

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

Pages: 1 through 65

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9 Washington, D.C.

10 Monday, November 26, 2018

11
 12 The above-entitled matter came on for
 13 oral argument before the Supreme Court of the
 14 United States at 10:05 a.m.

15
 16 APPEARANCES:

17
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 19 behalf of the Petitioner.

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 22 for the United States, as amicus curiae,
 23 supporting the Petitioner.

24 DAVID C. FREDERICK, ESQ., Washington, D.C.; on
 25 behalf of the Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

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

Mr. Wall.

ORAL ARGUMENT OF DANIEL M. WALL

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

7 MR. WALL: Excuse me?

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

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

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

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

25 MR. WALL: The developers, yes.

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

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

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

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

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

24 MR. WALL: Sure.

25 JUSTICE SOTOMAYOR: -- more generally

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

5 MR. WALL: Yes.

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

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

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

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

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

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

1 the first purchaser of that 30 percent markup.

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

8 JUSTICE SOTOMAYOR: Apple took
9 30 percent from the customer, not from the
10 developer.

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

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

22 MR. WALL: Apple.

23 JUSTICE BREYER: Apple. And if you
24 pay -- if that's true, they can raise prices to
25 some people, lower them to others, their

1 suppliers. And if you were injured because you
2 paid them more, the monopolist, you can collect
3 damages.

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

9 MR. WALL: Everything in Illinois
10 Brick --

11 JUSTICE BREYER: All right. What is
12 that?

13 MR. WALL: -- conflicts with that.

14 JUSTICE BREYER: Yeah.

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

19 JUSTICE BREYER: It says that if -- I
20 don't mean to interrupt you, but I don't want
21 to -- you to miss the point I'm making.

22 If Joe Smith buys from Bill, who
23 bought from the monopolist, then we have
24 something indirect. But, if Joe Smith bought
25 from the monopolist, it is direct. That's a

1 simple theory.

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

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

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

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

25 In other words, the consumer says you

1 have a monopoly on apps. You might also have a
2 monopoly on the distribution function, which
3 the app developers have to live with, but you
4 have a monopoly on apps, which the consumers
5 have to live with.

6 MR. WALL: In --

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

12 MR. WALL: Well, two points, Justice
13 Kagan.

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

22 It is -- it is simply the pipeline,
23 the sale of the apps, which is -- which is
24 alternately described in this case as either
25 distribution or as the so-called aftermarket,

1 which is simply limiting that to iOS apps
2 instead of the 80 percent of the apps --

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

8 MR. WALL: Uh-huh.

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

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

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

1 they say is a higher price. And if -- you,
2 United Fruit, did not become a monopolist.

3 Now I think I'm advising Jay
4 Rockefeller, John Rockefeller, and I give him
5 the same advice. And I give the same advice to
6 United Shoe, which happened to be a
7 distribution company. And we thereby have --
8 well, you see the point.

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

21 And it goes up by 10 points tomorrow.
22 No consumer is injured unless the apps' prices
23 change. The apps' prices have to change. And
24 if they don't -- and they only change by virtue
25 of a decision which implicates everything this

1 Court talked about in Hanover Shoe, in Illinois
2 Brick, and in --

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

10 Now, in the facts of Illinois Brick,
11 and, indeed, in the facts of all the Illinois
12 Brick cases that we've discussed, you had both.
13 So you didn't have to separate the two.

14 And now, here, you don't have both,
15 because this is not a vertical supply chain,
16 but there still is a pass-through mechanism.
17 So then the question is, does Illinois Brick
18 apply to that or not?

19 And I think what Justice Breyer was
20 suggesting to you, that as long as it's not
21 that vertical supply chain where the person is
22 not buying from the monopolist itself, here,
23 the person is transacting with the monopolist
24 itself, that that's what separates this case
25 from Illinois Brick and makes it entirely

1 different, notwithstanding that there's some
2 kind of pass-through mechanism involved.

3 MR. WALL: I completely agree with you
4 that the key to this is deciding what Illinois
5 Brick was about. Was it simply a formalistic
6 case about vertical chains, or was it about
7 pass-through?

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

19 It was 100 percent about pass-on. The
20 vertical chain was the factual setting of the
21 case, and, indeed, Respondents' argument would
22 -- would have this Court believe that the
23 factual setting is the sum and substance of the
24 Court's reasoning.

25 JUSTICE ALITO: Mr. Wall, could I ask

1 you about what troubles me about your position,
2 and -- and it is this: Illinois Brick was not
3 about the economic theory. It was about the
4 court's -- the court's -- the basis for the
5 decision was not economic theory, as I read the
6 case. It's the court's calculation of what
7 makes for an effective and efficient litigation
8 scheme.

9 And maybe your answer to this question
10 is that the validity of Illinois Brick is not
11 before us. But I really wonder whether, in
12 light of what has happened since then, the
13 court's evaluation stands up.

14 Take the third point that it makes
15 about that the direct, so-called direct
16 purchasers are the most efficient and most --
17 in the best position to -- to sue.

18 If we look at this case, how many app
19 developers are there whose apps are sold at the
20 Apple store?

21 MR. WALL: Tens of thousands.

22 JUSTICE ALITO: Yeah. Has any one of
23 them ever sued?

24 MR. WALL: None have ever sued. There
25 have been -- there have been plenty of

1 disputes, but none has ever gone to litigation.
2 For that matter, no state or federal antitrust
3 agency has ever sued either.

4 We do not take that -- we do not take
5 the absence of litigation as evidence of an
6 oppressed developer community that cannot speak
7 for itself. These -- you know, the fact of the
8 matter is that nowadays major companies suing
9 their suppliers happens all of the time.

10 The idea that it -- that it -- that it
11 doesn't, which was decried by Judge Posner as
12 fanciful, has proven to be fanciful because it
13 literally happens all of the time.

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

22 And antitrust normally accounts for
23 economics, rather than forms of contract.

24 MR. WALL: Indeed.

25 JUSTICE GORSUCH: I take your point.

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

8 But why should we build on Illinois
9 Brick? Shouldn't we question Illinois Brick,
10 perhaps, given the fact that so many states
11 have done so. They've repealed it.

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

20 MR. WALL: Right.

21 JUSTICE GORSUCH: And indirect
22 purchasers may be better suited to enforce the
23 antitrust laws. So long wind-up.

24 MR. WALL: Okay.

25 JUSTICE GORSUCH: Sorry, but there's

1 the pitch.

