No. 13-63

In The
Supreme Court of the United States

PAMELA BRENNAN, ET AL., PETITIONERS,

v.

CONCORD EFS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), this Court ruled that antitrust plaintiffs cannot bring damages actions for injuries allegedly suffered when a purportedly "fixed" price is passed on to them as part of a separate price. In this case, plaintiffs contend that (i) defendants conspired to fix a fee the bank defendants pay to others, thus increasing the bank defendants' out-of-pocket costs, and then (ii) the bank defendants individually passed the "fixed" fee on to some, but not all, of their respective customers as part of a separate fee the banks set independently of each other. The question presented is:

Whether this Court should create a new exception to the *Illinois Brick* rule to permit a plaintiff to bring suit alleging that the defendants "inflated" prices by conspiring to increase the costs the defendants pay to others, where there was no agreement to pass on those costs to the plaintiff and no agreement regarding the price the plaintiff pays.

CORPORATE DISCLOSURE STATEMENT

Bank of America, N.A. is wholly owned by BANA Holding Corporation. BANA Holding Corporation is wholly owned by BAC North America Holding Company. BAC North America Holding Company is wholly owned by NB Holdings Corporation, which in turn is wholly owned by Bank of America Corporation.

Citibank, N.A. is successor-by-merger to Citibank (West), FSB. Citibank, N.A. is a wholly owned, indirect subsidiary of Citigroup Inc.

Concord EFS, Inc. is a wholly owned subsidiary of First Data Corp. First Data Corp. is a wholly owned subsidiary of First Data Holdings, Inc. KKR & Co., L.P. indirectly owns more than 10% of First Data Holdings, Inc.'s stock.

JPMorgan Chase Bank, N.A., successor-in-interest to Bank One, N.A., is a wholly owned subsidiary of JPMorgan Chase & Co.

SunTrust Banks, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Wells Fargo Bank, N.A. and Servus Financial Corporation are wholly owned subsidiaries of Wells Fargo & Co. Wells Fargo & Company is the successor to Wachovia Corporation, which has been dissolved.

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INTRODUCTION

This Court in *Illinois Brick* established a bright-line rule: where a seller allegedly fixed a price unlawfully, only the party that directly paid the fixed price—the "direct purchaser"—may sue for antitrust damages. If the direct purchaser "passed on" the overcharge via a separate price it charged others, the parties to whom the overcharge was passed on cannot obtain damages relief. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Only "the overcharged direct purchaser, and not others in the chain of manufacture or distribution," may sue for damages under Section 4 of the Clayton Act. *Id.* at 729.

This case involves an alleged conspiracy to "fix" a price that the plaintiffs, petitioners here, do not pay. Petitioners alleged a conspiracy between the Star ATM Network and the bank respondents to set the interchange fee that banks pay to ATM owners to gain access to ATMs that the banks do not own. According to petitioners, the cost of the interchange fee was then marked up and passed on to them through a separate fee, the foreign ATM fee, that the bank respondents charged them. Pet. 8. However, as both the district court and court of appeals emphasized, petitioners never alleged an agreement to set the foreign ATM fee that they pay; there is no dispute that each bank respondent determines unilaterally whether it will charge a foreign ATM fee at all and, if so, how much that fee will be.

Petitioners do not dispute that *Illinois Brick* bars pass-on claims. Pet. 4-5. Instead, petitioners seek a novel and broad exception to the *Illinois Brick* rule. Petitioners assert that they should be able to sue for the purported inflation of a cost that the bank respondents bear because respondents allegedly agreed to increase that cost.

The court of appeals correctly rejected petitioners' claim. Where, as here, the plaintiffs are challenging the lawfulness of a price that allegedly was passed on to them, they are indirect purchasers for purposes of the *Illinois Brick* rule. The decision below is simply a straightforward application of this Court's longstanding rule.

