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The Direct Purchaser Requirement in Clayton Act Private Litigation: The Case of *Apple Inc. v. Pepper*

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THE DIRECT PURCHASER REQUIREMENT IN CLAYTON ACT PRIVATE LITIGATION: THE CASE OF *APPLE INC. V. PEPPER*

*Konstantin G. Vertsman**

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Apple Inc. v. Pepper involved fundamental issues related to consumers' relationships with mobile marketplace platforms and long-standing doctrines regarding standing to file suit under § 4 of the Clayton Act. Nevertheless, the facts of this case are not complicated: The plaintiff represented the purchasers of iPhone applications ("Apps") from Apple Inc.'s ("Apple") marketplace interface for the sale of Apps ("App Store").¹ The App Store came preloaded on all the iPhones purchased by the consumers represented in the suit ("Consumers").² The Consumers alleged they were overcharged for the Apps they purchased as a result of Apple's monopoly, and they sought treble damages for the relevant overcharges.³

In response, Apple argued that the Consumers lacked standing under the direct purchaser doctrine⁴ articulated in the Supreme Court's decision in *Illinois Brick Co. v. Illinois*.⁵ According to Apple, the direct purchasers of the App Store services were the App developers who utilized the App Store to sell their own Apps to the Consumers.⁶ Consequently, the Consumers were only indirect purchasers when they were purchasing the App Store service indirectly through their purchases of the Apps from the App developers. These developers are the ones who may or may not have passed on the monopolistic overcharges from Apple. This argument presented by Apple raised substantial issues with respect to the proper definition of a "purchaser" within the field of internet intermediary platforms, as well as a question as to whether the direct purchaser doctrine articulated in *Illinois Brick* should be revisited and revised.

I. ISSUES PRESENTED IN *APPLE INC. V. PEPPER*

Within *Apple Inc. v. Pepper*, broadly speaking, there are two issues of major importance. First, are the Consumers direct or indirect purchasers of Apps from Apple's App Store based on the *Illinois Brick* precedent?⁷ This is the core issue in dispute between Apple and the Consumers. Second, should the direct purchaser doctrine from *Illinois Brick*, which prohibits pass-through damages for antitrust cases, be modified or entirely overruled?⁸ The issue of revisiting

¹ *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519 (2019).

² *See id.* at 1519.

³ *Id.* at 1520.

⁴ *Id.* at 1519.

⁵ *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 735-36 (1977).

⁶ *See* Transcript of Oral Argument at 4-5, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204).

⁷ *See Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520-21 (2019).

⁸ *See id.*

Illinois Brick was raised by the amicus briefs and argued between the amici.⁹ During oral arguments, Justices Alito and Gorsuch highlighted the need to revisit the *Illinois Brick* issue.¹⁰ Furthermore, while the reevaluation of *Illinois Brick* was not addressed directly within the majority opinion, the dissenting opinion construed the majority opinion as moving away from *Illinois Brick* without a proper adversarial process.¹¹

II. SIGNIFICANCE OF THE ISSUES AND PRIOR LAW

This case is significant from both a practical and a theoretical standpoint. Its practical significance comes from the business model Apple utilizes, which is a prevalent business model for internet retailers: Apple provides an intermediary platform and charges a fee for every transaction that utilizes its platform.¹² Dominant companies such as Google, Apple, and Amazon, as well as countless others, are using this type of model.¹³ The value proposition of these marketplaces is that the marketplace acts merely as a conduit between buyers and sellers, and for this service the marketplace operator receives a commission on every transaction in the marketplace. This type of service has a tendency to create a natural monopoly because, in such a marketplace, the value of the marketplace increases as the number of buyers and sellers increases.¹⁴ For every additional buyer, the marketplace becomes more valuable to every seller and vice versa, which leads toward a single marketplace within a specific domain.¹⁵ In that vein, the case of *Apple Inc. v. Pepper* relates to the practical question of whether, through the internal structure of the marketplace operator or through agreements with market participants, an internet marketplace operator can limit its antitrust litigation exposure to those market participants that are least likely to instigate litigation.

In these intermediary marketplace structures, it may be possible to limit antitrust standing to the market participant who is least likely to litigate or the

⁹ See *id.* at 1531 (Gorsuch, J., dissenting).

¹⁰ See *id.* at 1515-31; Transcript of Oral Argument, *supra* note 6, at 15-17, 48.

¹¹ See *Pepper*, 139 S. Ct. at 1515-31; Transcript of Oral Argument, *supra* note 6, at 14.

¹² Christina Bonnington, *5 Years On, the App Store Has Forever Changed the Face of Software*, WIRED (July 10, 2013, 6:30 AM), <https://www.wired.com/2013/07/five-years-of-the-app-store/>.

¹³ Tony Owusu, *App Store Wars: Why Apple, Google Are Upping App Developer Pay*, THE STREET (June 9, 2016, 3:45 PM), <https://www.thestreet.com/story/13602896/1/app-store-wars-why-apple-google-are-upping-app-developer-pay.html>.

¹⁴ Peter Cao, *App Store Sees Massive Growth, Generated 93% More Revenue than Google Pay in Q3, 9TO5MAC* (Oct. 11, 2018, 11:16 AM), <https://9to5mac.com/2018/10/11/app-store-massive-revenue-growth-over-google-play/>.

¹⁵ Jonathan Vanian, *Mobile App Store Spending Topped \$100 Billion in 2018*, FORTUNE (Jan. 16, 2019, 9:00 AM), <https://fortune.com/2019/01/16/mobile-app-billions-spending/>.

market participant that shares in the monopolistic profits and lacks any damages to bring suit; this would eviscerate private enforcement of antitrust laws.¹⁶ Likewise, class action litigation can be defeated if the market participants who have standing to sue lack commonality in the types of injuries they suffered or are compelled to sign a contract with an arbitration clause.¹⁷ Naturally, the broad issue of antitrust liability for an operator of an internet marketplace may also be phrased in a manner which is sensitive to Apple's concerns: Are operators of internet marketplaces, who act as conduits between buyers and sellers, protected from duplicative damages and inconsistent legal obligations which may arise when they are sued by both the buyers and the sellers relating to the same commission?

The practical effect of limiting standing to either solely the buyers or the sellers in a marketplace is that it may prevent an outside individual from bringing a private cause of action. This issue has been discussed by Justice Scalia in his seminal paper on prudential standing titled "The Doctrine of Standing as an Essential Element of the Separation of Powers."¹⁸ This reality that there may not be a plaintiff to enforce the private right transforms the substance of the discussion herein from "who is the proper person to enforce the antitrust laws" to "whether those laws can be enforced at all" through private litigation. In considering the aforementioned issues, it is also necessary to be aware of the risk of agency capture and the immense political power wielded by monopolists. Therefore, the debate presented within *Apple Inc. v. Pepper* takes on a great political significance as well as a practical one beyond the purely theoretical reasoning undertaken by scholars, lawyers, and judges.¹⁹

Nevertheless, despite the practical importance of *Apple Inc. v. Pepper*, this case must be analyzed primarily through the application of legal precedent and legal theory. The case that is most factually similar to *Apple Inc. v. Pepper* is *Campos v. Ticketmaster Corp.*²⁰ The *Ticketmaster* decision involved a situation where Ticketmaster was, similarly to Apple, running a marketplace as an intermediary between consumers and concert venues.²¹ In that case, the United

¹⁶ Kate Patrick, *Congress Is 'Fed Up' with Big Tech, but Antitrust Action May Be Impossible*, INSIDESOURCES (Nov. 30, 2018), <https://www.insidesources.com/congress-is-fed-up-with-big-tech-but-antitrust-action-may-be-impossible/>.

¹⁷ CTR. FOR JUSTICE AND DEMOCRACY, FACT SHEET: CASES TOSSED OUT OF COURT BECAUSE OF FORCED ARBITRATION CAUSES AND CLASS ACTION BANS 1 (2019), <https://centerjd.org/content/fact-sheet-cases-tossed-out-court-because-forced-arbitration-causes-and-class-action-bans>.

¹⁸ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 890 (1983).

¹⁹ See *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

²⁰ *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1168-74 (8th Cir. 1998).

²¹ *Id.* at 1168-69.