2 MR. WALL: Sure. So a few things.
3 First of all, it is -- it is an enormously
4 complicated and controversial issue what to do
5 with the Illinois Brick doctrine.

6 You can see this in -- in the briefing
7 in this case where, yes, you do have states
8 saying repeal it. You also had the plaintiff's
9 bar through the American Antitrust Institute
10 say don't repeal it.

11 There have been, I think, on the order
12 of 17 efforts in Congress to have -- have it
13 changed. Not once has it ever gotten to the
14 floor. It is a quintessentially controversial
15 political issue which belongs across the
16 street, not here.

17 I would disagree completely --

18 JUSTICE GINSBURG: Why? Why is that
19 so if the Court created the doctrine in the
20 first place?

21 MR. WALL: Because I don't think it's
22 fair to say that the court just created it.
23 What the court did was it applied the
24 foundational principle of all Section 4
25 jurisprudence, which is the proximate cause

1 principle of damages not going past the first
2 step, and then it -- it dealt with that in the
3 context of the potential for duplicative
4 pass-through over-charge claims, which are a
5 unique problem in antitrust.

6 It's not a general problem of all
7 damage theories. But, when you have
8 over-charge cases -- and this gets to Justice
9 Gorsuch's point about the potential for -- for
10 duplicative recovery, it's not hypothetical.
11 It's automatic. It's mathematical.

12 If the first purchaser gets
13 100 percent of the over-charge because of
14 Hanover Shoe, anything else that is recovered
15 that gets added on to that is necessarily
16 duplicative, and that's what happens in the
17 district courts. You get the direct purchasers
18 and the direct purchasers suing on whatever
19 theory optimizes their level of recovery.

20 I'd like to reserve the rest of my
21 time and turn it over to the Solicitor General
22 at this point.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 General Francisco.

1 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONER
4 GENERAL FRANCISCO: Mr. Chief Justice,
5 and may it please the Court:

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

9 At bottom, Illinois Brick and Hanover
10 Shoe, properly understood, prohibit
11 pass-through theories. And they reflect a
12 basic application of the background principles
13 of proximate cause that this Court generally
14 reads into statutes of this sort, and, in
15 particular, the rule that damages stop at the
16 first step.

17 Here, the first step is the app
18 maker's pricing decision, because the
19 Respondents, the consumers, are injured if and
20 only if the app makers decide to increase their
21 prices in order to recoup Apple's --

22 JUSTICE KAGAN: General, I have to say
23 I find that a not intuitive argument, I mean,
24 because it just seems to me that when you're
25 looking at the relationship between the

1 consumer and Apple, that there is only one
2 step.

3 I mean, I pick up my iPhone. I go to
4 Apple's App Store. I pay Apple directly with
5 the credit card information that I've supplied
6 to Apple. From -- from my perspective, I've
7 just engaged in a one-step transaction with
8 Apple.

9 And when I come in and say Apple is a
10 monopolist and Apple is charging a
11 super-competitive price by -- by extracting a
12 commission that it can only extract because of
13 its market power, I mean, there's my one step.

14 GENERAL FRANCISCO: Right. I
15 understand that, Your Honor. But, in proximate
16 cause, the issue is not transactional
17 proximity. The issue is proximity between the
18 illegal conduct on the one hand, here, Apple's
19 monopolistic over-charge, and the injury to
20 consumers on the other hand, here, the higher
21 prices.

22 And Apple's monopolistic over-charge
23 is not the direct cause of higher prices. The
24 direct cause of the higher prices is the app
25 maker's decision to increase their prices in

1 order to recoup the over-charge.

2 JUSTICE KAVANAUGH: How do we know
3 that? How do we know that, given that Apple
4 really operates as a retailer in many respects
5 here, as Justice Kagan points out?

6 GENERAL FRANCISCO: Right.

7 JUSTICE KAVANAUGH: And how do we know
8 that the 30 percent charge is not affecting the
9 price?

10 GENERAL FRANCISCO: Well, you don't
11 know --

12 JUSTICE KAVANAUGH: In the same way
13 that any retailer that adds 30 percent would
14 affect the ultimate price paid by the consumer?

15 GENERAL FRANCISCO: You don't know for
16 sure, but that's the whole point. Here,
17 because app makers set the final price, they
18 have a choice to make: They either absorb the
19 over-charge and keep prices the same, in which
20 case the consumers aren't harmed at all, or
21 they increase their prices to recoup the
22 over-charge, in which case the app makers are
23 also harmed because they face a drop in sales
24 as a result of increased prices.

25 JUSTICE KAVANAUGH: But the consumers

1 are harmed then too.

2 GENERAL FRANCISCO: Yes, Your Honor.

3 And that's the whole point of Illinois Brick
4 and Hanover Shoe. When you've got part of the
5 harm going to that initial party that's bearing
6 the full brunt of the over-charge in the first
7 instance because of its pricing decision,
8 that's the party that gets the whole claim.

9 JUSTICE KAVANAUGH: But we have
10 ambiguity about what Illinois Brick means here,
11 and shouldn't that ambiguity, if -- if there is
12 such ambiguity, be resolved by looking at the
13 text of the statute? Any person injured?

14 GENERAL FRANCISCO: Yes, Your Honor.

15 JUSTICE KAVANAUGH: That's broad.

16 GENERAL FRANCISCO: And what I think
17 that Illinois Brick reflects is the type of
18 statutory interpretation that this Court has
19 engaged in in a variety of cases, including the
20 RICO cases, including the Lexmark cases, where
21 you interpret background principles of
22 proximate cause to be built into the statute,
23 including the rule that damages stop at the
24 first step.

25 JUSTICE KAGAN: Does it make a

1 difference, General, that -- that Apple is
2 influencing the prices here? In other words,
3 this is -- you're suggesting that the app
4 developers are just sort of setting these
5 prices independently --

6 GENERAL FRANCISCO: Uh-huh.

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

9 The first way is this 99 cent
10 charge --

11 GENERAL FRANCISCO: Uh-huh.

12 JUSTICE KAGAN: -- which you might
13 say, well, that doesn't matter because, you
14 know, it could be 99 cents or it could be
15 \$100.99.