That application does not conflict with any decision of any other court of appeals. Contrary to petitioners' argument, neither the Third Circuit nor the Seventh Circuit has adopted an exception that allows such facile evasion of the limits imposed by *Illinois Brick*.

Petitioners hinge their claim of conflict with the Third Circuit on a decision that applied the ownership-or-control exception to *Illinois Brick*—an exception petitioners expressly acknowledge does not apply here. *See Winoff Indus. v. Stone Container Corp.* (*In re Linerboard Antitrust Litig.*), 305 F.3d 145 (3d Cir. 2002); Pet. 13 n.4. And the Seventh Circuit decisions petitioners cite do not authorize pass-on claims by indirect purchasers at all. Rather, petitioners' principal case involved joint and several liability in a suit

brought by plaintiffs who, unlike petitioners, directly paid the allegedly fixed price. *See Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629 (7th Cir. 2002).

At bottom, petitioners ask this Court to consider whether to adopt a new and far-reaching exception to *Illinois Brick* that no appellate court has ever adopted. And they do so in an idiosyncratic case that would be a particularly unsuitable vehicle for considering such an exception.

In a typical price-fixing conspiracy, the conspirators seek to increase their revenues by agreeing to raise the prices they *charge* others. Petitioners try to fit into that mold, asserting (as they did in their complaint) that the allegedly inflated interchange fee that banks pay serves as a "floor" for the foreign ATM fee that the bank respondents charge petitioners. Pet. 8. But petitioners' claim failed on summary judgment after discovery, and the facts are to the contrary. The interchange fee is a financial cost that the summary judgment record establishes is not automatically passed on to cardholders through foreign ATM fees; many of the bank respondents' customers pay no foreign ATM fee at all. Indeed, as the district court observed, "the bank Defendants pay more in interchange fees than almost all other members of the Star Network and are therefore the entities most adversely affected by such fees." Pet. App. 35a-36a n.4. Further, there was no evidence or allegation of an agreement among banks to fix the amount of foreign ATM fees, or even to charge such

fees. And petitioners never explained why the independently owned Star ATM Network would participate in a purported conspiracy to inflate interchange fees above competitive levels, when doing so would reduce its transaction volume and revenue.

A case with such an atypical claim presents a poor vehicle for considering whether to cut holes in the *Illinois Brick* wall.

The petition should be denied.

STATEMENT

A. Legal Framework

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property" by an antitrust violation may seek treble damages from the alleged violator. 15 U.S.C. § 15.

In *Illinois Brick*, this Court held that a plaintiff whose claim is based on a "pass-on theory"—*i.e.*, that overcharges resulting from an unlawfully "fixed" price were passed on to the plaintiff as part of a separate price—does not suffer injury within the meaning of Section 4 of the Clayton Act. *Illinois Brick*, 431 U.S. at 726. The Court expressed grave concerns about the "nearly insuperable difficulty" courts would face if required to determine how much of a price increase was actually passed on. *Id.* at 725 n.3. The Court reasoned that prohibiting pass-on claims would increase the effectiveness of the treble-damages remedy by eliminating "the burden of litigating the intricacies of pass-on," and avoiding the

costs of multiple litigation and potentially duplicative recoveries. *Id.* at 745-746.

In *Kansas v. UtiliCorp United, Inc.*, the Court reaffirmed that *Illinois Brick* operates strictly to bar claims that would require a court to adjudicate whether (and how much of) a "fixed" price was passed on to the plaintiff. 497 U.S. 199, 210, 216-217 (1990). Refusing to endorse context-specific exceptions to *Illinois Brick*, the Court explained that the "process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the * * * rule was meant to avoid." *Id.* at 216 (quoting *Illinois Brick*, 431 U.S. at 744-745). The Court concluded it would be "an unwarranted and counterproductive exercise to litigate a series of exceptions" to the *Illinois Brick* rule. *Id.* at 217.

