

IN THE
Supreme Court of the United States

IN RE ATM FEE ANTITRUST LITIGATION

PAMELA BRENNAN *et al.*,

Petitioners,

v.

CONCORD EFS, INC. *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

MERRILL G. DAVIDOFF
BART D. COHEN
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

BRENDAN P. GLACKIN
LIEFF CABRASER HEIMAN
& BERNSTEIN
275 Battery Street
29th Floor
San Francisco, CA 94111
(415) 956-1000

JEFFREY A. LAMKEN
Counsel of Record
MARTIN V. TOTARO
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

JUSTIN B. WEINER
MOLOLAMKEN LLP
300 North LaSalle Street
Chicago, IL 60654
(312) 450-6700

Counsel for Petitioners Pamela Brennan, et al.

QUESTION PRESENTED

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), this Court ruled that, in general, “indirect purchasers” do not have standing to bring civil antitrust claims; standing instead is ordinarily reserved for “direct purchasers.” *Id.* at 729. The question presented is:

Whether a plaintiff who purchases directly from a member of a price-fixing conspiracy is necessarily a “direct purchaser” under *Illinois Brick* (as the Third and Seventh Circuits have held), or whether instead the plaintiff must show that the conspirators agreed to set the specific price the plaintiff paid and not merely that the conspiracy inflated that price by anticompetitive means (as the Ninth Circuit held below).

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Pamela Brennan, Terry Crayton, and Darla Martinez were plaintiffs in the district court and appellants in the court of appeals.

Respondents Bank of America, N.A., Bank One, N.A., Citibank (West), FSB, Citibank N.A., Concord EFS, Inc., First Data Corporation, JPMorgan Chase Bank N.A., Servus Financial Corporation, SunTrust Banks, Inc., Wachovia Corporation, and Wells Fargo Bank, N.A. were defendants in the district court and appellees in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Pamela Brennan, Terry Crayton, and Darla Martinez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-29a) is reported at 686 F.3d 741. The district court's opinion (App., *infra*, 30a-53a) is not reported but is available at 2010 WL 4918971.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on July 12, 2012. App., *infra*, 1a-29a. It denied rehearing on March

13, 2013. *Id.* at 54a. On June 4, 2013, Justice Kennedy extended the time to file a petition for a writ of certiorari to July 11, 2013. No. 12A1161. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Clayton Act, 15 U.S.C. §§ 12-27, and the Sherman Act, 15 U.S.C. §§ 1-7, are set forth in the Appendix. App., *infra*, 99a-101a.

PRELIMINARY STATEMENT

Expressly disagreeing with the Third and Seventh Circuits, the Ninth Circuit's decision in this case exacerbates an acknowledged circuit conflict over the scope of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In *Illinois Brick*, this Court ruled that indirect purchasers ordinarily do not have standing to bring civil antitrust claims; instead, only "direct purchasers" have standing. *Id.* at 729. The courts of appeals, however, are divided on whether a plaintiff who directly purchases from a defendant who participated in a price-fixing conspiracy is necessarily a "direct purchaser" under *Illinois Brick*. Answering that question in the affirmative, the Third Circuit has held that "a plaintiff who purchases directly from the alleged offender" is a "direct purchaser." *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 159 (3d Cir. 2002). That is true, the court held, whether the conspirators directly set the price of the product the plaintiff buys, or the plaintiff instead "buys a product which incorporates the price-fixed product as one of its ingredients." *Ibid.* The Seventh Circuit likewise "allocate[s] to the first non-conspirator in the distribution chain the right to collect 100% of the damages" regardless of whether the conspirators expressly set the price paid by the plaintiff. *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 631-632 (7th Cir. 2002).

In this case, the Ninth Circuit held the opposite. Rejecting the Third and Seventh Circuits' approach, the Ninth Circuit ruled that petitioners are not "direct purchasers" even though they purchased services directly from members of the alleged conspiracy—not from an innocent intermediary. App., *infra*, 23a-24a n.7. In the court's view, petitioners are not "direct purchasers" because the conspiracy set the price of an *input* to the product petitioners purchased and not the price of the *product itself*. Plaintiffs who purchase from members of a price-fixing conspiracy cannot be considered "direct purchasers," the court held, unless the conspiracy specifically "set" the price the plaintiff actually paid. *Id.* at 18a. "[T]he price paid by plaintiffs must be the price set (not merely 'fixed' in some broad sense) for plaintiffs to be a direct purchaser." *Id.* at 20a; see *id.* at 23a (conspiracy must "involve[] the setting of the price actually paid (and not an upstream price that was then passed on)"). The Ninth Circuit thus held that it is not enough that the defendants agreed on the price for an input they all supply and use, even where the defendants use that price to inflate the charges levied on the plaintiffs. App., *infra*, 24a; see *id.* at 13a, 15a-16a, 19a-20a, 23a, 25a. Invoking *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002), the court declared that the Fourth Circuit "also requires that plaintiffs allege a conspiracy to fix the price paid by the plaintiffs." App., *infra*, 16a. That open and acknowledged circuit conflict warrants this Court's review.

STATEMENT

I. STATUTORY FRAMEWORK

Section 1 of the Sherman Act prohibits "[e]very contract, combination * * *, or conspiracy, in restraint of trade or commerce." 15 U.S.C. §1. "[H]orizontal agreements among competitors to fix prices" are per se illegal

under § 1. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Under § 4 of the Clayton Act, “[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue” for compensation. 15 U.S.C. § 15(a).

This Court addressed the scope of the private right of action created by § 4—and who has “standing” to sue under it—in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *Hanover Shoe* concerned whether an antitrust defendant (which manufactured machines for making shoes) could defend by arguing that the plaintiff (a shoe manufacturer) had no injury because it passed along any overcharge to its customers. The Court held that an antitrust plaintiff can collect damages without regard to whether it recouped losses by passing on the inflated price to downstream purchasers. 392 U.S. at 493-494. A contrary rule, the Court explained, would undermine enforcement by leaving it to downstream customers with “only a tiny stake” in bringing suit. *Id.* at 494.