16 But, in fact, these are all low-cost
17 products for the most part. So saying a price
18 has to end with the -- you know, the -- the
19 number 99 is saying a lot about the fact that
20 you can't charge 77 cents or 55 cents --

21 GENERAL FRANCISCO: Sure.

22 JUSTICE KAGAN: -- or 32 cents. So
23 that's one.

24 And the other is the entire allegation
25 here is that Apple is truly a monopolist on

1 both sides of the market. It's able to dictate
2 to developers whatever price structure it
3 wants, and it's also able to dictate to
4 consumers what the nature of the sale is going
5 to be.

6 GENERAL FRANCISCO: Right.

7 JUSTICE KAGAN: And in that event, it
8 -- it sure seems as though, you know, Apple --
9 you know, it happened to set up this commission
10 that puts it in the ambit of Illinois Brick,
11 but it could have done a thousand other things
12 that are essentially the same that would have
13 taken it out of the Illinois Brick rule.

14 GENERAL FRANCISCO: Sure. And let me
15 take those points in turn. First, the 99 cent
16 pricing policy.

17 The first thing I'll point out is it's
18 not in the complaint, but we'll put that to the
19 side and assume that it's part of this case.
20 Here, I don't think it changes the fact that
21 the app makers still control the overall price,
22 and to the extent that -- to the extent that
23 Respondents are harmed by that, it's based on a
24 pass-through.

25 Look, if I go to an auction house and

1 I have to bid in \$10 increments, nobody thinks
2 the auction house is setting the price. The
3 bidders are still setting the price. And,
4 here, the Respondents are --

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

8 GENERAL FRANCISCO: Right.

9 JUSTICE KAGAN: -- then, indeed, you
10 are setting the price.

11 GENERAL FRANCISCO: And, well, that's
12 my second point, Your Honor. Here, any injury
13 is based on a pass-through because app makers
14 are either going to round up or they're going
15 to round down. If they round down to the lower
16 99 cent price point, the consumers aren't
17 injured at all. If they round up to the next
18 99 cent price point, the consumers are injured
19 as a result of the pass-through theory. And
20 it's that intermediating pricing decision that
21 we think that under the principles of proximate
22 cause --

23 JUSTICE SOTOMAYOR: General, the
24 problem is that they're not measuring damages
25 by that.

1 GENERAL FRANCISCO: I --

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

6 GENERAL FRANCISCO: I --

7 JUSTICE SOTOMAYOR: And it could be
8 theoretically a lot higher than the markup. It
9 could well be within it, but the point is that
10 that 30 percent -- that 30 percent or whatever
11 that 30 --

12 GENERAL FRANCISCO: Uh-huh.

13 JUSTICE SOTOMAYOR: -- percent figure
14 is, is not the measure of our damages. That's
15 as I understand --

16 GENERAL FRANCISCO: Yeah --

17 JUSTICE SOTOMAYOR: -- that they're
18 saying the developers may have their own claim,
19 their damages likely have to stay within the
20 30 percent, but we don't measure our damages by
21 that.

22 GENERAL FRANCISCO: So, respectfully,
23 I'll disagree with that, and in explaining it,
24 Justice Kagan, I think I can also answer the
25 second part of your question.

1 The harm to the consumers here is that
2 they have to pay higher prices for apps. And
3 the reason they have to pay higher prices for
4 apps -- and, Justice Kagan, this goes to your
5 question -- is because Apple controls the
6 pipeline that connects app makers on the one
7 hand and iPhone users on the other.

8 And the way they exploit that pipeline
9 through their alleged monopoly is by charging
10 that 30 percent commission. So the only reason
11 consumers are harmed here in the form of paying
12 higher prices is because the app makers decide
13 to increase their prices in order to recoup
14 that commission.

15 And, Justice Breyer, to your question,
16 the reason why this makes it different than
17 your hypothetical of Bill buys from Sam and you
18 have transactional proximity is because the
19 question isn't proximity between the parties
20 who are transacting with one another but
21 proximity between the antitrust violation, the
22 30 percent commission, and the harm to
23 consumers in the form of higher prices.

24 JUSTICE BREYER: I wouldn't have
25 thought that was the antitrust violation. I

1 would have thought the antitrust violation is
2 having enormous market power achieved by not
3 patents and not skill, foresight, and industry
4 but, rather, anticompetitive or more
5 restrictive than necessary practices.

6 Alcoa --

7 GENERAL FRANCISCO: For sure.

8 JUSTICE BREYER: -- Alcoa did not
9 charge higher than competitive prices, and
10 that's why Learned Hand said the easy life, not
11 necessarily higher prices, is the reward,
12 often, of monopoly. Now --

13 GENERAL FRANCISCO: For sure --

14 JUSTICE BREYER: -- I would have
15 thought it's a matter for proof at the damages
16 stage whether, in fact, Apple, assuming they
17 prove it is a monopoly, has extracted higher
18 than competitive prices from those particular
19 people, the plaintiffs, or whether they've just
20 had the easy life.

21 GENERAL FRANCISCO: Right.

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

25 GENERAL FRANCISCO: Well --

1 JUSTICE BREYER: -- then they must
2 win.

3 GENERAL FRANCISCO: -- no -- so what I
4 wanted to say is that, for sure, the Illinois
5 Brick theory doesn't apply across the board,
6 but it does apply when somebody is bringing an
7 over-charge theory, as in Illinois Brick, as in
8 Hanover Shoe, and as here. The --

9 JUSTICE BREYER: Have we had trial on
10 that?

11 GENERAL FRANCISCO: Your Honor, where
12 you have that kind of over-charge theory, what
13 Illinois Brick says -- asks is under basic
14 principles of proximate cause, is there some
15 party other than the monopolist that's standing
16 in between the plaintiffs' injury in the form
17 of higher prices and the monopolist's violation
18 in the form of the commission.

19 And whenever the price setter, the
20 ultimate price setter, is somebody other than
21 the monopolist, it's never the monopolist's
22 over-charge that is the direct cause of the
23 injury.

24 JUSTICE KAVANAUGH: But -- but if the
25 app developer -- if Apple bought the apps from

1 the app developer and then added 30 percent to
2 it and sold it to the consumer, you would agree
3 that a claim could lie there, correct?

4 GENERAL FRANCISCO: Your Honor, I want
5 to make sure I understand the hypothetical. If
6 Apple said --

7 JUSTICE KAVANAUGH: Apple's buying the
8 app from the app developer for a price --

9 GENERAL FRANCISCO: Right.

10 JUSTICE KAVANAUGH: -- Apple's then
11 adding 30 percent to that price and selling it
12 to the consumer. The consumer alleges that
13 Apple's doing that as a result of monopolistic
14 behavior.