B. Factual Background

This case comes to this Court after a grant of summary judgment, not a motion to dismiss. Petitioners' reliance on the allegations of their complaint (*e.g.*, Pet. 8) is thus misplaced; those allegations cannot simply be taken as true. To the contrary, many of the allegations are belied by the undisputed record facts. For example, the interchange fee does not serve as a "floor" for the foreign ATM fee. *Contra* Pet. 8. As the district court concluded based on the undisputed record, the interchange fee is "not automatically passed on" to cardholders through foreign

ATM fees. *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1017 (N.D. Cal. 2008); *see* C.A. Supp. E.R. 249, 254, 258, 261, 266.

The following statement presents the undisputed facts established by the record below.

1. Automated teller machine ("ATM") networks provide a valuable service that no bank could provide on its own: they enable participating banks to offer their customers easy access to cash from their bank accounts across the globe at any hour of every day. There are four parties to an ATM network transaction: (1) the "cardholder," who obtains money from the ATM; (2) the "card-issuing bank," which holds the customer's deposit account and issues the customer's ATM card; (3) the "ATM owner," which operates the ATM from which the customer withdraws money; and (4) the "ATM network," which connects the ATM owner with the card-issuing bank, thereby enabling the ATM transaction to occur. Pet. App. 2a-3a. When a cardholder withdraws cash from an ATM that is owned and operated by an entity other than the cardholder's bank, it is called a "foreign ATM transaction." Pet. App. 2a.

The members of ATM networks are card-issuing banks and ATM owners. The business and economic interests of these entities vary greatly. Card issuers are institutions that accept demand deposits (*e.g.*, banks, credit unions, and thrifts) and issue ATM cards that their customers can use to access their funds. Card-issuing banks join ATM networks to

offer their customers access to a wider array of ATMs and thus to compete better for depositors. Pet. App. 3a-4a, 33a-34a; C.A. E.R. 268; C.A. Supp. E.R. 173-174, 226-227, 244-245, 248, 252, 256, 260, 264.

By contrast, a large portion of the ATM owners that participate in ATM networks like the Star Network are not financial institutions at all. They are, instead, "independent service organizations" ("ISOs") that deploy ATMs, frequently in locations such as grocery stores and gas stations. Pet. App. 3a. The GAO Report cited by petitioners (Pet. 6) reports that ISOs "own, operate, or service just over half of the nation's ATMs." Gov't Accountability Office, *Automated Teller Machines* 11 (2013); C.A. Supp. E.R. 198. ISOs do not have any depositors and do not issue ATM cards. Pet. App. 3a.

ATM networks exist to provide the operational and contractual structure that allows participating card-issuing banks to offer their customers the use of ATMs owned by other network participants. Operationally, networks are the intermediaries between card issuers and ATM owners and assume responsibility for "switching" the transaction—*i.e.*, routing electronic messages between a bank and an ATM owner to enable a cash withdrawal. Networks generate their revenue primarily through per-transaction charges to their members, such as "switch fees," typically $.05 per transaction. *Ibid.*; C.A. E.R. 568, 577-578. They do not sell any services directly to cardholders.

2. The ATM network industry is diverse and highly competitive. Petitioners acknowledge that the Star Network competes with approximately 24 other ATM networks for members. Pet. App. 33a, 75a. These competitors include at least two national networks with larger memberships than Star. *Contra* Pet. 6; *see* C.A. E.R. 115; C.A. Supp. E.R. 158, 176-177, 234-236.

As of the time the record closed, the Star Network had 4,750 members and participants. Pet. App. 34a. Through the late 1990s, Star was a member-owned network supervised by a board of directors that included, at times, executives affiliated with the bank respondents. Pet. App. 4a. On February 1, 2001, Concord EFS purchased Star in a transaction reviewed and approved by the United States Department of Justice; since then, Star has been a proprietary ATM network owned and operated solely by Concord. Pet. App. 4a-5a.