In *Illinois Brick*, this Court addressed the status of downstream customers. In that case, the State of Illinois and local government entities sought damages from the manufacturers and distributors of concrete blocks used in construction. 431 U.S. at 726. The manufacturers and distributors sold the blocks to masonry contractors “who submit[ted] bids to general contractors for the masonry portions of construction projects.” *Ibid.* “The general contractors, in turn, submit[ted] bids for these projects to customers” such as the plaintiffs. *Ibid.* The blocks were “purchased directly from [defendants] by masonry contractors and used by them to build masonry structures; those structures [we]re incorporated into entire buildings

by general contractors and sold” to the plaintiffs. *Ibid.* The plaintiffs were “thus indirect purchasers of concrete block, which passe[d] through two separate levels in the chain of distribution before reaching” them. *Ibid.* Relying on *Hanover Shoe*, the Court held that the plaintiffs could not sue under the Clayton Act. Such “an indirect purchaser,” the Court held, cannot “show its injury by establishing pass-on by the direct purchaser.” *Ibid.* The right to sue, the Court held, belongs exclusively to the innocent intermediary—in that case, the masonry contractors—who purchased from the antitrust violator. *Id.* at 727.

A contrary rule, the Court observed, would risk multiple recoveries. If a direct purchaser could recover “the full amount of the overcharge” under *Hanover Shoe*, and an “indirect purchaser” could also “sue to recover the same amount,” the defendant would be subject to multiple awards for the same harm—a concern exacerbated by the availability of treble damages. *Illinois Brick*, 431 U.S. at 730. The Court noted the evidentiary difficulties that would arise if a downstream plaintiff had to prove “how much of the overcharge was passed on * * * at each point at which the price-fixed goods changed hands before they reached the plaintiff.” *Id.* at 732-733. And the Court invoked *Hanover Shoe*’s concern about dispersed indirect purchasers who “have only a tiny stake in a lawsuit.” *Hanover Shoe*, 392 U.S. at 494. According the exclusive right to sue to the person who purchased from the violator, the Court held, would “concentrate[] * * * recovery for the overcharge in the direct purchasers,” giving them an appropriate incentive to sue. *Illinois Brick*, 431 U.S. at 735, 745-746.

II. PROCEEDINGS BELOW

The complaint in this case alleges a conspiracy to fix certain fees charged in connection with transactions using automated teller machines (known as “ATMs”).

A. Background

The ATM was first conceived in the 1930s, when Luther Simjian “came up with the idea of creating a hole-in-the-wall machine that would allow customers to make financial transactions.” MIT School of Engineering, *Inventor of the Week Archive: Luther Simjian*, <http://web.mit.edu/invent/iow/simjian.html>. The idea, however, was initially “met with a great deal of skepticism.” *Ibid.* Time has vindicated Mr. Simjian’s vision. From modest beginnings in the 1960s, ATMs have become a ubiquitous feature of the modern banking system. Today, more than 400,000 ATMs dot the country. Gov’t Accountability Office, *Automated Teller Machines* 1 (2013). Consumers have made billions of ATM withdrawals, totaling hundreds of billions of dollars. *Ibid.*

When a consumer withdraws money from an ATM owned by an entity other than his bank (such as when his own bank does not have ATMs in the area), the withdrawal is termed a “foreign ATM transaction.” App., *infra*, 2a. Those transactions occur through interbank ATM networks, which establish rules governing (among other things) foreign ATM transactions among network members. *Id.* at 3a. The STAR network at issue here—the largest such network—was originally a joint venture by its member banks (who are competitors in most other contexts). *Id.* at 3a-4a. In February 2001, Concord EFS, Inc. (“Concord”) purchased the STAR network. *Ibid.* Concord agreed with the member banks to establish a Network Advisory Board that would advise Concord of the member banks’ interests and provide “input on pol-

icies and pricing issues.” *Id.* at 28a. The larger member banks sat on the Network Advisory Board. *Id.* at 4a-5a. In 2004, Concord was purchased by First Data Corp., which assumed control of the STAR network. *Id.* at 5a.

A foreign ATM transaction on the STAR network triggers a series of financial transactions involving four parties: (1) the customer; (2) the bank that issued the customer’s ATM card; (3) the owner of the ATM; and (4) the STAR network. App., *infra*, 2a-3a. The bank that owns the ATM charges the customer’s bank an “interchange fee” set by the STAR network. *Id.* at 3a. The card-issuing bank, in turn, charges its customer—the cardholder—what is known as a “foreign ATM fee.” *Ibid.* That foreign ATM fee includes the interchange fee. *Id.* at 5a. The foreign ATM fee the customer’s bank charges the customer is distinct from, and in addition to, any surcharge the ATM owner directly charges the customer at the time of the transaction. *Ibid.* As a result, a customer making a \$20 withdrawal might also pay \$6.00 in charges—a \$2.50 foreign ATM fee assessed by his bank, plus a \$3.50 surcharge assessed by the ATM owner. The foreign ATM fee, unlike the ATM surcharge, is not displayed to the customer at the time he withdraws money; instead, it may appear on the customer’s bank statement weeks later. *Id.* at 91a-92a. It is the foreign ATM fee that is at issue here.

B. Proceedings in the District Court

Petitioners Brennan, Crayton, and Martinez, all ATM cardholders, filed this action in the U.S. District Court for the Northern District of California on July 2, 2004. App., *infra*, 5a. The complaint alleges that Concord and its parent company, First Data Corp., conspired with Bank of America, N.A., JPMorgan Chase Bank, N.A., Citibank, N.A., Citibank (West), Bank One, N.A., FSB,

SunTrust Banks, Inc., Wachovia Corp., Wells Fargo Bank, N.A., and Servus Financial Corp. (collectively, the “Bank Respondents”) and others to engage in “horizontal price fixing of fees paid to the ATM owners by the banks (issuing the ATM cards to the cardholders) when cardholders retrieve cash from an ATM not owned by their bank.” *Id.* at 1a-2a.

The complaint alleges that respondents agreed to set the STAR interchange fee that financial institutions (including the Bank Respondents) charge each other for their customers’ use of Bank Respondents’ ATMs. App., *infra*, 5a. The Bank Respondents then incorporate those fees into the foreign ATM fee they charge their customers. The interchange fee thus serves as a “floor” for the foreign ATM fee. The complaint explains that interchange fees originally compensated ATM owners for the additional cost of providing cash to other banks’ customers. *Id.* at 58a-59a. Those fees, however, became unnecessary at least by 1996, when the STAR network began permitting ATM owners to impose a direct surcharge on other banks’ customers for using their ATMs. *Ibid.*¹

Respondents moved to dismiss, asserting that the suit is barred by *Illinois Brick*.² Respondents argued that petitioners are indirect purchasers who lack standing because the complaint alleges only a conspiracy to set the

¹ Although banks other than the Bank Respondents own ATMs and charge foreign ATM fees, the complaint proposes a class limited to cardholders who were directly charged the foreign ATM fee by the Bank Respondents. App., *infra*, 23a, 70a-71a. The complaint seeks damages from July 2, 2000 onward. *Id.* at 5a.