15 The claim lie?

16 GENERAL FRANCISCO: Yes, you can sue
17 Apple directly, but you can't sue Apple if the
18 -- if -- if Apple isn't the price-setting party
19 but the app maker is the price-setting party.
20 And that's why -- may I finish the answer, Your
21 Honor?

22 And that's why the key is who sets the
23 price, and it's very hard to manipulate our
24 rule because, under our rule, you actually have
25 to change the party that has the authority to

1 set the final price, and that's a fundamental
2 change in the nature of the transaction itself.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Frederick.

6 ORAL ARGUMENT OF DAVID C. FREDERICK

7 ON BEHALF OF THE RESPONDENTS

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

10 Apple directed anticompetitive
11 restraints at iPhone owners to prevent them
12 from buying apps anywhere other than Apple's
13 monopoly App Store. As a result, iPhone owners
14 paid Apple more for apps than they would have
15 paid in a competitive retail market.

16 Under this Court's precedents, iPhone
17 owners have a cause of action under Section 4
18 of the Clayton Act directly against Apple for
19 those over-charges. The court of appeals
20 should be affirmed for three reasons.

21 First, Illinois Brick is a bright-line
22 rule that Respondents easily satisfy.

23 Second, Apple directed its monopoly
24 abuses at Respondents. So it's appropriate
25 that Respondents can sue Apple for their

1 damages as a result of those violations.

2 And, third, Apple seeks to expand and
3 modify the bright-line rule of Illinois Brick
4 to deny indisputably direct purchasers an
5 antitrust remedy and to change the rule into a
6 standardless inquiry that will be hard to apply
7 at the pleadings stage.

8 Now, if I could return to the first
9 point, the direct purchaser rule is a
10 bright-line rule. This Court said so in
11 Illinois Brick and, importantly, a case that
12 has not yet been discussed today, in UtiliCorp,
13 in which the Court said Illinois Brick is a
14 bright-line rule for direct purchasers,
15 notwithstanding the economics that go into
16 that.

17 UtiliCorp was a case that protected
18 the defendants, who were asserting that -- who
19 -- who were asserting that the -- there was a
20 break in the link of the chain.

21 This case is really the flip side of
22 that to protect plaintiffs who directly
23 purchased from the alleged antitrust violator
24 and are claiming damages as a result of that
25 antitrust violation.

1 CHIEF JUSTICE ROBERTS: There's --
2 there's one antitrust violation under your
3 theory, which is the increase, the 30 percent
4 increase that Apple imposes when it -- when it,
5 as you put it, it sells the apps?

6 MR. FREDERICK: Wrong. And this is
7 very important for the Court to understand.
8 The antitrust violation here is the monopoly
9 App Store. Consumers cannot buy an app
10 anywhere other than Apple's 100 percent-owned
11 monopoly App Store.

12 CHIEF JUSTICE ROBERTS: But, when it
13 comes to the 30 percent increase, you're --
14 you're obviously saying the purchasers, again,
15 under your theory of the apps, are harmed by
16 that and recover -- can recover damages for
17 that, and also that the developers are harmed
18 by that and they can recover damages for it as
19 well.

20 In other words, to the extent it might
21 be said that Apple is a two-sided market,
22 they're -- they're subject to suit on both
23 sides of the market for a single antitrust
24 price increase that they're alleged to have
25 imposed.

1 MR. FREDERICK: So, Mr. Chief Justice,
2 I think that your question kind of gets to the
3 core of a lot of the confusion here because, by
4 having a wholly-owned monopoly App Store, Apple
5 is able to distort the market at the supply
6 chain and at the retail chain for consumers.

7 We, representing consumer iPhone
8 owners, are suing only for the damages that we
9 incur. That is the higher than what a
10 competitive market price would be for apps.

11 Our measure of damages is not
12 necessarily the 30 percent. The 30 percent is
13 simply proof that Apple is acting as a
14 monopolist because it extracts --

15 CHIEF JUSTICE ROBERTS: No, no, I
16 understand -- I understand your claim on your
17 side of the market. But you do think that the
18 developers have a claim as well, don't you?

19 MR. FREDERICK: Well, I have no grief
20 --

21 CHIEF JUSTICE ROBERTS: It's the same?

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

24 CHIEF JUSTICE ROBERTS: For -- for the
25 same price increase --

1 MR. FREDERICK: No.

2 CHIEF JUSTICE ROBERTS: -- for the
3 same --

4 MR. FREDERICK: No, I disagree with
5 that, Mr. Chief Justice. Apple's supplier of
6 the apps, if they have a claim, it is that
7 Apple has distorted the market for the supply
8 of apps in a way that hurts app developers'
9 profits.

10 Their argument would be, if we weren't
11 suffering under the one monopoly store
12 constraint, we might be able to charge a
13 different price lower than 99 cents and be able
14 to get a direct purchase from an iPhone Apple
15 owner.

16 CHIEF JUSTICE ROBERTS: Well, I think
17 you're just saying that the measure of damages
18 would be different between the two sides of the
19 market?

20 MR. FREDERICK: And -- but they would
21 be different damages.

22 JUSTICE KAGAN: In other words, you
23 are saying the consumer says, I'm paying a
24 higher price for the product. It might be the
25 entire 30 percent commission, it might be some

1 portion of the 30 percent commission, that's
2 super-competitive, but I'm paying a higher
3 price for the product.

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

8 And that represents some amount of
9 lost profits. But those two things are not --
10 I mean, it is true that two people are being
11 able to sue because Apple is -- is transacting
12 with each of these people and each of them has
13 a gripe against what -- the way Apple has
14 structured the market.

15 But the damages are entirely
16 different. One is a measure of lost profits,
17 which may or may not exist. The other is I'm
18 paying too much.

19 MR. FREDERICK: That's correct.

20 JUSTICE GORSUCH: Well, but, Mister --

21 JUSTICE ALITO: That's an interesting
22 theory, but is that the theory -- is that your
23 claim?

24 MR. FREDERICK: Yes.

25 JUSTICE ALITO: I thought this case

1 was all about the 30 percent.

2 MR. FREDERICK: Well, the other side
3 has been trying, Justice Alito, to make the
4 case all about the 30 percent. But if you read
5 the --

6 JUSTICE ALITO: So the 30 percent has
7 nothing to do with this?

8 MR. FREDERICK: The -- what the
9 30 percent is, is an allegation that Apple is
10 monopolizing the sale of apps. And we know
11 that because they can extract 30 percent on
12 every single sale, which only a monopolist
13 could do.