States Court of Appeals for the Eighth Circuit sided with Ticketmaster in determining that consumers are not direct purchasers of Ticketmaster's services, and, consequently, the consumers in the case did not have standing to file an antitrust suit.²² However, despite noting the decision in *Ticketmaster*, in deciding *Apple Inc. v. Pepper*, the United States Court of Appeals for the Ninth Circuit concluded that the Consumers were direct purchasers of Apple's App Store services and could sue Apple.²³ This decision ultimately created a circuit split with respect to this issue.²⁴ In deciding *Apple Inc. v. Pepper*, the Supreme Court resolved this circuit split and clarified antitrust liability exposure for e-commerce, including the extent to which agreements and an internal business structure can insulate potential defendants from certain prospective plaintiffs.²⁵

Apple Inc. v. Pepper would have been even more significant had the Supreme Court directly addressed the issue raised by the attorney generals ("AGs") from thirty-one states: Whether the doctrine of *Illinois Brick*, which prohibits pass-through antitrust damages, should have been overruled?²⁶ However, to overrule such an important precedent without usurping legislative authority the Supreme Court would have had to find that the Consumers could not maintain their litigation under the *Illinois Brick* doctrine. This could have been based on the fact that the Consumers were indirect purchasers of Apple's App Store service and the harm they suffered was solely the result of the monopolistic premium being passed on to them by the App developers. After finding that the Consumers did not have standing under *Illinois Brick*, the Supreme Court would have been able to reconsider *Illinois Brick* without exceeding the court's institutional constraints. However, in *Apple Inc. v. Pepper*, the Supreme Court found that the Consumers were direct purchasers and, consequently, the court did not have the appropriate opportunity to overrule *Illinois Brick*. Nevertheless, according to Justice Gorsuch's dissenting opinion, the Supreme Court started "whittling away [*Illinois Brick*] to a bare formalism."²⁷

III. THE PROCEDURAL POSTURE AND FACTS OF *APPLE INC. V. PEPPER*

Apple Inc. v. Pepper arose from a consumer class action lawsuit against Apple.²⁸ The Consumers alleged in their complaint that they had purchased

²² *Id.* at 1168-74.

²³ *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 323-25 (9th Cir. 2017).

²⁴ *Id.* at 324-25; *Campos*, 140 F.3d at 1174.

²⁵ *See* *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519 (2019).

²⁶ *See* Brief for Texas, Iowa, and 29 Other States as Amici Curiae Supporting Respondents, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204).

²⁷ *Pepper*, 139 S. Ct. at 1531 (Gorsuch, J., dissenting).

²⁸ *Id.* at 1518-19.

various Apps from Apple between 2007 and 2013, and they had paid too much for these Apps due to Apple's monopolistic power over the App Store.²⁹ However, according to Apple, the Consumers were not direct purchasers of the App Store service and thus lacked antitrust standing under *Illinois Brick*; consequently, Apple filed a motion to dismiss for failure to state a claim upon which relief may be granted.³⁰ The trial court granted Apple's motion, but the ninth circuit reversed the dismissal on the basis that the Consumers were purchasing the Apps directly from Apple and thus should be regarded as "direct purchasers."³¹ The ninth circuit's decision created a circuit split with the eighth circuit, which came to the opposite conclusion in *Campos v. Ticketmaster Corp.*³² The United States Supreme Court granted certiorari on June 18, 2018, held oral arguments on November 26, 2018, and decided the case on May 13, 2019.³³

The facts of *Apple Inc. v. Pepper* are relatively straightforward. As discussed above, the App Store is an interface established by Apple where users of iPhones can purchase Apps. The iPhone is a "closed system" where Apple controls which Apps can run on the system and which cannot.³⁴ The App Store was launched by Apple in 2008 for users of iPhones to find and download relevant software for their iPhones.³⁵ Although Apple develops some of the Apps available on the App Store, third-party developers create many of the Apps and Apple collects a 30 percent commission from the payments made through the App Store for non-Apple developed software.³⁶ Apple also charges developers a ninety-nine dollar annual subscription fee and commissions on the extra content offered within the Apps by developers ("in-app purchases").³⁷ Apple also requires all the prices in the App Store to end in \$0.99, such as \$0.99, \$1.99, and so forth.³⁸ Finally, Apple threatens developers who distribute Apps outside of the App Store with suspension from the App Store and, similarly, Apple discourages customers from downloading Apps through other sources by voiding their respective iPhone warranties if they do so.³⁹

²⁹ *Id.*

³⁰ *Id.* at 1519; *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 316 (9th Cir. 2017).

³¹ *Pepper*, 139 S. Ct. at 1519.

³² *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171-72 (8th Cir. 1998).

³³ *See Pepper*, 139 S. Ct. at 1514.

³⁴ *In re Apple iPhone Antitrust Litig.*, 846 F.3d at 315-16.

³⁵ *Id.*

³⁶ *Id.* at 316.

³⁷ *Pepper*, 139 S. Ct. at 1519.

³⁸ Brief for Respondents at 7, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204).

³⁹ *In re Apple iPhone Antitrust Litig.*, 846 F.3d at 315-16.

IV. RELATED LAW AND JURISPRUDENCE

This case was brought under § 4(a) of the Clayton Act, as codified in 15 U.S.C. § 15(a), which reads in relevant part, “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney’s fee.”⁴⁰ Although the words “any person” in the statute would include anyone when read literally, they have been interpreted by the Supreme Court in *Illinois Brick* to encompass a direct purchaser requirement.⁴¹

In *Illinois Brick*, the state of Illinois sued the manufacturer and distributor of concrete block under § 4 of the Clayton Act, alleging a conspiracy to price fix the block.⁴² Illinois Brick would manufacture and distribute concrete block which would be sold primarily to masonry contractors who would then submit bids to general contractors who in turn would submit bids to customers, such as the state of Illinois.⁴³ Based on its previous decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,⁴⁴ the Supreme Court ruled it would be unfair to allow pass-through damages to be used in an offensive manner to allow suits by indirect purchasers while not allowing said damages to be used in a defensive manner to offset damages that were passed through the supply chain.⁴⁵ Furthermore, in *Illinois Brick* the Supreme Court stated that by concentrating the recovery in the hands of the sole direct purchaser and by avoiding the partitioning of damages throughout the supply chain, the direct purchaser rule would advance the enforcement goals of § 4 of the Clayton Act.⁴⁶

Over fifty years have passed since the decision in *Illinois Brick*, and certain scholars and legal professionals still believe that it should be overturned. The next section of this paper analyzes whether Apple or the Consumers should prevail under the direct purchaser doctrine of *Illinois Brick*. Section VI then discusses the amici’s arguments for overturning or limiting the doctrine.

V. WERE THE CONSUMERS DIRECT PURCHASERS OF APPS FROM APPLE?

The crux of the dispute between Apple and the plaintiffs was whether or not the Consumers were direct purchasers of Apple’s services; in other words, were

⁴⁰ 15 U.S.C. § 15(a) (2019).

⁴¹ *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977).

⁴² *Id.* at 726-27.

⁴³ *Id.* at 726.

⁴⁴ *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 487 (1968).

⁴⁵ *Ill. Brick Co.*, 431 U.S. at 729.

⁴⁶ *Id.* at 734-35.

the Apps being purchased directly from Apple?⁴⁷ This question relates to the direct purchaser requirement under the doctrine found in *Illinois Brick*.

A. Apple's Arguments

According to Apple, the App Store is a service being provided to the developers who then sell their Apps directly to the consumer through the developers' usage of Apple's distribution service.⁴⁸ Based on this interpretation, all damages suffered by the Consumers in the case were entirely the result of the App developers passing Apple's monopolistic rents downstream.⁴⁹ Effectively, Apple believed it functioned as a consultant to the App developers and the purchasing of Apps involved transactions solely between the Consumers and the App developers.

To argue that the Consumers were not direct purchasers of any of its products or services, Apple relied on: the iOS developer agreements between itself and the App developers, the fact that the developers ultimately set the price of the Apps, the eighth circuit decision in *Campos v. Ticketmaster Corp.*, and the policy argument against exposure to duplicative liability underlying *Illinois Brick*.⁵⁰

According to Apple, each iOS developer agreement provided that the developer would pay Apple the 30 percent commission based on the sales price of the relevant App.⁵¹ Consequently, since the fees were paid by the developers, the Consumers were only indirect customers of Apple's services, and the relevant fees may or may not have been passed on to them through the increased price of the Apps. Moreover, despite the requirement that prices must end in \$0.99, the App developers were entirely in control of how they priced their respective Apps.⁵² Importantly, in his dissent Justice Gorsuch also noted that the \$0.99 requirement would likely prevent many of the App developers from passing on the price increase, since the next price that they could charge was \$1.99.⁵³ Based on these facts, Apple argued that whether any particular App did or did not include a pass-through of Apple's monopoly premium would inevitably require a case by case analysis.

⁴⁷ See generally *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019).

⁴⁸ Brief for Petitioner at 35-36, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204).

⁴⁹ *Id.* at 25-26.

⁵⁰ *Id.* at 6; see *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169 (8th Cir. 1998); *Ill. Brick Co.*, 431 U.S. at 759.

⁵¹ Brief for Petitioner, *supra* note 48, at 2-3.

⁵² *Id.* at 3.

⁵³ *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1528 (2019) (Gorsuch, J., dissenting).

Furthermore, Apple noted that in *Campos v. Ticketmaster Corp.*, a case analogous to the dispute that was litigated in the eighth circuit, it was decided that consumers have no right to sue under circumstances similar to those present in *Apple Inc. v. Pepper* as a result of the direct purchaser doctrine in *Illinois Brick*.⁵⁴ Finally, Apple argued that it would be unfair if both the App developers and the Consumers could file a claim against it for treble damages, since that type of hypothetical litigation would result in duplicative recovery, with each recovery being subject to trebling and attorney's fees.