The Star Network Operating Rules set forth the terms of participation in the Star Network. The rules address, among other things, the terms under which the ATM owner will be repaid and compensated by the card-issuing bank, including when and in what amount. Pet. App. 3a, 33a; *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d at 1009; C.A. Supp. E.R. 157-158, 229-230.

3. "Interchange" refers to the settlement of transactions between card-issuing banks and ATM owners through the ATM network. Pet. App. 3a; C.A.

Supp. E.R. 157. Virtually all of the dozens of ATM networks in this country have provided for the payment of an "interchange fee" from the card-issuing bank to the ATM owner on each foreign ATM transaction. C.A. Supp. E.R. 170-171, 178, 230, 234. Because ISOs own or operate nearly half of all ATMs, petitioners are incorrect when they suggest that these are fees that only "financial institutions (including the Bank Respondents) charge each other" for use of ATMs. Pet. 8. A significant portion of interchange fees are paid to ISOs, which do not pay such fees themselves because they do not have cardholders.

As the district court concluded, the Star ATM Network sets the interchange fee for transactions among its network members, as it would be impracticable for thousands of banks and ISOs to negotiate bilateral interchange fee arrangements. Pet. App. 33a; *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d at 1016. As of the time the record closed, the Star Rules provided for an interchange fee of $0.46 to $0.54 to be paid by the card-issuing bank to the network, and then by the network to the ATM owner. Pet. App. 33a.

Through interchange fees, card-issuing banks compensate ATM owners for making their ATMs available to the card issuers' customers, and they provide incentives for ATM owners to deploy more machines. Pet. App. 32a; *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d at 1009; C.A. E.R. 568, 577; C.A. Supp. E.R. 157, 163, 178. ATM networks use interchange fees to compete for members and

increase cardholder access to machines. Star, for example, has raised its interchange fees at times to attract ISOs and to encourage existing members to deploy more ATMs, expanding the scope of the network. C.A. Supp. E.R. 159-160, 304-306; *see also* C.A. E.R. 972-973; C.A. Supp. E.R. 297-299, 307-308.

The participants in ATM networks have very different economic interests when it comes to interchange fees. For example, about 600 of Star's 4,750 participants are either "pure receivers" of interchange fees (*i.e.*, entities, such as ISOs, that receive interchange fees but do not pay them) or "net receivers" of those fees (*i.e.,* entities that receive more in interchange fees than they pay). Pet. App. 34a-35a.

On the other hand, about 1,000 of Star's participants are "pure payers" of interchange fees, *e.g.*, entities like credit unions and Internet banks that pay interchange fees but do not receive them because they do not own ATMs. Pet. App. 34a-35a, 44a & n.6. The remaining Star participants are "net payers," *i.e.*, entities that pay more interchange fees than they receive. Pet. App. 34a-35a. Indeed, contrary to petitioners' allegation that the bank respondents "receive the benefits of inflated fees" (Pet. 9), nearly all of the bank respondents were in fact "net payers" of Star's interchange fees for virtually the entire class period. C.A. Supp. E.R. 245, 249, 254, 256, 261. Those banks paid "approximately $120 million more in interchange fees than they received" from 2008 through 2010 alone, to both ISOs and competing

banks, to ensure their customers had widespread access to their funds. Pet. App. 35a & n.4.

4. An ATM cardholder who engages in a foreign ATM transaction may be charged two fees. The ATM owner may charge the cardholder a surcharge fee on the transaction. Pet. App. 3a. Petitioners did not challenge the surcharge fee, which is set independently by each ATM owner, nor do they claim that the surcharge fee is unlawfully fixed. Pet. App. 79a.

The cardholder may also be charged a foreign ATM fee by his bank. Pet. App. 3a. But not all banks charge such fees. Indeed, the GAO Report found that approximately 45 percent of financial institutions do not charge their customers a foreign ATM fee. GAO Report 14. Of the banks that do charge foreign ATM fees, many banks (including most of the bank respondents) charge them to some customers but not to others, and the amounts of such fees vary widely from bank to bank. C.A. Supp. E.R. 1-14, 249, 254, 258, 261, 266; *see also* GAO Report 15 (foreign ATM fees ranged from $0.25 to $5.00 in 2012).