² Respondents had previously moved to dismiss “on the ground that plaintiffs do not state a claim for a *per se* violation of the antitrust laws,” but the district court denied those motions. *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1131, 1138 (N.D. Cal. 2005).

price of the *interchange* fee, not the *foreign ATM fee* paid by petitioners. App., *infra*, 6a. The district court initially rejected that argument. Petitioners, the court recognized, were “purchasing directly from the price-fixing conspirators” and there was “no realistic possibility” that the Bank Respondents—all of whom are alleged to be conspirators—would sue each other and the owner of the STAR network. *Id.* at 5a.

Respondents later moved for summary judgment, again contending that *Illinois Brick* bars the suit. App., *infra*, 6a. This time, the district court agreed with respondents. *Ibid.* It ruled petitioners to be “indirect purchasers” because they “did not directly pay the alleged fixed interchange fees” and did not allege that the Bank Respondents “have conspired to fix the foreign ATM fee that [petitioners] must pay.” *Ibid.* The district court also stated (without record support) that “there is a very realistic possibility that” card-issuing banks “would file suit to challenge the fixing of interchange fees at artificially high rates.” *Id.* at 7a n.2. The court did not address why banks—like the Bank Respondents here—that are members of the price-fixing conspiracy, and thus receive the benefits of inflated fees, would sue when doing so would threaten those fees and potentially concede antitrust violations.

C. The Court of Appeals’ Decision

The Ninth Circuit affirmed. App., *infra*, 29a. The court of appeals observed that, under *Illinois Brick*, “indirect purchasers may not use a pass-on theory to recover damages and thus have no standing to sue.” App., *infra*, 10a.³ In this case, the court noted, petitioners

³ The decision “limit[ed]” its discussion “to the issues relevant to standing.” App., *infra*, 2a. The court did not address “the district

“have never directly paid interchange fees.” *Id.* at 13a. “Instead,” the “card-issuing banks” (including the Bank Respondents) “pay interchange fees and then include them when they charge foreign ATM fees (alleged by [petitioners] to be artificially inflated).” *Id.* at 12a. Because petitioners did not themselves pay the interchange fee that respondents allegedly conspired to set, the Ninth Circuit held that they were “indirect purchasers” who cannot bring suit under *Illinois Brick*. *Id.* at 13a.

1. The Ninth Circuit observed that there are “limited exceptions” under which even indirect purchasers obtain antitrust standing. App., *infra*, 11a. For example, the Ninth Circuit and other courts of appeals had recognized what is sometimes called a “‘co-conspirator’ exception.” *Ibid.* That exception, the court of appeals held, “allows an indirect purchaser to sue when co-conspirators *set the price paid* by the plaintiff.” *Id.* at 13a (emphasis added). Although that exception permits indirect-purchaser plaintiffs to sue “when the direct purchaser conspires horizontally or vertically to fix the price paid by the plaintiffs,” the court held that it does not apply when the direct purchaser conspires to fix the price of an upstream input, even if that necessarily inflates the price the plaintiffs pay. *Ibid.*

Despite being labeled a “co-conspirator exception” by some courts, the panel indicated that it is “not really an exception at all.” App., *infra*, 14a. Rather, where the immediate purchaser is alleged to be part of the antitrust

court’s (1) determination that the rule of reason, and not the per se rule, applies here; (2) rejection of the single-brand, derivative aftermarket alleged in the complaint; and (3) determination that the claim against Bank of America, N.A., did not relate back to the filing of the original complaint under Rule 15(c) of the Federal Rules of Civil Procedure.” *Ibid.*

conspiracy, the next purchaser in line is appropriately considered the “direct purchaser”: She is the one who purchases directly from those engaged in the violation. *Ibid.* “Whether one adopts a co-conspirator exception or regards this situation as outside *Illinois Brick*’s domain,” the court continued, *Illinois Brick* does not apply because “there is no tracing or apportionment [of damages] to be done.” *Ibid.* (quoting IIA Areeda *et al.*, *Antitrust Law* ¶346h (3d ed. 2007)). Because “the plaintiffs pay the fixed price directly,” they “are not indirect purchasers” and “there is no pass-on theory involved.” *Ibid.* Whatever the proper nomenclature, the court stated, “[i]f the direct purchaser conspires to fix the price paid by the plaintiffs, then the plaintiffs pay the fixed price directly and are not indirect purchasers.” *Ibid.*

2. Applying that rule to this case, the Ninth Circuit nonetheless held that petitioners are indirect purchasers who lack antitrust standing. “Here, while Plaintiffs allege a conspiracy to set *interchange fees*, they fail to show a conspiracy to set *foreign ATM fees*.” App., *infra*, 16a (emphasis added). Because petitioners paid the foreign ATM fee that incorporated the interchange fee—and not the interchange fee itself—they had not paid the price that was “fixed.” *Id.* at 18a. Accordingly, the Ninth Circuit ruled that petitioners were not, under *Illinois Brick*, “injured within the meaning of §4 of the Clayton Act.” *Id.* at 20a.

The Ninth Circuit rejected petitioners’ argument that they had antitrust standing because respondents “conspired to fix interchange fees *for the purpose of raising foreign ATM fees*.” App., *infra*, 18a (emphasis added). The court held that *Illinois Brick* foreclosed that theory when it “rejected exceptions for markups by middlemen or when the price-fixed good is a vital input to a larger

product.” *Id.* at 19a. In both scenarios, the Ninth Circuit stated, a court would be required to use a “passing on” theory forbidden by *Illinois Brick*. *Id.* at 20a. The court instead concluded that *Illinois Brick* allows suit where defendants agree to set the price of the product sold to the plaintiff, but not where defendants inflate that price by agreeing to fix the price of an input. The conspiracy must “involve[] the setting of the price actually paid (and not an upstream price that was then passed on).” *Id.* at 23a. “[T]he price paid by plaintiffs must be the price set (not merely ‘fixed’ in some broad sense) for plaintiffs to be a direct purchaser.” *Id.* at 20a.

Respondents, the court of appeals continued, “have not conspired to set the foreign ATM fees” paid by petitioners; the Bank Respondents “independently set the fee paid by” petitioners. App., *infra*, 22a. Even if the conspirators had intended to fix the price of the finished product by fixing an input’s price—*i.e.*, had agreed to set the interchange fee in order to fix the foreign ATM fee—the court held that “the price paid by a plaintiff must be set by the conspiracy and not merely affected by the setting of another price.” *Id.* at 20a.