14 The 30 percent is not a measure of
15 damages. I'm not aware of any case from this
16 Court that says you have to plead antitrust
17 damages with particularity. But the -- because
18 of the ability to extract a monopoly rent, we
19 can say in good faith that they -- we are
20 paying more than we would pay than if a
21 competitive market existed.

22 JUSTICE GORSUCH: Mr. Frederick, I
23 think you'd agree that there can only be one
24 monopoly rent. And then the question becomes,
25 who's paying it?

1 And it might be spread partially
2 between direct purchasers and indirect
3 purchasers. It might be partially spread
4 between the app makers and the purchasers of
5 apps. And disaggregating that is the question
6 that we've been wrestling with here.

7 I guess here is where I'm stuck and
8 need your help. You say that Illinois Brick is
9 a bright-line rule premised on the existence of
10 a contractual relationship between the buyer --
11 the ultimate purchaser and the intermediate
12 seller, and that there has to be that kind of
13 relationship, rather than a sales agency
14 relationship like we have here.

15 But antitrust doesn't usually depend
16 upon such contractual formalities. It usually
17 depends upon the underlying economics. And I
18 have a hard time distinguishing this case from
19 Illinois Brick in the sense of -- in the
20 question of economic pass-through and the
21 problems that it presents, the possibility that
22 the intermediate purchaser may absorb the
23 monopoly rent and not pass it along.

24 Now that raises for me the question,
25 further question, and I -- I -- I'll wind it up

1 quickly, I promise, whether Illinois Brick is
2 correct. All right. And you have an amicus
3 that says it's not, but you don't make that
4 argument.

5 I'm really curious why --

6 MR. FREDERICK: Because --

7 JUSTICE GORSUCH: -- the plaintiffs'
8 bar is not making that argument before this
9 Court.

10 MR. FREDERICK: Because --

11 JUSTICE GORSUCH: So there -- there's
12 a whole -- a whole bunch of things for you to
13 chew on.

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

16 We haven't asked for Illinois Brick to
17 be overruled because we plainly meet the
18 bright-line rule. We paid Apple and Apple was
19 --

20 JUSTICE GORSUCH: Say I don't -- say I
21 don't buy the formalistic contractual -- it
22 seems to me an argument in -- in -- in the law
23 of contracts rather than the law of antitrust.
24 So help me out with economics.

25 MR. FREDERICK: Economics, we paid

1 money. Apple never shared that money with any
2 middleman. Illinois Brick is a case about a
3 middleman. There's no middleman here.

4 We paid the money. Apple kept
5 30 percent of it --

6 JUSTICE GORSUCH: Again -- again, that
7 --

8 MR. FREDERICK: -- before sending
9 70 percent on.

10 JUSTICE GORSUCH: -- that's based on
11 the form of the relationship.

12 MR. FREDERICK: But that --

13 JUSTICE GORSUCH: Talk to me about the
14 possibility, the problem that the app producer
15 might absorb the monopoly rent. That's the
16 economic problem that I'm stuck with.

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

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

25 JUSTICE GORSUCH: I understand the 99

1 cent argument.

2 MR. FREDERICK: Okay.

3 JUSTICE GORSUCH: Let's put that
4 aside.

5 MR. FREDERICK: All right. Now that
6 we've got that aside, let's look at it from the
7 developer's perspective.

8 If they had a claim, if they had a
9 claim -- and I'm not saying that they do -- but
10 if they had a claim, they would need to show
11 the difference between the profits that they
12 would have achieved in the monopoly App Store
13 versus the profits they would have achieved at
14 a competitive market price.

15 And that depends on three factors,
16 okay? One is the difference in sales that they
17 would achieve between 99 cents and 99 -- 90
18 cents. The second is how their sales
19 differences would affect their revenue. And
20 the third is whether the commission was
21 30 percent in a competitive market. Okay?

22 So, if you take my hypothetical, the
23 damages for the developer, there are three
24 possibilities. One is that it's zero. If the
25 commission went to 22 percent in a competitive

1 market, the developer takes home 70 cents just
2 as it does with Apple's 30 percent in a 99 cent
3 monopoly market. At 22 percent commission, the
4 developer has zero damages.

5 The developer would have positive
6 damages if the commission were zero because
7 then the app developer sustains damages of 20
8 cents. The developer would make the 90 cents
9 in the competitive market instead of the 70
10 cents that Apple is now passing along by virtue
11 of the monopoly market.

12 The damages would be negative, though,
13 if, in a competitive market, the commission
14 stayed at 30 percent because, there, the
15 benefits that would achieve by the monopoly
16 price of 99 cents give the developer an extra
17 eight cents per transaction.

18 So, in that way, Mr. Chief Justice,
19 the developer has a different claim that's
20 based on its lost profits. And that would be
21 irrespective of whether the buyer of the app,
22 the consumer, sustains damage for the nine
23 cents in my hypothetical.

24 You can run these out under different
25 -- you can get your law clerks to run all the

1 different scenarios. It always works the same
2 way.

3 JUSTICE BREYER: Unless we're --
4 unless we're prepared to overrule, which wasn't
5 our case, Alcoa, I think all you'd have to show
6 is, one, they have monopoly power, and, two,
7 they achieved it through less restrictive --
8 for more restrictive than necessary practices,
9 end of your burden.

10 In your case -- and -- and Justice
11 Gorsuch is quite right, there's only one
12 monopoly profit to be earned. And so you'd
13 have a different question when you get to the
14 damages stage. The different question is:
15 Well, how did they divide that monopoly profit?

16 You'd like to show that they got some
17 of it from consumers. But that's for a later
18 proceeding.

19 MR. FREDERICK: That's correct.

20 JUSTICE BREYER: And you're adding one
21 thing. One of the things that we want to use
22 in order to prove that they do have monopoly
23 power, i.e., the power to raise price
24 significantly above a competitive level, is
25 they charge us so bloody much money. That's

1 just a piece of evidence here, and we'll worry
2 later, agreeing that there's only one monopoly
3 profit in theory, as to who got what.