As the record on summary judgment comes to this Court, the undisputed facts establish that every bank (including each of the bank respondents) decided unilaterally (i) whether to charge a foreign ATM fee, (ii) which customers would be charged such a fee, and (iii) how much any such fee would be. Petitioners consistently have acknowledged that there has been no agreement or coordination among respondents on

these matters. Pet. App. 3a, 12a-13a, 32a-33a; *see also* C.A. Supp. E.R. 249, 254, 261, 266.

C. Proceedings Below

1. Proceedings in the district court

Petitioners are depositors of the bank respondents who made foreign ATM withdrawals. They filed their original complaint in July 2004, alleging that respondents had agreed to "fix" the Star Network's ATM interchange fee, and that this agreement constituted a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Pet. App. 80a-81a, 96a. The complaint acknowledged that petitioners do not pay interchange fees; rather, the bank respondents pay them. Pet. App. 58a-59a, 83a. The complaint nonetheless alleged that "fixing" interchange fees injured petitioners because the bank respondents purportedly "mark[ed] up" those costs and passed them on to their cardholders as part of foreign ATM fees. Pet. App. 58a.

The district court, the Hon. Charles R. Breyer, granted respondents' motion for summary judgment on petitioners' *per se* claim, concluding that establishing the level of interchange fees is a core business activity of the Star Network and hence could not be *per se* unlawful under *Texaco Inc. v. Dagher*, 547 U.S.

1 (2006). *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d at 1013.[1]

Petitioners then re-pleaded their complaint under the rule of reason. The district court granted summary judgment on this claim as well, concluding that the claim was barred by *Illinois Brick*. Judge Breyer began by observing that petitioners' claim was "illogical." Pet. App. 45a. Given that "the bank Defendants pay more in interchange fees than almost all other members of the Star Network," they would have no reason to "conspire to set the interchange fee at artificially high levels, in contravention to their financial interests." Pet. App. 35a-36a n.4. And "[i]mportantly, Plaintiffs do not allege that the Defendants or any other banks have conspired to fix the foreign ATM fee that the Plaintiffs must pay." Pet. App. 33a.

The district court held that *Illinois Brick* barred petitioners' claim. The court reasoned that (i) petitioners did not directly pay the allegedly fixed price, the interchange fee; (ii) petitioners' allegation that respondents had "marked up" and passed on the cost of the interchange fee to petitioners through a separate fee—the foreign ATM fee, which was set individually by the banks—is precisely the kind of claim

[1] Although petitioners appealed this holding to the court of appeals, the court below did not reach it. Pet. App. 2a. The only issue presented by the petition is whether the *Illinois Brick* rule bars petitioners' claim. *See* Pet. 9 n.3.

Illinois Brick forbids; and (iii) petitioners' claim did not fall within the narrow exceptions to the *Illinois Brick* rule. Pet. App. 30a-53a.

2. Proceedings in the court of appeals

The court of appeals unanimously affirmed. The court observed that *Illinois Brick* and *UtiliCorp* establish a "bright line rule" that antitrust plaintiffs "may not use a pass-on theory to recover damages and thus have no standing to sue." Pet. App. 10a. The court concluded that petitioners' claim fell squarely within this rule. The court of appeals first rejected petitioners' semantic argument that they are "direct" purchasers. The court pointed out that petitioners "concede that they have never directly paid interchange fees." Pet. App. 12a. Because petitioners' claim is that "the Bank Defendants pass on the cost of the interchange fees through the foreign ATM fees," their claim is barred by *Illinois Brick*. *Ibid.*

The court of appeals then recognized that *Illinois Brick* contemplated two possible exceptions to its rule but concluded that neither the "preexisting cost-plus contract" exception nor the "ownership or control" exception applied in this case. Pet. App. 13a, 24a-29a.

