, and if so, define its contours before this Court's intervention becomes necessary.

B. This case is a poor vehicle for reviewing the question presented.

As explained previously, the Sixth Circuit has already concluded that UAS's antitrust claim would fail under a traditional proximate-cause analysis. Even without that independent holding on the antitrust claims, however, it is clear that *Illinois Brick* was not dispositive here. Normally, when a case is dismissed on a Rule 12 motion, there may be questions about what discovery would reveal. Not here. Because the state law claims proceeded to summary judgment, we know exactly what the record would show: that UAS's antitrust claims would fail for any number of reasons unrelated to *Illinois Brick*.

The summary judgment record in this case established beyond reasonable dispute that "Amerigroup had *independent* concerns with excessive allergy-care billing by primary-care physicians separate from anything the Center said." Pet. App. 51. Far from establishing an antitrust conspiracy, the record included no "evidence that the Center successfully convinced an insurer to audit even a single primary-care physician." *Id.* at 52. And the record established that Amerigroup acted to protect from "fraud and waste" rather than any improper purpose, *id.* at 45, and that UAS's business model violated the terms of the physicians' agreements with their insurers, *id.* at 47.

These determinations are not subject to further appellate review. It is likely that all or most of them would be given issue preclusive effect if UAS's antitrust claims were allowed to proceed. *Cf. Mullins* v.

Tennessee, 294 S.W.3d 529, 534-535 (Tenn. 2009). Even if not technically preclusive, however, they make clear that the narrative of anticompetitive conduct that UAS tries to spin in its complaint and petition bears no relationship to reality.

C. This case is not important.

It is no surprise that this case fails on multiple independent grounds. That will often be the case where a party cannot survive *Illinois Brick*, given the overlapping considerations involved in both the antitrust injury and proximate-cause inquiry. Even though the doctrines are analytically distinct, *see supra*, p. 8, it is not at all surprising that they frequently lead to the same result. *See, e.g.*, *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 223-224 (S.D.N.Y. 2019) (indirect purchaser plaintiffs' injuries were "speculative" *and* failed under traditional proximate cause principles). This doctrinal overlap makes it unnecessary for this Court to step in and clarify the application of *Illinois Brick* to the specific fact pattern in this case.

Finally, even if (unlike here) *Illinois Brick* has foreclosed a suit with legitimate merit, there are ample alternative remedies. For starters, it is at least an open question whether injunctive relief is available under federal antitrust law—an issue the panel did not address. Pet. App. 95-96. UAS did not preserve a claim for injunctive relief, *see* Pet. App. 95, likely because it knows full well that its product will not succeed on the market. There are also alternative options for both injunctive relief and damages available under state tort and competition law. UAS pursued those claims, and they failed on the merits after full discovery. *Supra*, p. 9.

Ultimately, then, the question presented comes down to whether this Court should expand the right to sue for treble damages under federal antitrust law. This Court's precedents have properly erected guardrails against that strong medicine. *See, e.g.*, *Illinois Brick*, 431 U.S. at 745-746. If that issue ultimately requires this Court's attention at all, this is certainly not the case for this Court to grant review.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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