4 Now have I stated that correctly?

5 MR. FREDERICK: Yes, you have, Justice
6 Breyer.

7 I mean, the basic problem in this case
8 as it comes to this Court is who gets to
9 complain about the monopoly App Store. We say
10 as the buyers of the apps from the monopoly App
11 Store, there's no form or function, there are
12 no contract issues, Justice Gorsuch, that
13 create a different form versus function
14 problem. We're paying the money. They're
15 keeping it. And we think we're paying more
16 than we're -- we would have to if the market
17 was a competitive market.

18 JUSTICE KAVANAUGH: They say it would
19 be different if Apple purchased the apps from
20 the app developer and then added 30 percent on
21 the sale.

22 And why is that not different?

23 MR. FREDERICK: Because it's
24 irrelevant. And here's where we part company
25 from the Solicitor General. It's irrelevant

1 who sets the price so long as what the
2 violation is, here, the monopoly App Store,
3 leads to higher prices that the consumers have
4 to pay. That's what the violation is. That's
5 how we are proximately harmed.

6 So, in the very hypothetical, Justice
7 Kavanaugh, that you posed to the Solicitor
8 General, the Solicitor General concedes we are
9 direct purchasers in a situation where the app
10 developer sets the price and they simply tack
11 on 30 percent by virtue of their monopoly
12 power.

13 It's no different here. If you think
14 about it in -- in terms of what is actually
15 going on, suppose Apple dropped its commission
16 from 30 percent to 20 percent, but it
17 maintained the price restriction of a 99 cent
18 app. From the consumer's perspective, we're
19 still overpaying for the app. Under that
20 hypothetical, Apple simply gives the app
21 developer more money, but that doesn't affect
22 the consumer welfare at all.

23 JUSTICE SOTOMAYOR: Now --

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

1 JUSTICE SOTOMAYOR: The General said
2 that if, in fact, Apple bought these products
3 from suppliers and paid them and then added
4 30 percent to you, that that would be a classic
5 antitrust violation.

6 You're saying -- that's basically what
7 they're doing here anyway. But let's take the
8 reverse. Let's say they collected money from
9 you and paid all of it over to the developer
10 and then told the developer: Give us
11 30 percent of that back.

12 Would you then still be a direct
13 purchaser and --

14 MR. FREDERICK: So we would still be
15 direct purchasers if, under your hypothetical,
16 we're buying it from Apple and then Apple is
17 engaging in the Justice Gorsuch form over
18 function situations in terms of how the money
19 gets moved around.

20 I think that the -- in that situation,
21 we are still directly purchasing and we're
22 still able to complain about Apple's violation.
23 And I think, under your hypothetical, Justice
24 Sotomayor, we have to keep the idea that Apple
25 is still operating a monopoly App Store.

1 It's no different than if there was a
2 grocery store chain that monopolized the sale
3 of all vegetables. If they -- if that is the
4 only place you could buy vegetables, we would
5 say that that monopoly store outlet was able to
6 control prices and affect output. That's
7 basically what's happening here.

8 JUSTICE GORSUCH: Well, I think
9 Justice Sotomayor's question is a -- requires
10 further exploration. I mean, are -- are we in
11 danger of just incentivizing a restructuring of
12 contracts here so that all that Apple does or
13 people like it is make you purchase directly
14 from the app provider and then it then returns
15 the -- the profit to Apple later?

16 And if that's all we're doing, then
17 what is the point of Illinois Brick? And you
18 still haven't explained to me why the
19 plaintiffs' bar isn't asking to overturn
20 Illinois Brick when 31 states are. So help --
21 help me on both those.

22 MR. FREDERICK: Well -- well --

23 JUSTICE GORSUCH: They're two separate
24 questions.

25 MR. FREDERICK: -- okay. So -- so let

1 me take the second one first, Justice Gorsuch.
2 I don't represent the plaintiffs' bar. I
3 represent the consumers in this case, and the
4 consumers in this case have no brief and no
5 beef with Illinois Brick.

6 We think we are direct purchasers. We
7 satisfy the rule. We come within the bright
8 line. That's okay with us.

9 What the Court decides doctrinally to
10 do with Illinois Brick is obviously something
11 where I think you go to a different situation
12 if the case arises.

13 But, on your other point, I think it's
14 the other side that is actually asking for the
15 opportunity to use contracts in order to
16 distort or recharacterize matters in a way that
17 evades the Illinois Brick bright-line rule.

18 JUSTICE GORSUCH: Well -- well, assume
19 for the moment that -- that I believe the
20 economics underlying the two arrangements are
21 very similar. Hard to distinguish. I haven't
22 yet heard you give me a good argument why.

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

25 MR. FREDERICK: No, I think in that

1 hypothetical, I would be prepared to say if we
2 were paying the developer directly for the app
3 and the app developer could set whatever price
4 it wanted to set, okay, keep with me on that
5 assumption, the app developer operating in a
6 free market can set whatever it wants to set,
7 and then Apple comes after the app developer
8 and says, hey, you bought it -- the consumer
9 bought it through our store, we want whatever
10 we want, that becomes not a problem with the
11 consumer; that becomes a problem between the
12 developer and the app -- and the seller of the
13 app.

14 JUSTICE GORSUCH: Ah, so pricing
15 control is really important to proximate cause
16 then?

17 MR. FREDERICK: I beg your pardon.

18 JUSTICE GORSUCH: So pricing control
19 is really important to proximate cause?

20 MR. FREDERICK: No, pricing control is
21 not important to pricing -- to proximate cause
22 in the sense that whether -- I think, under
23 direct proximate cause, we're buying the app
24 directly from the app developer, and, remember,
25 a key part of my answer was the app developer

1 can set that price competitively in a
2 competitive market.

3 What arrangements happen between Apple
4 exercising its monopoly control through the App
5 Store and the supplier is not something we are
6 proximately --

7 JUSTICE KAVANAUGH: Your -- your --

8 MR. FREDERICK: -- affected by that.

9 JUSTICE KAVANAUGH: Sorry to
10 interrupt. Your point was that the other side
11 is putting form over the reality?

12 MR. FREDERICK: That's correct. And
13 -- and they're doing it in a way that is
14 particularly standardless, because what the
15 court in UtiliCorp held was that even when it
16 is absolutely clear 100 percent of the
17 over-charge is going from the natural gas
18 supplier through the utility directly to the
19 consumer, this Court held: No, we're going to
20 keep the bright-line rule. Only the utility
21 gets to complain about the natural gas
22 over-charge.