The Ninth Circuit also rejected petitioners’ contention that *Illinois Brick* did not apply because they had “purchased directly from price-fixing” conspirators. App., *infra*, 23a. The court of appeals again concluded that, under *Illinois Brick*, the inquiry focuses on what price was fixed: the one paid by petitioners or an upstream price common to all conspirators. *Ibid.* That petitioners paid fees directly to conspirators as a result of the antitrust violation committed by those conspirators made no difference, because the price fixed was “an upstream price that was then passed on” and not “the price actually paid.” *Ibid.* The court of appeals thus ruled that peti-

tioners had “run into the *Illinois Brick* wall,” *id.* at 24a, and “lack standing to seek damages for the alleged antitrust violations,” *id.* at 29a.⁴

3. The court of appeals recognized that its ruling conflicts with decisions of the Third and Seventh Circuits. App., *infra*, 23a-24a n.7. In those circuits, a plaintiff has antitrust standing “when the direct purchaser conspires with the seller, even though the price illegally set is an upstream cost that is passed-on to the plaintiffs.” *Ibid.* (citing *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629 (7th Cir. 2002), and *In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002)). The Ninth Circuit, however, “decline[d]” to adopt that approach, *id.* at 23a, and expressed disagreement with those circuits’ reasoning, *id.* at 23a-24a n.7. Relying instead on *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002), the court of appeals stated that the Fourth Circuit “requires that plaintiffs allege a conspiracy to fix the price paid by the plaintiffs” and has “refused to recognize an exception when plaintiffs allege a conspiracy but the conspirators did not fix the price paid by the plaintiffs.” *Id.* at 16a-17a.

4. The court of appeals denied rehearing on March 13, 2013. App., *infra*, 54a. On June 4, 2013, Justice Kennedy extended the time to file a petition for a writ of certiorari to July 11, 2013. No. 12A1161. This petition followed.

REASONS FOR GRANTING THE PETITION

The decision below expands an entrenched and openly acknowledged circuit conflict on an important issue of

⁴ The decision below also held that the cost-plus contract exception and the ownership-and-control exception to *Illinois Brick* did not apply. App., *infra*, 13a, 25a-29a. Any such exceptions to *Illinois Brick* are not specifically at issue here.

antitrust law—when, for purposes of the “direct purchaser” rule established in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), a plaintiff who purchases from a member of a price-fixing conspiracy is a “direct purchaser” with standing to sue. The Third and Seventh Circuits have held that such purchasers necessarily are “direct purchasers” under *Illinois Brick*. *In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002); *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629 (7th Cir. 2002). *Illinois Brick*’s “direct purchaser” requirement, those courts hold, “allocate[s]” standing to the “first non-conspirator in the distribution chain.” *Paper Systems*, 281 F.3d at 632. That is true whether the defendants conspired to set the price they charged the plaintiffs, or whether they inflated that price by setting the price of an input they all use. *Ibid.*; *Linerboard*, 305 F.3d at 159. Consequently, in the Third and Seventh Circuits, a plaintiff who purchases directly from members of a price-fixing conspiracy is a “direct purchaser” with standing to sue “even though the price illegally set is an upstream cost that is passed-on to the plaintiffs.” App., *infra*, 24a n.7.

The Ninth Circuit’s decision in this case took the opposite view, expressly disagreeing with the Third and Seventh Circuits. App., *infra*, 23a-24a & n.7. Relying instead on the Fourth Circuit’s decision in *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002), the Ninth Circuit held that a plaintiff who directly purchases from a member of a price-fixing conspiracy—with no innocent intermediary—is not a “direct purchaser” *unless* the “co-conspirators set the price paid by the plaintiff.” *Id.* at 18a (emphasis added). Under the Ninth Circuit’s approach, it makes no difference that the defendants conspired to fix the price of an upstream input that all of the

defendants use; that they did so “for the purpose of raising” the prices they charge the plaintiffs; and that they in fact incorporated that inflated price into the amount they charged the plaintiffs. *Ibid.* Instead, plaintiffs who themselves purchase from members of a price-fixing conspiracy at inflated prices—not through an intermediary—are not “direct purchasers,” and lack standing under *Illinois Brick*, unless the conspirators agreed to “set” the downstream price the plaintiffs actually paid. *Id.* at 23a.

That ruling does not merely exacerbate an open circuit conflict. It also takes the wrong side of the split. As the Third and Seventh Circuits have recognized, *Illinois Brick* allocates standing to sue to those who purchase directly—with no innocent intermediary—from the members of the illegal antitrust conspiracy. *Illinois Brick* does not exonerate the Clayton Act’s right of action by barring injured customers from suit whenever conspirators in a multi-level conspiracy are savvy enough to agree on the price of an upstream input rather than the end-product itself. The issue, moreover, is important and recurring. This Court’s review is warranted.

I. THE NINTH CIRCUIT’S DECISION DEEPENS AN ACKNOWLEDGED CIRCUIT CONFLICT

The courts of appeals are in open conflict on the scope of the “direct purchaser rule” this Court established in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In *Hanover Shoe*, the Court held that direct purchasers may seek damages under the Nation’s antitrust laws even if they are alleged to have passed all of their costs on to their customers. 392 U.S. at 493-494. Building on that decision, *Illinois Brick* held that only “direct purchasers” have standing to sue. 431 U.S. at

727. The courts of appeals are now sharply divided on who may bring suit as a “direct purchaser” under that rule. That conflict warrants this Court’s review.

A. The Third and Seventh Circuits Accord Standing to the First Non-Conspirator Purchaser

The rule in the Third and Seventh Circuit is straightforward: Where the defendants have engaged in an anti-trust conspiracy, anyone who makes purchases from one of the conspiring defendants at prices inflated by the conspiracy has standing under *Illinois Brick*. As the Seventh Circuit explained in *Paper Systems*, “*Hanover Shoe* and *Illinois Brick* allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages.” 281 F.3d at 632; see *id.* at 631 (“The first buyer from a conspirator is the right party to sue.”). Under that rule, it makes no difference whether the defendants conspire to directly fix the price of the goods they sell, or instead conspire to inflate those prices by agreeing on a critical upstream price for a product or service they provide each other. Plaintiffs alleging a conspiracy between suppliers and intermediaries “are entitled to collect damages from both the [suppliers] and their intermediaries if conspiracy and overcharges can be established.” *Id.* at 632. Adopting the same approach, the Third Circuit has held that “a plaintiff who purchases directly from the alleged offender, but buys a product which incorporates the price-fixed product as one of its ingredients,” is a “direct purchaser.” *Linerboard*, 305 F.3d at 159.