B. Consumers' Arguments

The Consumers argued that, as far as they were concerned, they purchased Apps directly from Apple.⁵⁵ Therefore, the Consumers considered themselves to be "direct purchasers" of Apps from Apple in line with *Illinois Brick*: "[Consumers] pay the monopoly prices for Apps directly to Apple through its App Store. Those facts make [consumers] direct purchasers of iPhone Apps who can sue Apple for damages under § 4 of the Clayton Act and the bright-line rule [the Supreme Court] adopted in *Illinois Brick*."⁵⁶ The Consumers further believed that how Apple internally structured the transactional agreements it entered into with the developers did not affect their rights or change the reality that the purchases occurred directly from Apple.⁵⁷ In addition, the Consumers argued that the policy underlying *Hanover Shoe*⁵⁸ requires that a party who has an incentive to sue be given such an opportunity and that, in the situation of Apple's monopoly over Apps or App distribution services, the developers had never sued and were unlikely to do so.⁵⁹

The Consumers also did not consider the iOS developer agreements to have any effect on the economic reality of the App Store, which they regarded as a "two-way market."⁶⁰ According to the Consumers, Apple holds a monopoly over the sale of Apps while at the same time it may also hold a monopsony over the Apps that it purchases from developers.⁶¹ In this way, the injuries of the Consumers were categorically different from the injuries suffered by the developers.

⁵⁴ *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169 (8th Cir. 1998).

⁵⁵ Brief for Respondents, *supra* note 38, at 1.

⁵⁶ *Id.* at 1.

⁵⁷ *Pepper*, 139 S. Ct. at 1522-23.

⁵⁸ *Id.* at 1527 (Gorsuch, J., dissenting).

⁵⁹ See Brief for Respondents, *supra* note 38, at 13.

⁶⁰ Reply Brief for Petitioner at 7, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204) (referring to respondent's arguments of Apple having two separate monopolies: one on the buyer side and one on the seller side).

⁶¹ *Pepper*, 139 S. Ct. at 1520.

With respect to whether Apple or the App developers controlled the price setting of relevant Apps, the Consumers found it difficult to distinguish their case from the precedent set in the Supreme Court decision of *Kansas v. Utilicorp United, Inc.*⁶² In *Utilicorp United*, the Supreme Court decided that there should be no exceptions to the *Illinois Brick* bright-line rule against allowing pass-through damages, even in cases where the intermediary company has no discretion in setting price, but instead has to follow the price of the upstream monopolist.⁶³ Specifically, the Supreme Court found that no cause of action arises when a supplier overcharges a public utility for natural gas and the public utility is required by law to pass on the entire overcharge to its customers.⁶⁴ The Consumers maintained that their situation was different from the one in *Utilicorp United* because the Consumers were purchasing Apps directly from the monopolist rather than through an intermediary,⁶⁵ as was the case in *Utilicorp United*. Furthermore, in their brief, the Consumers argued that Apple deprived the developers of any meaningful pricing decision as a result of Apple's requirement that App prices must end in \$0.99, combined with the marketplace reality that the vast majority of non-free Apps are priced exactly at \$0.99.⁶⁶

However, at oral arguments, the Consumers backed down from their argument that the App developers did not have any meaningful pricing decision by stating that it is "irrelevant who sets the price so long as ... [the monopoly] leads to higher prices that the consumers have to pay."⁶⁷ When pressed by Chief Justice Roberts, the Consumers further retreated by stating that they did not raise the \$0.99 requirement in their complaint because they did not consider it significant at the time.⁶⁸ The Consumers then clarified that they only added this fact after Apple noted it in its brief.⁶⁹ Nevertheless, when questioning the solicitor general, Justice Kagan highlighted that the \$0.99 rule can effectively function as a price setting mechanism.⁷⁰

With respect to the eighth circuit's decision in *Campos v. Ticketmaster Corp.*, the Consumers argued that *Ticketmaster* was decided incorrectly because the standard used by the court in that case was not supported by *Illinois Brick*.⁷¹ Namely, the standard utilized in the *Ticketmaster* decision defined an indirect

⁶² *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 206 (1990).

⁶³ *Id.* at 201, 216.

⁶⁴ *Id.* at 201.

⁶⁵ Brief for Respondents, *supra* note 38, at 1.

⁶⁶ *Id.* at 33, 52.

⁶⁷ Transcript of Oral Argument, *supra* note 6, at 46.

⁶⁸ *Id.* at 56.

⁶⁹ *Id.*

⁷⁰ *Id.* at 25-26.

⁷¹ Brief for Respondents, *supra* note 38, at 10-11.

purchaser as someone who “bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser.”⁷² Although it would appear that under this test the Consumers were harmed as a result of a transaction between Apple and the App developers, the Consumers and the ninth circuit did not believe this interpretation of *Illinois Brick* was correct.⁷³

Finally, the Consumers’ response to the risk of duplicative liability was that the damages suffered by the Consumers and the damages suffered by the App developers were distinct.⁷⁴ The damages of the App developers were based on their allegations of receiving lower profits or reduced sales; however, it is also hypothetically possible that the App developers benefited from the monopolization and in fact suffered no damages at all.⁷⁵ To further illustrate how Apple’s monopoly could have benefitted the App developers, the Consumers focused on the \$0.99 rule stating that “without the [\$0.99] rule, competition from other App developers might have forced the retail price for a particular App to [\$0.49] per App purchase rather than [\$0.99].”⁷⁶ Presumably, this would result in lower prices for the Consumers, but also a loss of profits for the App developers.

During oral arguments, the question of duplicative liability and the structure of the transactions were major focuses of counsel for the Consumers, as well as many of the justices; only Justices Ginsburg and Thomas did not question the Consumers on these topics.⁷⁷ The key pieces of the transactional argument related to the economic reality of the transactions and whether the damages between the developers and the Consumers must ultimately total the 30 percent commission that Apple charges for the App Store.⁷⁸ Chief Justice Roberts and Justices Alito and Gorsuch were particularly concerned with the existence of only one monopoly rent that could be absorbed by the App developers rather than paid by the Consumers.⁷⁹ On the other hand, Justice Kagan was more focused on outlining the Consumers’ argument to show that the damages suffered by the Consumers and the App developers were distinct.⁸⁰

⁷² *Id.* at 10.

⁷³ Apple Inc. v. Pepper, 139 S. Ct. 1514, 1521-23 (2019); Brief for Respondents, *supra* note 38, at 11.

⁷⁴ Brief for Respondents, *supra* note 38, at 2.

⁷⁵ *Id.* at 2-3.

⁷⁶ *Id.* at 41.

⁷⁷ Transcript of Oral Argument, *supra* note 6, at 35-50.

⁷⁸ *Id.* at 3-7, 11-13.

⁷⁹ *Id.* at 38-39.

⁸⁰ *Id.* at 18-19, 34-40.

C. The Supreme Court's Perspectives at Oral Arguments

Several Supreme Court justices hinted at whether they supported Apple or the Consumers during the questioning at oral arguments by showing a degree of disapproval for certain arguments made by each side.

The Supreme Court was particularly focused on the pricing control argument advanced by the Consumers. Specifically, Chief Justice Roberts and Justices Gorsuch, Kavanaugh, Alito, and Kagan were concerned that the Consumers' argument that Apple controlled pricing through the \$0.99 rule was not adequately introduced at the trial court level and may not have been properly understood by the ninth circuit.⁸¹ Thus, they were worried that a new argument was being introduced at the Supreme Court level.⁸²

On the other hand, the Supreme Court was also concerned that if the Consumers were found to not have standing to sue, there would be no plaintiff to enforce the antitrust laws in the case.⁸³ Justice Ginsburg asked Apple whether a "first purchaser" existed at all in the case, to which Apple responded, "the developers"; however, Justice Sotomayor interjected that "the first sale is from Apple to the customer. It's the customer who pays the 30 percent."⁸⁴ Justice Sotomayor repeated that the money Apple collects comes directly from the customer, not from the developer.⁸⁵ Justice Alito then noted that Apple has hundreds of App developers, but not one has ever chosen to sue Apple.⁸⁶ Justice Gorsuch expressed his reservation that, despite thirty-one states asking for *Illinois Brick* to be overruled, "[Apple] is asking [the Supreme Court] to extend *Illinois Brick*."⁸⁷ In addition, Justice Gorsuch noted that "indirect purchasers may be more suited to enforce the antitrust laws" since "direct purchasers do not always sue because there is a threat that monopolists will share the rents with the direct purchasers."⁸⁸

The Supreme Court also focused extensively on whether Apple is effectively a two-sided monopoly or whether the Consumers are sharing the absorption of the monopolistic premium with the App developers.⁸⁹ Justice Sotomayor expressly stated to Apple that the Consumers are not suing for the 30 percent commission charged by Apple for use of the App Store, but instead are trying to show that lower prices are unavailable due to Apple's monopolization of the

⁸¹ *Id.* at 52-53.

⁸² *Id.* at 52-56.