23 And it was that bright-line rule that
24 the Court said is going to apply. And the
25 reason is exactly, Justice Alito, for the point

1 that you made, which is that it's about
2 judicial administration at the pleadings stage.
3 We're just trying to figure out who has the
4 claim and who could complain about the
5 antitrust violation. Here, that's clearly the
6 consumers because we're the ones who are paying
7 Apple the money to receive the app.

8 And so, to -- to Justice Kavanaugh, to
9 finish off the point, what the other side is
10 essentially asking is that, instead of having a
11 bright-line rule, it's a very fuzzy rule,
12 because they don't have a test for what
13 constitutes a pass-through. They don't have a
14 test that applies when there is no middleman.
15 There's no middleman in this particular
16 transaction. It's directly between the iPhone
17 owner and Apple.

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

25 JUSTICE ALITO: What concerns me about

1 your argument is that it doesn't seem to be
2 based on the way in which this claim was
3 understood by the lower courts.

4 Maybe they misunderstood it. But, I
5 mean, the opening line of the -- the order
6 granting Apple's motion to dismiss the second
7 amended complaint by the district court: "The
8 thrust of Plaintiff's second amended complaint
9 is that Apple has engaged in antitrust conduct
10 by collecting 30 percent of the price of iPhone
11 applications."

12 MR. FREDERICK: The district court
13 just missed it, Justice Alito, respectfully.

14 JUSTICE ALITO: And where -- okay.
15 Where -- can you point to me where in the Ninth
16 Circuit's opinion they understood your claim in
17 the way that you've characterized it this
18 morning?

19 MR. FREDERICK: Yeah, they said on
20 page 21a of the petition app -- I think that's
21 the page -- that this is simply about a
22 monopoly distribution and that it is a simple
23 case as a result of that.

24 If you look at the bottom of 21a, the
25 very last paragraph: "Instead, we rest our

1 analysis, as compelled by Hanover Shoe,
2 Illinois Brick, UtiliCorp, and Delaware Valley,
3 on the fundamental distinction between a
4 manufacturer or producer on the one hand and a
5 distributor on the other." Apple is a
6 distributor of the iPhone apps selling them
7 directly to purchasers through its App Store.

8 And because of that, we have standing
9 to complain that they are the seller of the
10 apps. That's -- it's a very simple case in
11 that -- as viewed through that lens.

12 Now I accept, Justice Alito, that
13 there have been a lot of arguments and this
14 idea about the 30 percent has led to a certain
15 lack of clarity, but I think that the position
16 we have written in our brief is the best
17 articulation of what the underlying theory is
18 here, and that is that the Apple monopoly App
19 Store over-charges iPhone owners for apps.

20 JUSTICE KAGAN: And -- and -- and the
21 rule of the end in 99-cent requirement in that
22 theory is what? In other words, would your
23 theory be the same if no such requirement
24 existed, or would it not?

25 MR. FREDERICK: It would be still an

1 over-charge case, Justice Kagan, because the
2 theory economically is that, if you are having
3 to buy only from a monopoly, you are paying
4 more than you would if there was a, you know,
5 discount apps warehouse or you could buy
6 directly from the app's developer.

7 Our assertion is that, with multiple
8 sellers, multiple suppliers of the apps, we
9 would be able to buy them at a lower price.
10 It's that competition.

11 JUSTICE KAGAN: So what's the
12 significance of that end in 99-cent rule?

13 MR. FREDERICK: The significance of it
14 is that it informs the price elevation and the
15 price over-charge. And it also informs that,
16 contrary to Apple's assertion, they are not the
17 agent of the apps developers. I mean, they put
18 that in their contract. That's -- that's where
19 you get to Justice Gorsuch's form over
20 substance problem, because, at 99 cents,
21 they're telling the app developer, we're
22 foreclosing from you 99 percent of all pricing
23 options.

24 CHIEF JUSTICE ROBERTS: Well, if it's
25 that significant, why didn't you include it in

1 the complaint?

2 MR. FREDERICK: Because it's not
3 significant from this perspective, Mr. Chief
4 Justice, and that is that, with a monopoly
5 store, the prices are over-charged, our theory
6 is relatively simple. They brought up the 99
7 cents in the blue brief.

8 I think it's at page 9 of their brief
9 where they raise the 99 cent issue. And as we
10 were thinking about what the implications of
11 that were, it became clear to us that that
12 meant the app developer couldn't possibly be --

13 JUSTICE GORSUCH: Sounds kind of late
14 in the day --

15 JUSTICE KAVANAUGH: It's another --

16 JUSTICE GORSUCH: -- to come up with a
17 new litigation theory.

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

20 JUSTICE GORSUCH: In the Supreme
21 Court, a blue brief, really?

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

23 JUSTICE GORSUCH: I mean, should we be
24 taking that up now? I mean, maybe you can
25 amend your complaint or something like that on

1 remand, but should we be addressing that?

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

5 JUSTICE GORSUCH: But we're usually --

6 JUSTICE KAVANAUGH: It's not --

7 JUSTICE GORSUCH: -- a court of
8 review, not first view, right.

9 MR. FREDERICK: Well, no, our point
10 was that when they raised the 99 cents is
11 somehow proof that the developer actually gets
12 to set the price, we say, no, it's actually
13 irrelevant for the reasons which I've already
14 stated.

15 But, secondly, it's just wrong because
16 if you're constraining what 99 percent of the
17 pricing options are, you know, that -- that's
18 -- it is what it is.

19 But it also has the effect
20 economically of raising the prices --

21 JUSTICE KAVANAUGH: It's going to --

22 MR. FREDERICK: -- that the consumers
23 have -- have to pay.

24 JUSTICE KAVANAUGH: It's going to add
25 to your damages, correct?

1 MR. FREDERICK: Well, it --

2 JUSTICE KAVANAUGH: Potentially.

3 MR. FREDERICK: -- it could
4 potentially add to the damages or it could
5 subtract from the damages.

6 JUSTICE KAVANAUGH: Correct.

7 MR. FREDERICK: We don't know. What
8 we know is what the price is in a
9 noncompetitive market and we will have to have
10 experts that will assess what the damages would
11 be in a competitive market.

12 JUSTICE KAVANAUGH: Your theory
13 doesn't depend on the 99 cent?

14 MR. FREDERICK: Our theory of damages
15 or our theory of the violation?

16 JUSTICE KAVANAUGH: Well, the --

17 MR. FREDERICK: The theory of the
18 violation is the wholly-owned monopoly App
19 Store as the place to sell apps. That is what
20 the violation is here. And how you calculate
21 the damages is you look at what is the
22 over-charge based on what the monopoly is
23 selling the app for versus what it would be
24 sold for in a competitive market.