1. In *Paper Systems*, the plaintiffs—consumers of thermal paper—sometimes made purchases from manufacturers and sometimes made purchases through intermediaries. 281 F.3d at 631. They sued five thermal-paper manufacturers, all alleged to be part of a conspir-

acy, and the intermediary sellers also alleged to be part of the conspiracy. *Ibid.* All but one defendant, Nippon Paper, settled. *Ibid.* The Seventh Circuit ruled that the plaintiffs could sue Nippon Paper for damages caused by the conspiracy, even if “plaintiffs did not buy from Nippon Paper directly.” *Id.* at 634. Invoking the principle of joint-and-several liability, it held that “any direct purchaser * * * can collect its own portion of damages (that is, the damages attributable to its direct purchases) from any conspirator.” *Id.* at 632.

The court of appeals rejected the contention that *Illinois Brick* barred the suit simply because the sales occurred through intermediaries. When the intermediaries are *not* “alleged to have participated in the conspiracy,” the court agreed that the plaintiffs would lack standing under *Illinois Brick*. 281 F.3d at 632. For such sales, “*Hanover Shoe* and *Illinois Brick* allocate * * * any right to collect overcharges” solely to the intermediaries. *Ibid.* But for sales made through intermediaries alleged to be part of the conspiracy, “the first non-conspirator in the distribution chain” has the right to bring suit. *Ibid.*; see *In re Brand Name Prescription Drug Antitrust Litig.*, 123 F.3d 599, 604 (7th Cir. 1997) (including intermediaries in a conspiracy would cause “any indirect-purchaser defense [to] go by the board, since the pharmacies [*i.e.*, the end buyers] would then be direct purchasers from the conspirators”); *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980) (similar).

The Seventh Circuit rejected the argument that its rule would require “judges or juries * * * to trace the original overcharge through several levels of distribution” in violation of *Illinois Brick*. *Paper Systems*, 281 F.3d at 632. The amount of “monopoly overcharge,” the court of appeals held, “is the excess price at the initial

sale,” not the excess price charged to the plaintiff downstream. *Id.* at 633. And that figure could be calculated by “the conspirators’ own agreement” or, if necessary, by calculating “the elasticities of supply and demand.” *Ibid.*

The Seventh Circuit also concluded that its approach conformed to *Illinois Brick*’s rationale. The direct purchaser rule promotes deterrence by concentrating the prospect of recovery in parties that can most readily detect cartel behavior. *Paper Systems*, 281 F.3d at 632-633. Permitting suit by those who directly purchase from members of the conspiracy, the court held, would serve that end. *Ibid.* And because the plaintiffs are limited to collecting damages on account of their own direct purchases from a conspiring defendant, there is no risk of multiple recoveries. *Ibid.*

2. In *Linerboard*, the Third Circuit adopted the same rule. That case concerned a conspiracy to fix the price of linerboard—a “grade of paperboard suitable for * * * production of corrugated sheets, which are in turn used in the manufacture of corrugated boxes.” 305 F.3d at 148 n.1. The defendants were vertically integrated manufacturers that made and sold linerboard, corrugated sheets, and corrugated boxes. *Ibid.* The antitrust suit sought damages for purchasers who bought corrugated containers or corrugated sheets from the defendants. *Id.* at 148-149. They alleged that the defendants entered a “conspiracy to raise the price of linerboard” that “correspondingly raised the price of corrugated products [*i.e.*, sheets and containers].” *Id.* at 149.

The defendants argued that *Illinois Brick* barred the claims, because “members of the proposed classes purchased corrugated sheets or boxes, of which linerboard was a mere ingredient, and did not purchase linerboard *per se*.” 305 F.3d at 159. The Third Circuit disagreed. It

held that “a plaintiff who purchases directly from the alleged offender, but buys a product which incorporates the price-fixed product as one of its ingredients,” is a “direct purchaser” within the meaning of *Illinois Brick*. *Ibid.* The fact that “there will be some additional complications underlying the damage claims * * * must not be allowed to obscure the fact that the plaintiff did purchase directly from the alleged violator.” *Ibid.*

Consequently, the rule in the Third Circuit—as in the Seventh—is that direct purchasers from members of a cartel or conspiracy have standing under *Illinois Brick*, even if the cartel members inflate their prices by setting the price of an input rather than expressly setting the price for the finished product they sell to the public. As one district court explained, “although *Illinois Brick* bars Clayton Act suits by persons who are not direct purchasers from an antitrust defendant,” that “decision does not preclude a suit by a plaintiff who purchases directly from the alleged offender” by “buy[ing] a product which incorporates the price-fixed product as one of its ingredients.” *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 480 (W.D. Pa. 1999).⁵

B. The Ninth and Fourth Circuits Have Adopted The Contrary Rule

Expressly disagreeing with the Third and Seventh Circuits, the decision below adopted the opposite rule, deepening an entrenched circuit conflict.

1. Rejecting the Third and Seventh Circuits’ approach, the Ninth Circuit held that *Illinois Brick* does

⁵ The Eleventh Circuit has similarly ruled that “*Illinois Brick* does not apply to a single vertical conspiracy where the plaintiff has purchased directly from a conspiring party in the chain of distribution.” *Lowell v. Am. Cyanamid Co.*, 177 F.3d 1228, 1232 (11th Cir. 1999).

not necessarily permit the first purchaser outside a price-fixing conspiracy to bring suit as a “direct purchaser.” App., *infra*, 23a. Instead, the court held that plaintiffs who purchase directly from members of a price-fixing conspiracy still lack standing unless “the conspiracy involves *setting the price paid* by the plaintiffs.” App., *infra*, 24a (emphasis added). The court of appeals ruled that it is not enough that the defendants conspired to fix the price of an upstream input or component, even if they did so “for the purpose and effect of inflating another fee.” *Id.* at 22a. Instead, a plaintiff who purchases from a conspirator or cartel member has standing to sue only if the conspiracy or cartel “involve[s] the setting of the price actually paid (and not an upstream price that was then passed on).” *Id.* at 23a.

Applying that rule to this case, the court of appeals ruled that plaintiffs were not “direct purchasers” within the meaning of *Illinois Brick*. App., *infra*, 13a. The court accepted the complaint’s allegation that the Bank Respondents had conspired to set the “STAR interchange fee” they charge one another for transactions using each others’ ATMs. *Id.* at 6a. It also accepted the allegation that the Bank Respondents incorporated the price-fixed interchange fee into the “foreign ATM fee” they all charged their customers (including plaintiffs). *Id.* at 3a. However, because it read the complaint to allege that the Bank Respondents had conspired to set only the interchange fee and not to set the precise amount of the foreign ATM fee petitioners paid, the court held that petitioners lacked standing under *Illinois Brick*. *Id.* at 22a, 29a. It did not matter that petitioners “purchased directly from price-fixing Defendants,” *id.* at 22a, or that the Bank Respondents had “fix[ed] one fee for the purpose and effect of inflating” the fee charged to petition-

ers, *id.* at 21a. Absent an allegation that the Bank Respondents had agreed on and set the foreign ATM fee that petitioners “directly paid,” the case could not proceed. *Id.* at 23a.