⁸³ *Id.* at 4.

⁸⁴ Transcript of Oral Argument, *supra* note 6, at 4-5.

⁸⁵ *Id.* at 6.

⁸⁶ *Id.* at 15-16.

⁸⁷ *Id.* at 17.

⁸⁸ *Id.* at 17-18.

⁸⁹ *Id.* at 11, 35.

App distribution market.⁹⁰ Justice Kagan also explained that there are two monopolies, one at the distribution level and one at the App purchase level, that relate to the Consumers.⁹¹ Similarly, Justice Breyer, in response to Apple's argument that the payment flow makes no difference, recalled that one hundred years of antitrust law states that if one paid a monopolist too much money, he or she can collect damages, and if one is a supplier and prices were forced down, he or she can also collect damages.⁹² He further clarified that nothing in *Illinois Brick* changes that doctrine.⁹³ However, Apple maintained that the independent pricing decisions of the App developers changed the situation and turned the Consumers into indirect purchasers.⁹⁴

The solicitor general argued on behalf of Apple and focused his arguments on the separation of the App developers' pricing decisions from the alleged overcharging by Apple.⁹⁵ Justice Kagan, as she explained previously to Apple's counsel, stated that "looking at the relationship between the consumer and Apple ... there is only one step."⁹⁶ Likewise, Justice Kavanaugh noted that Apple was operating as a retailer in many respects.⁹⁷

Finally, there was an underlying issue regarding the Supreme Court's theory on the proximate cause requirement for standing when a statute provides "any person injured" with a right to sue.⁹⁸ Justice Kavanaugh implied that he believes in ambiguous cases, such as this one, standing should be given more broadly, while the solicitor general raised the Supreme Court case of *Lexmark International, Inc. v. Static Control Components, Inc.* to argue that damages, and therefore standing, should stop at the first step.⁹⁹ In fact, it is the precise definition of "first step" that is at the core of any proximate cause analysis related to standing: "The general tendency . . . is not to go beyond the first step. What falls within that step depends in part on the 'nature of the statutory cause of action,' and an assessment 'of what is administratively possible and convenient.'"¹⁰⁰

⁹⁰ *Id.* at 27-28.

⁹¹ *Id.* at 10.

⁹² *Id.* at 7-8.

⁹³ Transcript of Oral Argument, *supra* note 6, at 7-8.

⁹⁴ *Id.* at 9.

⁹⁵ *Id.* at 26.

⁹⁶ *Id.* at 21.

⁹⁷ *Id.* at 22-23.

⁹⁸ *See generally id.* at 20, 23 (asserting that the Supreme Court applies this requirement in cases similar to the present case).

⁹⁹ *Id.* at 23-24.

¹⁰⁰ *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1 (2010); *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258 (1992)).

VI. SHOULD *ILLINOIS BRICK* BE OVERRULED?

The argument for overruling *Illinois Brick* was presented in the amicus brief authored by the AGs.¹⁰¹ The Supreme Court raised this argument to both Apple and the Consumers; however, neither side argued in favor of overruling this precedent.¹⁰² Apple stated that *Illinois Brick* is a manifestation of the proximate cause rule of not going past the “first step” in allowing a right to sue and is meant to protect defendants against potential duplicative liability on overcharge claims.¹⁰³ The Consumers maintained their argument that they should be considered direct purchasers and clarified that they had “no beef with *Illinois Brick*.”¹⁰⁴

Despite the fact that no party argued for overruling *Illinois Brick* at oral arguments, this is still an issue that the Supreme Court could have addressed directly. Thirty-one state attorney generals argued for the overruling of *Illinois Brick*, and the Supreme Court has been developing its standing doctrine over the last several years with cases such as *Lexmark* and *Bank of America Corp. v. City of Miami*.¹⁰⁵ Therefore, this case could have been a useful vehicle to further refine the standing doctrine as it applies to antitrust law. However, since the Consumers were able to prevail under the old *Illinois Brick*¹⁰⁶ rule, revisiting *Illinois Brick* would have put the Supreme Court in the uncomfortable position of overruling precedent without needing to do so. This would then have made it appear as if the Supreme Court was usurping legislative authority.

At oral arguments, Justice Gorsuch explicitly asked the Consumers why they were not arguing that *Illinois Brick* be overruled; he then asked Apple why the court should not reconsider *Illinois Brick*.¹⁰⁷ Furthermore, Justice Breyer asked the Consumers about overruling other precedent.¹⁰⁸ Nevertheless, the Consumers did not argue for any changes to existing precedent, which may have been a strategic decision that allowed them to emphasize the persuasiveness of their arguments under existing law.¹⁰⁹ On the other hand, the AGs were not

¹⁰¹ Brief for Texas, Iowa, and 29 Other States as Amici Curiae Supporting Respondents, *supra* note 26, at 24.

¹⁰² See generally Transcript of Oral Argument, *supra* note 6; Amy Howe, *Argument Analysis: Justices Poised to Allow Antitrust Dispute Against Apple over Apps to Go Forward*, SCOTUSBLOG (Nov. 26, 2018), <https://www.scotusblog.com/2018/11/argument-analysis-justices-poised-to-allow-antitrust-dispute-against-apple-over-apps-to-go-forward/>.

¹⁰³ Transcript of Oral Argument, *supra* note 6, at 19.

¹⁰⁴ *Id.* at 49.

¹⁰⁵ See *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1307 (2017).

¹⁰⁶ See generally *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746-47 (1977).

¹⁰⁷ Transcript of Oral Argument, *supra* note 6, at 17.

¹⁰⁸ *Id.* at 40, 44.

¹⁰⁹ See *id.* at 40.

directly concerned with who should win the case, but were instead more interested in a change in policy.¹¹⁰

In the amicus brief submitted by the AGs, they made several arguments for overruling *Illinois Brick*. First, the AGs noted that the text of § 4(a) of the Clayton Act reads: “any person who shall be injured . . . by reason of anything prohibited in the antitrust laws . . . may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”¹¹¹ Furthermore, the AGs explained how prior to *Illinois Brick*, the courts used to allow lawsuits by consumers for indirect damages since they are almost always injured by antitrust violations due to extra costs being passed on to them.¹¹² Second, the AGs highlighted that since *Illinois Brick* was decided, at least thirty-five states have allowed consumers to sue for pass-through damages.¹¹³ They also noted that the underlying rationale that damages would be “virtually unascertainable” has proven to be false with the use of modern tools and methodologies and the courts only allowing proper evidence to be presented at trial.¹¹⁴ Third, the AGs focused on how the duplicative liability concern of *Illinois Brick* has proven to be without merit based on decades of state experience, during which not a single case of duplicative liability was ever proven.¹¹⁵ With respect to their third argument, the AGs described how the general test for remoteness in antitrust cases is a more principled basis for denying standing to plaintiffs that are too far removed from antitrust harm.¹¹⁶

The other briefs submitted in support of Apple or the Consumers primarily focused on the practical effects of either overruling the *Illinois Brick* precedent or expanding upon it.¹¹⁷ The brief of the antitrust scholars in support of the Consumers mainly discussed preserving private enforcement in the area of antitrust and the incentives for private enforcement.¹¹⁸ The antitrust scholars were concerned that by structuring the sales transaction, Apple and future

¹¹⁰ *See id* at 25.

¹¹¹ 15 U.S.C. § 15(a) (2019).

¹¹² Brief for Texas, Iowa, and 29 Other States as Amici Curiae Supporting Respondents, *supra* note 26, at 2-3.

¹¹³ *Id.* at 12.

¹¹⁴ *Id.* at 4-5.

¹¹⁵ *Id.* at 5.

¹¹⁶ *Id.* at 34 (reciting five factors to consider: “(1) the causal connection between the antitrust violation and the plaintiff’s harm; (2) the nature of the injury, including whether the plaintiff is a consumer or competitor in the relevant market; (3) the directness of the injury, and whether the damages are too speculative; (4) the potential for duplicative recovery, and whether the apportionment of damages would be too complex; and (5) the existence of more direct victims with motivation to sue”).

¹¹⁷ *See generally* Brief for the United States as Amicus Curiae Supporting Petitioner, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204).

¹¹⁸ Brief for Antitrust Scholars as Amici Curiae Supporting Respondents at 9, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204).

companies could manipulate the direct purchaser rule in such a way as to give the right to sue only to the entities that are least likely to exercise this right.¹¹⁹ By contrast, the United States Chamber of Commerce filed a brief in support of Apple focused on the practical importance of internet commerce and litigation potentially dampening this area of innovation.¹²⁰ The United States also filed a brief in support of Apple. In this brief, the United States defended the *Illinois Brick* direct purchaser rule and argued that the Consumers should be considered “indirect purchasers.”¹²¹ The core argument advanced by the United States was fundamentally similar to the argument made by Apple: allowing suits by indirect purchasers would result in duplicative liability for monopolists.¹²² Furthermore, the United States mentioned that although “more than two-thirds of the States have authorized the use of pass-on analysis to apportion damages under their own antitrust laws . . . [the] regime of parallel federal and state antitrust litigation has proved to be complex and inefficient.”¹²³ Finally, the United States argued that since the actual litigants in the case agreed on the relevant law, the only appropriate question for the Supreme Court was the proper application of that law.¹²⁴

VII. THE SUPREME COURT DECISION

The Supreme Court issued its decision in *Apple Inc. v. Pepper* on May 13, 2019.¹²⁵ The Supreme Court decided 5-4 that the Consumers did have standing to bring suit since they are considered “direct purchasers” within the rule articulated in *Illinois Brick*.¹²⁶

A. The Majority Opinion

The majority opinion in *Apple Inc. v. Pepper* was authored by Justice Kavanaugh and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.¹²⁷

¹¹⁹ *Id.* at 7.