The court of appeals also concluded that the so-called "co-conspirator exception"—an additional exception created by some lower courts (including the Ninth Circuit)—did not apply. Pet. App. 14a. The court explained that the "co-conspirator exception"

applies when a plaintiff alleges that a seller and a middleman conspire to set the price the plaintiff pays—*e.g.*, where milk producers and distributors conspire to set the price at which the distributors sell milk to consumers. Pet. App. 13a-14a (discussing *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208 (9th Cir. 1984)). In such cases, the plaintiff's claim "d[oes] not depend on pass-on damages" because the "fixed" price is the price the plaintiff directly paid. Pet. App. 13a. The court of appeals agreed with Judge Breyer that "[w]hether one adopts a co-conspirator exception or regards this situation as outside *Illinois Brick*'s domain," *Illinois Brick* does not apply because "there is no tracing or apportionment to be done." Pet. App. 14a (citing 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 346h (3d ed. 2007)).

The court of appeals rejected petitioners' contention that the "co-conspirator exception" should be expanded to encompass their claim. It concluded that such an expansion would require courts to determine the amount (if any) of the allegedly fixed price that was passed on to petitioners, in contravention of this Court's instruction in *Illinois Brick* and *UtiliCorp*. Pet. App. 23a-24a & n.7.

In a footnote, the court of appeals observed that decisions in the Third and Seventh Circuits may suggest a more expansive "co-conspirator exception." *Ibid*. It noted, however, that the earliest of those decisions, *In re Sugar Industry Antitrust Litigation*, 579 F.2d 13 (3d Cir. 1978), "actually exemplifies" the ownership-or-control exception, an exception that

does not apply here. Pet. App. 23a-24a n.7, 26a-27a. The court of appeals further noted that, insofar as two decisions subsequent to *Sugar* may suggest an even broader exception, those decisions "contradict[ ] the Supreme Court's admonition 'not to "carve out exceptions to the [direct purchaser] rule for particular types of markets."'" Pet. App. 23a-24a n.7 (quoting *UtiliCorp*, 497 U.S. at 216 (quoting *Illinois Brick*, 431 U.S. at 744) (alteration in *UtiliCorp*)).

The court of appeals denied petitioners' petition for rehearing en banc. Pet. App. 54a.

REASONS THE PETITION SHOULD BE DENIED

A. There Is No Conflict Among The Courts Of Appeals

Petitioners wrongly contend that the Third and Seventh Circuits have adopted a broad co-conspirator exception that "'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*." Pet. 2 (quoting *Paper Systems*, 281 F.3d at 631-632) (emphasis added). None of the decisions cited by petitioners adopted such a rule. While petitioners make much of the Ninth Circuit's footnote suggesting these other circuits may have recognized a broader exception to *Illinois Brick*, no circuit has ever applied the novel and potentially far-reaching exception to *Illinois Brick* petitioners seek.

1. The Third Circuit has not adopted petitioners' expansive "co-conspirator exception"

Petitioners hinge their claim of a conflict with the Third Circuit solely on *Linerboard*. Pet. 18-19. But that decision has no application here. *Linerboard* applied the "ownership-or-control exception" to *Illinois Brick*—an exception petitioners acknowledge is inapplicable. Pet. 13 n.4.

Unlike the so-called "co-conspirator exception," the ownership-or-control exception is one of two narrow exceptions expressly contemplated by this Court in *Illinois Brick*. *Illinois Brick* suggested the direct purchaser rule may not apply in cases "where the direct purchaser is owned or controlled by its customer"—that is, where the customer owns or controls the entity that directly paid the fixed price. 431 U.S. at 736 n.16. Courts also have applied this exception where the direct purchaser is owned or controlled by the seller. *See, e.g.*, *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1121 (9th Cir. 2008). In either circumstance (and unlike here), there is no genuine pass-on issue because the plaintiff or its affiliate has paid the allegedly "fixed" price directly to the entity that sold at the "fixed" price or to its affiliate.