The court acknowledged the Third and Seventh Circuits’ contrary rule. App., *infra*, 23a-24a & n.7. But the Ninth Circuit “decline[d] to” adopt that rule, criticizing it as inconsistent with *Illinois Brick*. *Ibid.* In particular, the Ninth Circuit urged that the Third Circuit’s *Linerboard* decision and the Seventh Circuit’s *Paper Systems* decision inappropriately “restrict *Illinois Brick*’s influence by allowing an exception when the direct purchaser conspires with the seller, even though the price illegally set is an upstream cost that is passed-on to the plaintiffs.” *Id.* at 24a n.7. That approach, the Ninth Circuit opined, “contradicts the Supreme Court’s admonition ‘not to carve out exceptions to the [direct purchaser] rule for particular types of markets.’” *Ibid.* (quoting *Kansas v. Utilicorp United*, 497 U.S. 199, 216 (1990)). “[T]he price paid by plaintiffs must be the price set (not merely ‘fixed’ in some broad sense) for plaintiffs to be a direct purchaser * * *.” *Id.* at 20a.

2. In so holding, the Ninth Circuit relied on the Fourth Circuit’s decision in *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002). *Dickson* concerned a monopolization claim: The plaintiffs alleged that Microsoft colluded with computer manufacturers who paid supra-competitive prices for Microsoft’s operating system and application software. *Id.* at 200. That, in turn, caused consumers to pay more for computers purchased from the manufacturers. *Ibid.*

The Fourth Circuit held that the plaintiff customers were indirect purchasers who lacked standing under *Illinois Brick*. The plaintiffs there had not alleged a con-

spiracy fixing the price that the plaintiffs themselves paid for the software; the plaintiffs' theory was that the monopoly "overcharge" for Microsoft's operating system and application software was priced into the cost of the computers they purchased. 309 F.3d at 215. Because the plaintiffs alleged only a conspiracy relating to the price of the operating system and software—rather than the price of the computer itself—the court held that the suit was barred by *Illinois Brick*. *Ibid*.

Judge Gregory dissented. "Permitting plaintiffs * * * to sue intermediaries that were part of a conspiracy to raise retail prices above a competitive level," he observed, "is consistent with *Hanover Shoe* and *Illinois Brick*." *Dickson*, 309 F.3d at 222 (Gregory, J., dissenting). He would have followed the Seventh Circuit's holding that "'*Hanover Shoe* and *Illinois Brick* allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages.'" *Ibid*. (quoting *Paper Systems*, 281 F.3d at 631-632).

3. The circuit conflict thus is established, developed, and entrenched. It was openly acknowledged by the decision below. App., *infra*, 23a-24a & n.7. It was openly acknowledged in *Dickson*. And it has been acknowledged by the district courts as well. As one district court observed (with considerable understatement), "those circuits that have addressed the issue have not taken a uniform view." *Laumann v. Nat'l Hockey League*, 907 F. Supp. 2d 465, 481-482 (S.D.N.Y. 2012) (following the Third and Seventh Circuits). This Court's review is warranted.

II. THE DECISION BELOW IS INCORRECT

The decision below does not merely aggravate a circuit conflict. It over-reads *Illinois Brick* to create an inappropriate immunity for price-fixing conspiracies. *Illinois*

Brick governs only *who* may assert a claim for an anti-trust violation. See, e.g., *UtiliCorp*, 497 U.S. at 204 (“only the utility has the cause of action because it alone has suffered injury within the meaning of §4”); *Illinois Brick*, 431 U.S. at 735 (masonry contractors have the right to sue). But it does not protect conspirators from suit whenever they are sufficiently astute to increase the prices they charge the plaintiffs by setting the price of a common critical input—effectively setting a price floor—while managing to avoid agreement on the specific price of the ultimate product itself.

The leading treatise agrees. “[I]t was never *Illinois Brick*’s purpose to place antitrust violations completely out of the reach of private plaintiffs.” IIA Areeda *et al.*, *supra*, ¶346j. “Thus, one set of purchasers should never be identified as ‘indirect’ unless those identified as ‘direct’ (1) actually have the proper incentives to sue and (2) would themselves have a cause of action for overcharge damages rather than damages based on lost profits or some other figure.” *Ibid.*; see *id.* ¶346a (“When a consumer (or other down-the-line purchaser) buys from an innocent intermediary who was overcharged due to its supplier’s antitrust violation, the intermediary ordinarily recovers from the offender without deduction for the amount of its injury ‘passed on’ to the consumer.”). *Illinois Brick* “does not stand for the proposition * * * that a defendant cannot be sued under the antitrust laws by any plaintiff to whom it does not sell.” *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 481 (7th Cir. 2002). It instead allows those who suffer the immediate injury—those who purchase from the violators and not from an innocent intermediary—to bring suit.

Here, as the “first non-conspirator[s] in the chain of distribution,” petitioners are appropriate plaintiffs under

Illinois Brick. Paper Systems, 281 F.3d at 631-632. The complaint alleges that the Bank Respondents conspired to impose excessive interchange fees, App., *infra*, 2a, and then incorporated those interchange fees into the foreign ATM fees they charge plaintiffs, *id.* at 5a. Because the Bank Respondents profit as ATM owners by receiving the inflated interchange fees they fixed, and as card-issuing banks by charging their cardholders a foreign ATM fee that includes a marked-up interchange fee, they have little incentive to bring suit (and have indicated no intention of doing so). The total harm instead is borne by non-conspirators, such as cardholders who pay foreign ATM fees incorporating the inflated interchange fee. The decision below, however, precludes any cardholder from recovering any overcharge unless the conspirators make the mistake of conspiring to set the foreign ATM fee itself, as opposed to the interchange fee they all incorporate into that fee.