¹²⁰ *See id.* at 9; Brief for Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner at 12, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204).

¹²¹ Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 117, at 8.

¹²² *Id.* at 12-13.

¹²³ *Id.* at 15, 18-19.

¹²⁴ *Id.* at 23, 26.

¹²⁵ *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1514 (2019).

¹²⁶ *Id.* at 1522.

¹²⁷ *Id.* at 1515; *see also* Amy Howe, *Opinion Analysis: Divided Court Allows Antitrust Lawsuit Against Apple to Continue*, SCOTUSBLOG (May 13, 2019), <https://www.scotus>

The Supreme Court ultimately held that “the [Consumers] purchased apps directly from Apple and therefore are ‘direct purchasers’ under *Illinois Brick*.”¹²⁸ The majority based its conclusion on the language of § 2 of the Clayton Act and Supreme Court precedent related to the direct purchaser rule.¹²⁹ The textual argument was based on the words “any person” in the Clayton Act, while the precedential argument was based on the words “the immediate buyers from alleged antitrust violators,” which can be found in *Kansas v. Utilicorp United, Inc.* as well as in *Illinois Brick*.¹³⁰ To elucidate how the language of the statute and the two precedents support giving standing to the Consumers, the Supreme Court discussed the *Illinois Brick* decision by stating that it involved a situation analogous to a “manufacturer A [who] sells to retailer B, and retailer B [who] sells to consumer C” with the result being that B can sue A and C can sue B, but C cannot sue A.¹³¹ At this point, the Supreme Court stated unequivocally, “There is no intermediary in the distribution chain between Apple and the consumer. . . . The absence of an intermediary is dispositive.”¹³² After stating this conclusion, the Supreme Court went on to carefully address Apple’s arguments and explain why the Supreme Court does not consider the App developers to be an intermediary between Apple and the Consumers.

The Supreme Court characterized Apple’s theory as arguing that “*Illinois Brick* allow[ed] consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party.”¹³³ The Supreme Court rejected this theory for three reasons: First, Apple’s theory contradicted the text in both the statute and precedent, and any ambiguity in *Illinois Brick* must be resolved in the direction of the statutory text, which provides for suit by “any person” injured.¹³⁴ Second, Apple’s theory was “not persuasive economically or legally” because it would create an “arbitrary and unprincipled” distinction “based on retailers’ financial arrangements with their manufacturers or suppliers.”¹³⁵

The Supreme Court went on to compare retailers’ usage of the “markup pricing model,” where a retailer purchases a product, marks up its price, and resells it to a consumer, to retailers’ usage of a “commission pricing model,” where a retailer pays nothing to the supplier and receives a commission only

[blog.com/2019/05/opinion-analysis-divided-court-allows-antitrust-lawsuit-against-apple-to-continue/](https://www.fairuse.com/blog/2019/05/opinion-analysis-divided-court-allows-antitrust-lawsuit-against-apple-to-continue/).

¹²⁸ *Pepper*, 139 S. Ct. at 1519.

¹²⁹ *Id.* at 1520; 15 U.S.C. § 2 (2019).

¹³⁰ *Pepper*, 139 S. Ct. at 1520; 15 U.S.C. § 2.

¹³¹ *Pepper*, 139 S. Ct. at 1521.

¹³² *Id.*

¹³³ *Id.* at 1518.

¹³⁴ *Id.* at 1517.

¹³⁵ *Id.*

when a product is sold.¹³⁶ According to the Supreme Court, despite the distinction between the two models being immaterial, Apple's rule would allow for a consumer lawsuit under the "markup pricing model" but would prohibit it under the "commission pricing model."¹³⁷ In addition, the Supreme Court appeared concerned that an "upstream arrangement between the manufacturer or supplier and retailer [would] determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer. . . ."¹³⁸ Thereupon, the Supreme Court stated, "If a retailer has engaged in unlawful monopolistic conduct that has caused consumers to pay higher-than-competitive prices, it does not matter how the retailer structured its relationship with an upstream manufacturer or supplier. . . ."¹³⁹ The court also expressly adopted the following rule: "If the retailer's unlawful monopolistic conduct caused a consumer to pay the retailer a higher-than-competitive price, the consumer is entitled to sue the retailer under the antitrust laws."¹⁴⁰

Finally, the Supreme Court was concerned that "if accepted, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement."¹⁴¹ Ultimately, the Supreme Court emphatically rejected Apple's arguments by refusing to "rubber-stamp such a blatant evasion of statutory text and judicial precedent."¹⁴²

In the final section of the Supreme Court's opinion, the court turned its attention back to *Illinois Brick* and reviewed the policy considerations underlying this precedent. "The *Illinois Brick* Court listed three reasons for barring indirect-purchaser suits: (1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants."¹⁴³ In terms of facilitating antitrust enforcement, the *Apple Inc. v. Pepper* court wrote, "Leaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could *also* sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases."¹⁴⁴ In addressing the argument related to complex damages calculations, the *Apple Inc. v. Pepper* court wrote that complexity in

¹³⁶ *Pepper*, 139 S. Ct. at 1522.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1523.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 1523-24.

¹⁴³ *Pepper*, 139 S. Ct. at 1524.

¹⁴⁴ *Id.* (emphasis added).

calculating damages in not a “get-out-of-court-free card” and the damages would be equally complicated whether a retailer employed a commission model or a markup model.¹⁴⁵

Next, the Supreme Court explained that there was no risk of duplicative damages because if the Consumers prevailed, they would receive their damages from the overpayment that was made to Apple, and this would not amount to damages being apportioned up and down the supply chain.¹⁴⁶ Although Apple may be subject to multiple lawsuits from different plaintiffs, this is permitted by *Illinois Brick* in cases “unrelated to passing an overcharge down a chain of distribution.”¹⁴⁷ The court further emphasized that the “mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative of one another.”¹⁴⁸ The court then supported this reasoning with the example of a “bottleneck” monopolist who acts as a monopolist for both downstream customers and upstream suppliers and is therefore subject to liability on both sides of the supply chain under different theories.¹⁴⁹

B. The Dissent

The dissent in *Apple Inc. v. Pepper* was written by Justice Gorsuch and joined by Chief Justice Roberts, Justice Thomas, and Justice Alito.¹⁵⁰ At its core, the dissent believes that *Illinois Brick* was reinterpreted by the majority to only prohibit suits where the plaintiff does not contract directly with the defendant, thereby reducing the proximate cause analysis to a matter of contractual privity.¹⁵¹ According to the dissent, the Consumers purchased the Apps from the App developers, who paid Apple a 30 percent commission for usage of the App Store and may have then passed that commission on to the Consumers.¹⁵² This type of “pass-on damage” is precisely what the dissenting justices believe is prohibited by *Illinois Brick*. In this situation, the Consumers would only be injured if the developers were able to and choose to pass on the commission to the Consumers. This raises the issue of causation and would require the trial court to determine for each App developer whether and to what extent they

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1525.

¹⁴⁷ *Id.*; *Ill. Brick Co. v. Illinois*, 431 U.S. 737, 741 (1977).

¹⁴⁸ *Pepper*, 139 S. Ct. at 1525 (quoting PHILLIP E. AREEDA ET AL., *ANTITRUST LAW* 136 (4th ed. 2014)).

¹⁴⁹ *Pepper*, 139 S. Ct. at 1525.

¹⁵⁰ See Greg Stohr, *Apple Must Face iPhone App Antitrust Suit, Supreme Court Rules*, BLOOMBERG (May 13, 2019), <https://www.bloomberg.com/news/articles/2019-05-13/apple-loses-at-u-s-supreme-court-on-iphone-app-antitrust-suit>.

¹⁵¹ *Pepper*, 139 S. Ct. at 1526.