25 The antitrust scholars, and I would

1 direct you to page 23 of their brief, they go
2 through a lot of the pricing scenarios that you
3 have explored through hypotheticals here and
4 they make very clear that, as a matter of
5 function, what is happening here is that the
6 monopoly seller of the apps here is extracting
7 an over-charge from the purchasers who are
8 direct purchasers of those apps.

9 JUSTICE ALITO: If this case were to
10 go to trial as a class action, would every app
11 purchaser potentially be entitled to three
12 times the 30 percent over-charge, or would it
13 depend on the particular app?

14 MR. FREDERICK: Your Honor, I -- I
15 think that -- I don't know the answer to your
16 question fully. I'll be candid. I have not
17 thought about how the experts are actually
18 going to try to prove it up.

19 What I would say, though, is that
20 they're probably, what will likely happen, is
21 that because there are apps that are sold at 99
22 cent, a huge number of them are free, but a
23 huge number are sold at 99 cents, some other
24 strata is sold for \$1.99, some other strata is
25 sold for \$2.99 or \$6.99, and I haven't put my

1 head around, to be perfectly honest, exactly
2 how you would carve up the damages on some sort
3 of a pro rata basis.

4 But the idea, of course, of the
5 Clayton Act is that treble damages is designed
6 to deter antitrust violations.

7 And so this Court has made very clear
8 in its cases that the point of having that
9 deterrence is to avoid having the monopolist in
10 this case act in a way that it's not penalized
11 for its monopoly behavior.

12 And if you were to suppose that it was
13 just a single damages problem, it would be easy
14 for monopolists to simply act, and, if they get
15 caught, they just simply pay over what they
16 caused in damage, but the idea behind the
17 Clayton Act's treble damages remedy is designed
18 to deter actions just like this.

19 And that is why Apple cannot point to
20 another e-commerce distributor that does what
21 it does. In every other instance, as we point
22 out in the red brief, there is an alternative
23 to buying the product.

24 And, in fact, Apple doesn't even do
25 this with its own computer software. And we

1 have pleaded that in the complaint, Mr. Chief
2 Justice, where we say that, if you buy
3 software, you can buy it open source and you do
4 not have to buy it through Apple's monopoly
5 chain.

6 So the iPhone app monopoly App Store
7 is a unique feature of the e-commerce setting.
8 Apple has found ways using technology and
9 contractual constraints to limit the
10 opportunity of a competitive market to
11 flourish.

12 If a competitive market did flourish,
13 the prices that iPhone owners pay would be
14 lower. Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Three minutes, Mr. Wall.

18 REBUTTAL ARGUMENT OF DANIEL M. WALL
19 ON BEHALF OF THE PETITIONERS

20 MR. WALL: Thank you, Mr. Chief
21 Justice.

22 I think I need to begin with the
23 experience I had in this case for its first
24 nine years, and that is it was about a
25 30 percent commission.

1 Paragraph 48 of the complaint is -- is
2 -- is the key allegation, which is the root of
3 the damages theory, which maintains that the
4 30 percent commission is a monopoly price.
5 It's called a monopoly price.

6 It's elsewhere called a
7 super-competitive price. It is the root of the
8 damages theory not just in part, not just on
9 the periphery, but entirely.

10 The brief in opposition at -- at pages
11 5 and 12 make this unmistakably clear. At --
12 at page 5, the brief in opposition states:
13 "Respondents seek damages based solely on the
14 30 percent markup."

15 So whatever other attributes of this
16 case one may want to talk about that might
17 contribute to the liability theory, the injury
18 theory, the damages theory, is, in their words,
19 solely about the -- the 30 percent.

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

23 If Apple had in every agreement with
24 an iPhone owner a provision that you can sue --
25 you can't sue, you have to go to an arbitrable

1 forum, in a one-by-one, then Apple would be
2 home free in this case?

3 MR. WALL: We -- we do not have such a
4 provision. In fact, the -- all of the relevant
5 agreements with both developers and consumers
6 state that -- that there shall be litigation in
7 the Northern District of California.

8 JUSTICE GINSBURG: Yeah, I -- I know
9 -- I know you don't, but suppose you did.

10 MR. WALL: If -- if that were the
11 case, then this would be a matter for
12 arbitration, and I don't think it changes the
13 legal question.

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

17 MR. WALL: Indeed, it -- it would, but
18 that's not this case. There is -- there is no
19 concern about that in this case.

20 The second point that I want to make
21 is -- relates to this duplicative recovery
22 possibility. It -- there is -- we never heard
23 any suggestion prior to the Respondents' merits
24 brief about potential lost profits claims based
25 upon monopsony.

1 To the contrary, the theory throughout
2 the life of this case is that -- that
3 developers, if they sued, would sue over the
4 same 30 percent markup. The brief in
5 opposition at 12 says any claim by the app's
6 developers -- excuse me -- a claim by the app's
7 developers, even if they had one, would not
8 overlap the 30 percent markup paid by app's
9 purchasers. Rather, it is a piece of the same
10 30 percent pie.

11 So going back to what is Illinois
12 Brick about, it is about not having that
13 apportionment fight. They admitted to the --
14 to the time that this case was on this Court's
15 doorstep that this is all about an
16 apportionment fight between the developers.

17 As -- as to the -- the -- the -- which
18 is the better rule, the formalistic rule or the
19 substantive rule, I suggest that -- that the
20 formalistic rule is always the one that is most
21 subject to manipulation.

22 The substantive rule that asks is your
23 damages theory a pass-on theory focuses on what
24 is of economic substance. And here, that's
25 what the district court judge did.

1 In -- in a patient but persistent
2 manner, she required them to say what is your
3 theory. And it -- and at JA 137 to 143, you
4 see the transcript of the district court
5 argument when -- when, finally, at JA 141 they
6 said -- or 143, rather -- they said their
7 theory is that, because of the commission, the
8 developer would mark up the app.

9 That is a classic over-charge case.
10 Now, to be sure, in a new setting, it's a new
11 world setting. It's not the brick-and-mortar
12 setting of the three cases that this case --
13 that this Court has decided before. But it is
14 the same economics that should have the same
15 outcome prohibiting pass-through damages
16 claims.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

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

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