The Ninth Circuit's approach turns on a distinction that is as unworkable as it is artificial. The Ninth Circuit attempted to distinguish between conspiracies in which competitors and intermediaries merely "set" the price of an input they use (in order to inflate the price they charge their customers), and conspiracies in which they agree upon and "set" the prices paid by the plaintiffs. "[T]he price paid by plaintiffs," the court of appeals held, "must be the price set (not merely 'fixed' in some broad sense) for plaintiffs to be a direct purchaser * * *." App., *infra*, 20a; see *id.* at 23a. But a product's price can be "fixed" as much through conspiracies to set the price of a required component as through agreements to set the end-product's price: Once set, the price of the component effectively becomes a "floor" for the final prod-

uct's price, as happened here.⁶ Agreements “formed for the purpose and with the effect of raising” prices are per se illegal, whether they operate directly or indirectly. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). Even exchanges of information for the purpose of inflating prices, without an actual agreement to set a price, can be horizontal price fixing. *United States v. Container Corp.*, 393 U.S. 333, 334-335 (1969). And this Court has ruled that fixing part of a price is tantamount to fixing the price itself. See *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647-648 (1980). Where the plaintiff himself purchases from a member of a price-fixing conspiracy at an inflated price—and not through an innocent intermediary—he is the “direct purchaser.” The means by which the conspiracy illegally inflated the price the plaintiff paid made is immaterial.

The Ninth Circuit’s artificial distinction between conspiracies to fix prices by setting the price for *inputs*, and those that specifically set the price of the *finished product*, is also a recipe for circumvention. To avoid private lawsuits, conspiring suppliers and intermediaries in the Ninth Circuit need only train their agreements on the prices charged at an earlier step in the distribution chain. This Court has held that parties cannot use a joint venture among competitors “as a vehicle for ongoing concerted activity” in violation of § 1. *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2209 (2010). The Ninth Circuit allows just that so long as the joint venture sets the price of the upstream product or service alone.

⁶ By conspiring to set the price for an input they all provide to each other (the interchange fee charged for access to each others’ ATMs), the Bank Respondents were able to establish a price floor, resulting in inflated charges to customers through the “foreign ATM fee.” See p. 8, *supra*.

The Ninth Circuit nowhere addressed why that loophole makes sense.

The Ninth Circuit did invoke the rationales for the “direct purchaser” rule, explaining that it “(1) eliminate[s] the complications of apportioning overcharges between direct and indirect purchasers,” (2) avoids “multiple recoveries,” and (3) “promote[s] the vigorous enforcement of the antitrust laws.” App., *infra*, 10a (quoting *Utili-Corp*, 497 U.S. at 208, 212, 214). To the extent those rationales are relevant, they defy the Ninth Circuit’s approach for precisely the reasons the Seventh Circuit identified in *Paper Systems*.

As to the first, there should be no concern about “apportioning overcharges.” This suit has been brought by the most direct plaintiff—the first non-conspirator in the chain of distribution—and the amount at issue is the overcharge the Bank Respondents agreed upon (here, the interchange fee). *Paper Systems*, 281 F.3d at 631-633. There are no competing damage claims to apportion among categories of plaintiffs (*e.g.*, cardholders and intermediaries).

Nor can there be “multiple recoveries.” For any overcharge, damages can be recovered only by the *first* non-conspirator claimant in the distribution chain; there is only one first. And even if one had to determine how much of the illegal interchange fee was incorporated into a particular foreign ATM fee, as the Ninth Circuit supposed, App., *infra*, 23a; but see *Paper Systems*, 281 F.3d at 631-632, the “[d]ifficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff’s rights,” *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-266 (1946) (quotation marks omitted). The prospect of calculating the overcharge “is present in every cartel case” and can be addressed through

economic analysis. *Paper Systems*, 281 F.3d at 633; see, e.g., *Temple v. Circuit City Stores, Inc.*, No. 06-5303, 2007 WL 2790154, at *7 (E.D.N.Y. Sept. 25, 2007); *In re Mid-Atl. Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1295-1296 (D. Md. 1981). If *Illinois Brick* barred every antitrust case that required expert economic analysis, few cases would survive.

The decision below also undermines “the longstanding policy of encouraging vigorous private enforcement of the antitrust laws.” *Illinois Brick*, 431 U.S. at 746. That is particularly true in cases like this one, which involve “[t]he rule against price fixing,” probably “the least controversial prohibition in competition law throughout the world.” Louis Kaplow, *Direct Versus Communications-Based Prohibitions on Price Fixing*, 3 J. Legal Analysis 449, 449 (2011). The decision below would exempt price-fixing conspiracies from private damages actions whenever the conspirators fix the price of an input that is ultimately charged to non-conspirators, so long as they are savvy enough to avoid agreeing to set the price of the ultimate product.

The Ninth Circuit may have thought it inappropriate to “creat[e] exceptions” to *Illinois Brick*, *UtiliCorp*, 497 U.S. at 207, or to “extend [the] current co-conspirator exception,” App., *infra*, 23a. As the decision below acknowledged, however, the issue here is not really whether there should be an exception to *Illinois Brick*. The issue is the scope of *Illinois Brick*’s “direct purchaser” rule: The “co-conspirator exception is not really an exception at all” because it asks whether a plaintiff is a direct purchaser under *Illinois Brick*. *Id.* at 14a; see *Linerboard*, 305 F.3d at 158-159; *Laumann*, 907 F. Supp. 2d at 482. Where, as here, the plaintiff is the first non-conspirator in the chain of distribution—buying from

conspirators and not from an innocent intermediary—the plaintiff is the direct purchaser and thus has standing under *Illinois Brick*. This Court has “refused to engraft artificial limitations on the § 4 remedy.” *Blue Shield of Va. v. McCready*, 457 U.S. 465, 473 (1982). The decision below does just that, creating a rule under which there may be no direct purchaser who can realistically bring suit.

III. THE ISSUE IS IMPORTANT AND RECURRING

The question presented by this case is important and recurring. Many products go through multiple hands on their way to the consumer; “[e]very firm sells indirectly in some respect.” *Paper Systems*, 281 F.3d at 632. At least four courts of appeals have weighed in on the issue, arriving at sharply diverging results. See pp. 15-22, *supra*. And the issue keeps arising in the district courts. Confronted by court of appeals decisions that “have not taken a uniform view,” *Laumann*, 907 F. Supp. 2d at 481-482, district courts have reached equally disparate results.