¹⁵² *Id.* at 1527-28 (Gorsuch, J., dissenting).

passed on the commission.¹⁵³ This task is made even more difficult due to Apple's policy that App prices must end in \$0.99 and the fact that most of the prices are exactly \$0.99.¹⁵⁴ Furthermore, whatever Apple overcharged would need to be apportioned between the App developers and the Consumers. Finally, there is the possibility that Apple may be liable for more than the total amount it charged if it is subject to multiple lawsuits, which may require joining the App developers into one massive lawsuit.¹⁵⁵

Relying on the points raised by the United States and the antitrust regulators who argued on behalf of Apple, the dissent suggested that *Illinois Brick* should be understood as a call to examine the economic substance of a transaction rather than the form of who is purchasing a product.¹⁵⁶ The dissent further explained that *Illinois Brick* used the words "direct purchasers" as shorthand to refer to "parties immediately injured by the monopoly overcharge" and that the majority misused them to fashion the rule that "anyone who purchases goods directly from an alleged antitrust violator can sue, while anyone who doesn't, can't."¹⁵⁷ The dissent also focused on the fact that Apple could simply change the way the cash flows in a transaction to eliminate the Consumers' standing to sue, for example by having the Consumers pay the App developers directly and then having the developers remit the commission back to Apple.¹⁵⁸ However, according to the dissent, this type of contractual change is likely to be economically inefficient and would only be done to avoid the rule in the majority decision.¹⁵⁹

Next, the dissent questioned whether the majority opinion even supports the doctrine in *Illinois Brick*.¹⁶⁰ "[The majority opinion] proceeds to question each of *Illinois Brick*'s rationales—doubting that those directly injured are always the best plaintiffs to bring suit, that calculating damages for pass-on plaintiffs will often be unduly complicated, and that conflicting claims to a common fund justify limiting who may sue."¹⁶¹ The dissent also discussed the distinction between the mark up model and the commission model for the retailers that were mentioned in the majority opinion.¹⁶² In the dissenters' opinion, the two retailer models are significantly different because under the markup model, the

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1528 (Gorsuch, J., dissenting).

¹⁵⁵ *Pepper*, 139 S. Ct. at 1529 (Gorsuch, J., dissenting).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1530 (Gorsuch, J., dissenting).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Pepper*, 139 S. Ct. at 1530 (Gorsuch, J., dissenting).

overcharge falls on consumers, while in the commission model, the overcharge falls on the supplier who may then choose whether or not to pass on that overcharge.¹⁶³ The dissent also argued that “the difficulty of disaggregating damages between those directly and indirectly harmed means that the consumer can’t establish proximate cause under traditional principles.”¹⁶⁴

Finally, the dissent noted that there is amici support for overturning the *Illinois Brick* precedent; however, the dissent stated that there was no reason to reconsider *Illinois Brick* since the plaintiffs expressly refused to argue for changing this precedent and this issue had not gone through the adversarial process.¹⁶⁵ The lack of an adversarial process is significant because overruling *Illinois Brick* may have extensive implications, including whether the defensive use of pass-on damages is now permissible and whether it is necessary to join all of the relevant parties within the supply chain.¹⁶⁶

VIII. OPEN ISSUES AFTER THE SUPREME COURT DECISION

The Supreme Court’s opinion in *Apple Inc. v. Pepper* provides further jurisprudence in the area of proximate cause standing, creates certain rules for retailers, and addresses some issues in the electronic commerce marketplace.¹⁶⁷ However, many questions have been left unanswered by the opinion, including: Can there be more than one direct purchaser? Can the specific privity rule being applied to retailers be expanded to other areas? Does the distinction between retailer and supplier even make sense in the electronic marketplace environment, or was *Illinois Brick* decided for a fundamentally different economy? Are there any equity elements at play in this decision to prevent Apple from circumventing the private enforcement remedy in antitrust law? Is the dissenting opinion correct that this decision is the beginning of *Illinois Brick* being whittled away? Many of these questions may have been left open to preserve the narrow 5-4 decision and to avoid addressing issues that would further splinter the court. However, these open issues will inevitably resurface at the Supreme Court level as businesses continue to try and insulate themselves from private antitrust enforcement.

¹⁶³ *Id.* at 1531 (Gorsuch, J., dissenting).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See *Pepper*, 139 S. Ct. at 1521, 1525; Chronicle Editorial Board, *Editorial: The Supreme Court Allows a Crucial Antitrust Test Case Against Apple*, S.F. CHRON. (May 14, 2019), <https://www.sfchronicle.com/opinion/editorials/article/Editorial-The-Supreme-Court-allows-a-crucial-13845678.php#article-comments>.

A. Is There Only One Direct Purchaser?

One of the core rationales underlying *Illinois Brick* is that only one class of direct purchasers is entitled to sue.¹⁶⁸ This is because, according to *Illinois Brick*, having multiple plaintiffs bringing separate actions for the same pool of money would potentially trigger compulsory joinder of parties.¹⁶⁹ However, after *Apple Inc. v. Pepper*, there may be a path to argue that multiple plaintiffs may be “direct purchasers.”¹⁷⁰

The opportunity to argue for multiple “direct purchasers” exists because the rule created for consumers, who purchase products from a retailer, could coexist with a “direct purchaser” rule, which includes a “purchasers of a service” theory and a supplier theory. For example, according to the Consumers and the Supreme Court, the developers are suppliers under the commission model being used by Apple and the role of Apple is one of a retailer in a two-sided market.¹⁷¹ However, the developers may choose to pursue a monopoly theory against Apple in addition to or instead of a monopsony theory. According to Apple, the App Store is a service sold to App developers, and the supplier of that service is the body of consultants and developers who made the App Store platform rather than the developers who create Apps sold through the App Store.¹⁷² Since Apple drafted the contracts in this manner, it would be difficult for it to deny that the developers are “direct purchasers” of the App Store service. Furthermore, a “we paid too much commission” claim and a “we lost profits because our prices were depressed” claim might be able to coexist. In the App Store scenario, the mandatory \$0.99 price multiple requirement might cause a loss of profits independent from the 30 percent commission which relates to an overcharge.

B. What Does the Privity Rule Mean for Standing Doctrine in General?

The rule that “[t]he plaintiffs purchased apps directly from Apple and therefore are direct purchasers”¹⁷³ provides for an analysis that looks to the appearance of the transaction from an ordinary person’s viewpoint rather than a technical, accounting, or legal understanding of contractual arrangements. This rule makes intuitive sense since a defendant should not be able to use contracts

¹⁶⁸ Ryan M. Sandrock, *Apple Inc. v. Pepper and the Future of the Direct Purchaser Enforcement Regime*, ANTI-TRUST MAG. – AM. B. ASS’N, Spring 2019, at 6, 6.

¹⁶⁹ *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 737-38 (1977).

¹⁷⁰ See also Herbert Hovenkamp, *Fixing Antitrust’s Indirect Purchaser Rule*, THE REG. REV. (July 17, 2019), <https://www.theregreview.org/2019/07/17/hovenkamp-fixing-antitrust-indirect-purchaser-rule/>.

¹⁷¹ *Pepper*, 139 S. Ct. at 1522-23.

¹⁷² See Sandrock, *supra* note 168, at 8-9.

¹⁷³ *Pepper*, 139 S. Ct. at 1519.

with third parties or internal business structures to avoid liability imposed by the consumers of its products. This rule also follows the proximate cause requirements for standing recently announced in *Lexmark International, Inc. v. Static Control Components, Inc.*¹⁷⁴ In *Lexmark*, the Supreme Court laid out the rationale for the rule that states, “The general tendency [is] not to stretch proximate causation beyond the first step.”¹⁷⁵ The rationale is that “there ordinarily is a ‘discontinuity’ between the injury to the direct victim and the injury to the indirect victim, so that the latter is not surely attributable to the former (and thus also to the defendant’s conduct), but might instead have resulted from ‘any number of [other] reasons.’”¹⁷⁶

The rule adopted for retailers in *Apple Inc. v. Pepper* appears to offer a similar justification as was followed in the *Lexmark* decision. In *Apple Inc. v. Pepper*, in contrast to *Lexmark*, there was no discontinuity between the injury to the Consumers of being overcharged for the Apps and the behavior of the monopolist, which makes it appear that the Consumers were “direct victims” of Apple’s overcharge rather than “indirect victims.”¹⁷⁷ In this manner, the rule that provides standing to sue as a “direct purchaser” to a consumer who purchased from a retailer following a commission model may be read in terms of the exception created in the *Lexmark* decision, which dispensed with the typical requirement of having to be a direct competitor to maintain a Lanham Act cause of action.¹⁷⁸

The *Lexmark* case involved a supplier of microchips, Static Control Components, who made a Lanham Act false advertising claim against Lexmark that was based on certain advertisements claiming that refurbished printer cartridges were illegal.¹⁷⁹ Typically, a Lanham Act claim can only be made by a direct competitor; however, the supplier of the microchips being used to circumvent Lexmark’s printer cartridge interoperability functionality was upstream from the manufacturer of the refurbished printer cartridge.¹⁸⁰ Nevertheless, the Supreme Court determined that the microchip manufacturer had standing to sue because the microchips were both “necessary for” and “had no other use than, refurbishing Lexmark toner cartridges.”¹⁸¹ Furthermore, false advertising that resulted in the reduction of the business of the refurbished printer cartridge manufacturer also led to an injury to Static Control, since it was likely that there was a “1:1 relationship” between the number of refurbished

¹⁷⁴ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132-34 (2014).

¹⁷⁵ *Id.* at 139-40 (quoting *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 271 (1992)).