Some district courts have followed the Third and Seventh Circuits’ approach, holding that the first non-conspirator purchaser in the distribution chain is the direct purchaser. For example, one district court recently concluded that, “[w]here the relationship between the parties in a multi-tiered distribution chain is such that plaintiffs are the first or only victims of alleged anticompetitive agreements, the rationale for the *Illinois Brick* bar disappears.” *Laumann*, 907 F. Supp. 2d at 481 (emphasis omitted). “The purpose of *Illinois Brick*,” that court concluded, “was *not* to prevent the only non-conspirators in a multi-level distribution chain—consumers no less—from bringing a private antitrust suit.” *Id.* at 482. And “holding that the first purchaser who is not a

party to the unlawful agreement to restrain trade is not an *exception to Illinois Brick*, but rather a recognition that *Illinois Brick* ‘bans Clayton Act suits by persons who are not direct purchasers *from the defendant anti-trust violator[s].*’” *Ibid.* Consequently, “the first purchaser who is not party to the unlawful agreements to restrain trade has standing to sue.” *Ibid.* Other district courts agree.⁷ But still others have followed the more restrictive approach adopted by the decision below.⁸

In the wake of that disarray, plaintiffs seeking relief in federal court receive a different brand of justice depending on the happenstance of geography. This case, for example, could have been pursued in Illinois or Pennsylvania, but not in Virginia or California. The decision thus will encourage forum shopping: Plaintiffs would be well advised not to bring suits like this one in the Fourth or Ninth Circuits if they have a choice, see 15 U.S.C. § 22 (allowing suit anywhere the defendant conducts business), or instead to bring a state-law antitrust action, perhaps in a State within the Fourth and Ninth Circuits.⁹

⁷ See *Wallach v. Eaton Corp.*, 814 F. Supp. 2d 428, 434-438 (D. Del. 2011); *Fla. Power Corp. v. Granlund*, 78 F.R.D. 441, 443-444 (M.D. Fla. 1978); *Gen. Refractories Co. v. Stone Container Corp.*, No. 98-cv-3543, 1999 WL 14498, at *3 (N.D. Ill. Jan. 8, 1999). That approach had been adopted by district courts in the Fourth Circuit and the Ninth Circuit before *Dickson* and the decision below as well. *Mid-Atlantic Toyota Antitrust Litig.*, 516 F. Supp. at 1295; *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 306 (N.D. Cal. 2010); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F. Supp. 2d 1011, 1023 (N.D. Cal. 2010).

⁸ See *In re Refrigerant Compressors Antitrust Litig.*, 795 F. Supp. 2d 647, 657-659 (E.D. Mich. 2011); *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, No. 09-cv-0560, 2010 WL 3521979, at *8 (E.D. Cal. Sept. 3, 2010).

⁹ Several States within the Fourth and Ninth Circuits do not follow *Illinois Brick* at all. Cal. Bus. & Prof. Code § 16750; Nev. Rev. Stat.

The issue is also potentially important to state antitrust actions in the many States that either require their antitrust laws to be consistent with this Court's rulings,¹⁰ or follow *Illinois Brick* as a matter of decisional law.¹¹

The impact on enforcement of federal antitrust law underscores the need for this Court's review. The Ninth Circuit's approach will often leave damages from an antitrust conspiracy uncollectable, and the bounty of violations in the hands of the conspirators. See *Paper Systems*, 281 F.3d at 634. So long as a multi-level conspiracy does not set the price charged to outsiders, and instead inflates the price of inputs conspirators provide to each other, innocent non-conspirators cannot sue. It might be that some intermediaries are not part of the conspiracy, and that they could sue suppliers for fixing the price that *they* pay. But those intermediaries could recover only their own damages; the gains from sales through conspirator intermediaries would be immune from private recovery. *Id.* at 632. That result cannot be reconciled with the goal of robust enforcement of the antitrust laws. And even if the Ninth Circuit's approach were correct,

§ 598A.210(2); W. Va. Code § 142-9-2; *Bunker's Glass Co. v. Pilkington, PLC*, 75 P.3d 99, 102 (Ariz. 2003); *Teague v. Bayer AG*, 671 S.E.2d 550, 555-556 (N.C. Ct. App. 2009).

¹⁰ See Conn. Gen. Stat. § 35-44b; Mo. Stat. § 416.141; N.H. Rev. Stat. § 356.14; Okla. Stat. tit. 79, § 212; Tex. Bus. & Com. Code § 15.04.

¹¹ See *Berghausen v. Microsoft Corp.*, 765 N.E.2d 592, 594 (Ind. Ct. App. 2002); *Arnold v. Microsoft Corp.*, No. 2999-CA-002144, 2001 WL 1835377, at *3 (Ky. Ct. App. Nov. 21, 2001); *Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 794-795 (Ohio 2005); *Pomerantz v. Microsoft Corp.*, 50 P.3d 929, 933 (Colo. App. 2002); *Free v. Abbott Labs, Inc.*, 164 F.3d 270, 275 (5th Cir. 1999) (Louisiana law); *Davidson v. Microsoft Corp.*, 792 A.2d 336, 342 (Md. Ct. Spec. App. 2002); *Boos v. Abbott Labs.*, 925 F. Supp. 49, 51 (D. Mass. 1996) (Massachusetts law); *Wilson v. Gen. Motors Corp.*, 921 A.2d 414, 416 (N.J. 2007); *Siena v. Microsoft Corp.*, 796 A.2d 461, 464 (R.I. 2002).

that would mean defendants in the Third and Seventh Circuits are confronting private antitrust suits that should not be filed. "Because of the importance of the issue * * * for the administration of the antitrust laws," *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 820 (1978), the petition should be granted.

IV. THIS CASE IS AN IDEAL VEHICLE

This case is an appropriate vehicle for resolving the question presented. The court of appeals addressed that issue at length in a published opinion. It expressly acknowledged the circuit conflict, relying on the Fourth Circuit while rejecting the approach of the Third and Seventh Circuits. App., *infra*, 16a-18a, 23a-24a & n.7. There can be no serious debate that the outcome would have been different in the Third and Seventh Circuits, as the decision below acknowledges. *Id.* at 23a-24a & n.7. And the decision is final, affirming the district court's grant of summary judgment.¹² A case that presents the issue more cleanly, squarely, or starkly, is difficult to imagine.

CONCLUSION

The petition for a writ of certiorari should be granted.

¹² The Ninth Circuit did not address other issues, such as whether the case is subject to "rule of reason" or "the per se" rule applicable to price fixing, App., *infra*, 2a, the scope of the relevant market, *id.* at 2a-3a, or whether the complaint related back with respect to one specific Bank Respondent, *id.* at 4a. But the issue of standing is logically antecedent to all of those issues; this Court would have no reason to address them; and they would, following this Court's decision on the merits, at most be issues for the lower courts on remand.

Respectfully submitted.

MERRILL G. DAVIDOFF
BART D. COHEN
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

BRENDAN P. GLACKIN
LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP
275 Battery Street
29th Floor
San Francisco, CA 94111
(415) 956-1000

JEFFREY A. LAMKEN
Counsel of Record
MARTIN V. TOTARO
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

JUSTIN B. WEINER
MOLOLAMKEN LLP
300 North LaSalle Street
Chicago, IL 60654
(312) 450-6700

Counsel for Petitioners Pamela Brennan, et al.

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