¹⁷⁶ *Id.* (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458-59 (2006)).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 137-38.

¹⁷⁹ *Id.* at 120-23; 15 U.S.C. § 1125(a)(1) (2019).

¹⁸⁰ *Lexmark Int’l, Inc.*, 572 U.S. at 137-40.

¹⁸¹ *Id.* at 139-40.

cartridges and the number of microchips sold by the manufacturer.¹⁸² Here, proximate cause was satisfied because the alleged injury was so integral to the alleged violation.¹⁸³

If the privity rule adopted in *Apple Inc. v. Pepper* is read in line with *Lexmark* rather than solely as an interpretation of *Illinois Brick*, there appears to be an additional element to the doctrine of standing that goes beyond a mechanical application of the “not going beyond the first step” rule in determining proximate cause.¹⁸⁴ The difficulty with the progeny of *Illinois Brick* is the case of *Kansas v. Utilicorp United, Inc.*, in which a public utility was required to pass-through an entire overcharge directly to its customers.¹⁸⁵ Despite these facts, the Supreme Court followed *Illinois Brick* literally and found no proximate cause and therefore denied that the plaintiffs had standing to sue.¹⁸⁶ In *Apple Inc. v. Pepper*, the Supreme Court declared the Consumers to be direct purchasers despite Apple’s commission structure and it referenced *Utilicorp United* only for the premise that immediate buyers may sue the antitrust violator.¹⁸⁷ However, to declare the Consumers direct purchasers then reference *Utilicorp United* in support of the premise that direct purchasers can sue is rather circular. If the *Apple Inc. v. Pepper* decision is instead viewed through the prism of *Lexmark*, the reasoning of the Supreme Court becomes more apparent, but taking this approach leads to the conclusion that the precedential value of *Utilicorp United* should be reexamined.

C. Does Equity Have a Role in Questions of Standing?

During oral arguments and in its judgment, the Supreme Court appeared concerned that the wrongdoer would be able to structure its transactions to avoid legal liability through distortion of procedural law.¹⁸⁸ At oral arguments, Justice Ginsburg questioned if there were in fact any “first buyers” according to Apple.¹⁸⁹ Justice Alito then asked whether out of the thousands of App developers if any had sued Apple, to which Apple replied, “None have ever sued.”¹⁹⁰ Justice Kagan noted that Apple is “able to dictate to developers

¹⁸² *Id.*

¹⁸³ *Id.* at 139 (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 479 (1982)).

¹⁸⁴ *See id.*; *see also* *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1529 (2019); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 750-51 (1977).

¹⁸⁵ *See* *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 210-12 (1990).

¹⁸⁶ *Id.* at 218-19.

¹⁸⁷ *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1518 (2019).

¹⁸⁸ *See* Transcript of Oral Argument, *supra* note 6, at 48-50; *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1529-30 (2019) (Gorsuch, J., dissenting).

¹⁸⁹ Transcript of Oral Argument, *supra* note 6, at 4.

¹⁹⁰ *Id.* at 16.

whatever price structure it wants, and it is able to dictate to consumers what the nature of the sale is going to be ... it could have done a thousand other things that are essentially the same that would have taken it out of the *Illinois Brick* rule.”¹⁹¹ Justice Gorsuch was concerned that the Supreme Court was “in danger of just incentivizing a restructuring of contracts here so that all that Apple does or people like it is make you purchase directly from the app provider and then it returns ... the profit to Apple later[.]”¹⁹²

The Supreme Court expressly stated that Apple’s theory, if adopted by the court, would be “a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement.”¹⁹³ Furthermore, the court stated that it would not “green-light monopolistic retailers to exploit their market position” by helping insulate them from antitrust suits by consumers.¹⁹⁴ Even when analyzing the reasoning behind *Illinois Brick*, the Supreme Court wrote, “*Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated.”¹⁹⁵

The above reasoning relied on by the Supreme Court does not appear to be entirely detached from concepts of equity or fairness. There is a distinct concern that Apple might be intentionally “gaming the system” with its contracts or internal structure in order to avoid a private enforcement action despite monopolistically overcharging consumers.¹⁹⁶ This concern seems to have also been present in the *Lexmark* case, where Lexmark was using false advertising against a manufacturer of a key component of a competing product rather than using false advertising against its direct competitor.¹⁹⁷ This indirect consideration of fairness seems reasonable given the precedent in *Lexmark* as well as the opinion in *Apple Inc. v. Pepper*. Moreover, despite both of these Supreme Court opinions being phrased, in part, as interpretations of prior precedent, the resulting carve outs and special rules point toward a more flexible approach.

D. Are E-Commerce Supply Chains Inherently Dynamic?

In 1937, Ronald H. Coase wrote his celebrated paper “The Nature of the Firm,” in which he laid out the fundamental economic reasons behind the

¹⁹¹ *Id.* at 25.

¹⁹² *Id.* at 48-49.

¹⁹³ *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1523 (2019).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1524.

¹⁹⁶ *See id.* at 1530 (Gorsuch, J., dissenting).

¹⁹⁷ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 137-38 (2014).

organization of economic activities within enterprises.¹⁹⁸ According to Coase, firms ultimately exist to minimize transaction costs, with the largest transaction cost being the cost of obtaining information on prices.¹⁹⁹ With the electronic economy, this cost has greatly decreased and resulted in supply chains that are highly fragmented and dynamic. In reality, the electronic commerce supply chain is different, dynamic, and redefined in its very essence when compared to the traditional supply chains that existed in the era of *Hanover Shoe* or *Illinois Brick*.²⁰⁰ The modern era is the era of *Lexmark* and *Apple Inc. v. Pepper*.

In the supply chain of the electronic marketplace, the traditional concept of an enterprise utilizing direct materials, direct labor, indirect materials, indirect labor, and manufacturing overhead for the purpose of producing an output to be sold downstream is being challenged. The upstream and downstream are flexible and subject to definitions that can be manipulated for legal purposes. The doctrine of proximate cause is one area of the law where this manipulation has become quite evident. In *Lexmark*, the proximate cause issue related to a microchip manufacturer that was producing microchips that were being used downstream by a printer cartridge remanufacturer competing with Lexmark.²⁰¹ The issue was that the microchip manufacturer was further upstream in the supply chain for printer cartridges and, therefore, did not fit the traditional definition of a “competitor.”²⁰² However, the Supreme Court created an exception in order to include this type of upstream supplier within the scope of persons entitled to sue under the Lanham Act.²⁰³

In *Apple Inc. v. Pepper*, a “retailer” created an internal structure and then claimed it was simply providing a service to the developers and hence was two steps upstream from consumers.²⁰⁴ In this situation, the Supreme Court decided that there needed to be a safe harbor rule to provide standing to anyone who is directly purchasing a product from a monopolist retailer, without regard to the other arrangements that the monopolist retailer created.²⁰⁵

Beyond the individual exceptions mentioned above, the Supreme Court has altered the doctrine of proximate standing in a way that provides standing to a broader range of plaintiffs. First, with *Lexmark*, the Supreme Court changed the doctrine of standing from a prudential doctrine to one of statutory

¹⁹⁸ Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 396-97 (1937).

¹⁹⁹ *Id.* at 390.

²⁰⁰ Petition for Writ of Certiorari at 4, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204).

²⁰¹ *Lexmark Int’l, Inc.*, 572 U.S. at 122-23.

²⁰² *See id.* at 139-40.

²⁰³ *See id.* at 140.

²⁰⁴ *See generally* *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1517 (2019).

²⁰⁵ *See id.* at 1525.

construction.²⁰⁶ This change made it easier for the legislature to expressly broaden standing as needed, since the doctrine of standing was no longer being controlled by the courts but by statutory drafting and construction. With *Apple Inc. v. Pepper*, the doctrine of standing is now moving further toward an ad-hoc analysis based on principles, such as whether the consumer bought the product from the monopolist or not, without respect to the underlying legalistic structure of the transaction.²⁰⁷

The path of old economic assumptions being manipulated for the purpose of accommodating modern, dynamic supply chains is currently undergoing a transition through the creation of exceptions to old rules. However, the old rules must and will be replaced by a more dynamic understanding of modern commerce. With electronic commerce, intermediaries can be easily created or destroyed for the purpose of using proximate cause standing doctrine to circumvent private enforcement rights. For example, a large retailer can contract with micro-retailers for identical terms and commissions. It can then require those retailers to use identical portals and websites with simple, hidden disclaimers stating that those micro-retailers are not directly affiliated with the large retailer. In fact, such arrangements can be made invisible to end users or to consumers in general. Similarly, intermediaries can simply be created upstream with companies that aggregate suppliers or they can act as brokers for the services provided by the relevant supplier. In each of these cases, the Supreme Court may find that the particular corporate or contractual structure at issue does not defeat proximate cause with the plaintiff. However, creating these doubts and unnecessary litigation tends to favor the monopolist over the smaller supplier or the consumers as a whole. Furthermore, this uncertainty creates a market for these types of convoluted supply chains that serve the primary purpose of providing litigation insurance rather than economic efficiency. Therefore, a more dynamic understanding of proximate cause standing doctrine that is untethered to old supply chain concepts is necessary to maintain effective private enforcement rights. Fortunately, *Lexmark* and *Apple Inc. v. Pepper* are major steps forward in the development of such an understanding.

E. What Remains of the *Illinois Brick* Direct Purchaser Rule?

In his dissent, Justice Gorsuch observed that perhaps the majority of the Supreme Court disagrees with *Illinois Brick* because it created a new rule and

²⁰⁶ *Lexmark Int'l, Inc.*, 572 U.S. at 125-26.

²⁰⁷ *See Pepper*, 139 S. Ct. at 1520 (holding that those who purchased apps for their iPhones through Apple's App Store were direct purchasers from Apple and may sue Apple for allegedly monopolizing the retail market for the sale of iPhone apps).

the rationales underlying *Illinois Brick* are questionable.²⁰⁸ The problem for the majority in *Apple Inc. v. Pepper* was that the plaintiffs did not call for *Illinois Brick* to be overruled, so the court was deprived of the opportunity to argue the benefits and drawbacks of *Illinois Brick* with the litigants.²⁰⁹ Furthermore, overruling such longstanding precedent based on an amicus brief supplied by the AGs would have put the court in the position of being overly proactive and going beyond what was necessary to resolve a dispute among litigants. It is for these reasons that it is worth considering whether the *Illinois Brick* direct purchaser rule continues to be the bright-line rule for the proximate cause analysis in antitrust litigation.

After the Supreme Court decision in *Lexmark*, it may be worthwhile to reconsider all prior proximate cause jurisprudence, as the relevant decisions are based on fundamentally different theoretical underpinnings. The concept of prudential standing is based on maintaining the legitimacy of the judiciary and creating a method of avoiding cases that are more properly suited for other branches of government.²¹⁰ However, the doctrine of prudential standing brought about the uncomfortable contradiction of a court refusing to hear a case squarely within its jurisdiction based solely on “prudential” considerations. The *Lexmark* decision resolved this issue by making the proximate cause requirement of standing a component of statutory construction.²¹¹ This change made the standing question less about whether there are reasons for the court not to hear a case in order to preserve institutional integrity,²¹² and more about whether standing is appropriate to serve the legislative purpose underlying the relevant private cause of action. Therefore, given the dynamic nature of the modern economy and the recent theoretical transformation of standing doctrine at the Supreme Court, it is highly likely that *Illinois Brick* and its rules will continue to be weakened in the future.

IX. CONCLUSION

Apple Inc. v. Pepper provided the Supreme Court with the unique opportunity

²⁰⁸ *Pepper*, 139 S. Ct. at 1530 (Gorsuch, J., dissenting).

²⁰⁹ *Id.* at 1531 (Gorsuch, J., dissenting).

²¹⁰ Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?: Lexmark International, Inc.*, 18 U. PA. J. CONST. L. 213, 219 (2015).

²¹¹ Ira S. Sacks et al., *The Supreme Court Resolves a Circuit Split Regarding Standing to Sue for False Advertising Under the Lanham Act*, ACKERMAN (Sept. 4, 2014), <https://www.akerman.com/en/perspectives/the-supreme-court-resolves-a-circuit-split-regarding-standing-to.html>.

²¹² *See generally* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17-18 (2004) (explaining how party lacked prudential standing because right to sue is dependent on state family law rights).

to decide a case with direct and substantial implications for the entire United States and, perhaps, the world economy. However, despite the very broad issues presented in this case, it is also imperative to remember that this was a case between two litigants. Furthermore, one must also recognize that the Supreme Court is primarily responsible for resolving disputes, not formulating antitrust policy.²¹³ This institutional constraint, along with the narrow margin of a 5-4 decision, resulted in a decision that left many crucial questions open for future litigation.

On the narrow question of whether the Consumers were direct purchasers, the Justices of the Supreme Court ruled for the Consumers. The majority ultimately adopted a rule that states if consumers purchase goods or services directly from a retailer, they are considered “direct purchasers.”²¹⁴ This rule appears to be a compromise made to address some of the major concerns that were presented during the oral arguments. During these arguments, the justices focused primarily on two areas of the dispute: First, whether treating the Consumers as indirect purchasers would prevent adequate enforcement of antitrust laws. Second, whether treating the Consumers as direct purchasers would potentially result in duplicative or inconsistent judgments against Apple.²¹⁵ The first concern was not adequately addressed by Apple, and it is a concern that has been expressly discussed by justices in the past, specifically by the late Justice Antonin Scalia in his paper “The Doctrine of Standing as an Essential Element of the Separation of Powers.”²¹⁶ In that article, Justice Scalia prudently noted that if no one has the power to enforce a certain right, then the right will not be enforced.²¹⁷ It is likely that this concern was the core reason why the Supreme Court ultimately sided with the Consumers.

On another note, the court’s concern with duplicative liability appeared to be assuaged by the Consumers’ argument that the App developers suffered a fundamentally different injury than the Consumers. The court also appeared to be swayed by the fact that damages would not necessarily total the 30 percent that Apple charges for App Store usage. Moreover, Justice Kagan in particular outlined the Consumers’ arguments and appeared to be persuaded by them.²¹⁸ The argument that the injuries suffered by the Consumers and the App

²¹³ U.S. CONST. art. III, § 2, cl. 2.

²¹⁴ Hovenkamp, *supra* note 170.

²¹⁵ *See* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1524 (2019).

²¹⁶ *See generally* Scalia, *supra* note 18, at 897 (discussing the judicial doctrine of standing relating to the plaintiff’s alleged injury).

²¹⁷ *Id.* at 896.

²¹⁸ Tucker Higgins, *Supreme Court Appears Skeptical of Apple’s Arguments in App Store Monopoly Case*, CNBC (Nov. 26, 2018, 3:48 PM), <https://www.cnbc.com/2018/11/26/supreme-court-appears-skeptical-of-apples-arguments-in-app-store-monopoly-case.html>.

developers were of a fundamentally different nature was raised extensively in the majority opinion. This appears to be the only answer the court provided to address Apple's concern about being exposed to multiplicative liability and litigation from various plaintiffs.

With respect to overturning *Illinois Brick*, the Supreme Court was interested in reevaluating this precedent at oral arguments, likely because it is related to its recent reconsideration of standing doctrine in general.²¹⁹ The court even expressly raised the idea that it might be willing to overrule its precedent in *Illinois Brick*; however, the Consumers never argued for a change in precedent and persistently contended that they should be considered direct purchasers under the *Illinois Brick* rule.²²⁰ This put the Supreme Court in a difficult position as it attempted to clarify the *Illinois Brick* precedent in such a manner as to include the Consumers' litigation within the proximate cause analysis. Consequently, it appears that *Illinois Brick* is disfavored by the Supreme Court at this time. Nevertheless, for the court to have explicitly overruled *Illinois Brick*, it would have had to make that decision *sua sponte* and in spite of the fact that no litigant argued in favor of doing so. Overruling *Illinois Brick* would not only have resulted in the amici taking over the case, but it would have also forced the Supreme Court to make policy rather than resolve a dispute between two litigants. That role of the Supreme Court is even less justified under the current *Lexmark* framework of proximate cause standing, where said standing is now an element of statutory construction. Under this framework, the legislature may always modify proximate cause standing limitations through legislation, and it should be given the first opportunity to do so.

In the end, the Consumers' arguments that they purchased the Apps from Apple and that the internal structure of Apple's relationship with the App developers should not affect the rights of the Consumers remain highly persuasive. However, the arguments advanced by the Consumers and the intuitive understanding of how a consumer purchases an application do not fit within the narrow bounds of the supply chain paradigm envisioned by *Illinois Brick* and *Hanover Shoe*. Electronic commerce involves a decentralized and dynamic supply chain that does not follow traditional notions of direct competitor, supplier, or customer.²²¹ This reality of the modern marketplace has

²¹⁹ See *Supreme Court Holds App Store Buyers Are Direct Purchasers Under Long-Standing Antitrust Doctrine*, DUANE MORRIS (May 15, 2019), https://www.duane-morris.com/alerts/supreme_court_holds_app_store_buyers_direct_purchasers_longstanding_antitrust_doctrine_0519.html.

²²⁰ See Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 24 (2004) (explaining that consumers are claiming that they are direct purchasers).

²²¹ Stefan W. Schmitz, *The Effects of Electronic Commerce on the Structure of*

resulted in litigation such as *Lexmark* and *Apple Inc. v. Pepper*. Although these cases have been resolved through narrow carve outs from traditional rules, it is inevitable that the traditional rules will eventually be abandoned in their entirety. These rules will then be replaced by a dynamic system that accounts for the modern business reality and shifts away from old assumptions about large, stable, and immutable enterprises. Ultimately, antitrust law will continue to adapt and move toward a more Coasian view of enterprises, in which enterprises are considered to be organizations of transactions that change rapidly in scope, purpose, and boundary depending on market opportunities and incentives.