That is the exception applied by the Third Circuit in *Linerboard*. In *Linerboard*, the plaintiffs alleged that the defendants had engaged in price fixing of linerboard, which is an ingredient in corrugated

sheets and boxes. 305 F.3d at 148 n.1, 150-151. The plaintiffs had not purchased linerboard; rather, they purchased corrugated sheets and boxes containing linerboard. *Id.* at 159. The court held that the plaintiffs could pursue their claim because the defendants not only manufactured linerboard but also manufactured the corrugated sheets and boxes and sold them directly to the plaintiffs. *Id.* at 148 n.1 ("Appellants are major integrated manufacturers and sellers of linerboard, corrugated sheets and corrugated boxes."); *id.* at 159 ("plaintiffs purchased corrugated sheets or boxes directly from Appellants"). Because the linerboard manufacturers owned or controlled the entities from which the plaintiffs purchased, the plaintiffs were "direct purchasers" from the linerboard manufacturers. *Id.* at 159.

In so holding, the Third Circuit applied its earlier decision in *Sugar*, 579 F.2d 13. *See Linerboard*, 305 F.3d at 159-160 (agreeing with the plaintiffs that "the facts here come within the purview of our decision and rationale" in *Sugar*). In *Sugar*, the plaintiffs were purchasers of candy who alleged that companies that both refined sugar and made candy had conspired to increase the price of sugar. *Sugar*, 579 F.2d at 15-16. Relying on this Court's footnote in *Illinois Brick*, the Third Circuit held that a "suit could be maintained where a refiner, *or its subsidiary* used its sugar in manufacturing candy which it sold to the plaintiff." *Id.* at 19 (emphasis added).

The court of appeals' decision here does not conflict with these Third Circuit decisions. Indeed,

petitioners rightly claim no conflict with *Sugar*. As the court below recognized, *Sugar* was not a "co-conspirator exception" case: *Sugar* "actually exemplifies the exception allowed when an upstream violator controls or owns the direct purchaser." Pet. App. 23a-24a n.7. But *Linerboard* simply applied *Sugar*. To the extent that the Ninth Circuit's footnote misread *Linerboard* as something other than an application of the "ownership-or-control exception," *see* Pet. 21 (citing Pet. App. 23a-24a & n.7), the Third Circuit does not. *See Linerboard*, 305 F.3d at 159-160 (applying *Sugar*); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 968 n.22 (3d Cir. 1983) (describing *Sugar* as "holding that in certain circumstances, an indirect purchaser could sue when it had purchased goods from the subsidiary of an antitrust violator").

Accordingly, petitioners' claim would have fared no better in the Third Circuit. As the Ninth Circuit held, the ownership-or-control exception does not apply here, and petitioners expressly disclaim any challenge to that holding. Pet. 13 n.4 (citing Pet. App. 25a-29a).

2. The Seventh Circuit has not adopted petitioners' theory

Nor is there any conflict with the Seventh Circuit.

a. Petitioners primarily rely on *Paper Systems*. Pet. 16-18. But *Paper Systems* did not address the viability of a claim, like petitioners', that relies on a pass-on theory of injury. Instead, *Paper Systems*

answered a different question: whether a defendant may be jointly and severally liable for conspiring to fix a price paid directly by the plaintiffs to different defendants. *Paper Systems*, 281 F.3d at 632.

Paper Systems involved an alleged conspiracy among three trading houses and five paper manufacturers, including Nippon Paper, to fix the price at which fax paper was sold directly to U.S. customers. *Id.* at 631. Nippon Paper sold only to two direct purchasers, neither of which was a party in the suit. *Id.* at 632. Because the plaintiffs did not purchase fax paper directly from Nippon Paper, it was undisputed that "no damages [could] be awarded to the three plaintiffs (or any class member) on account of Nippon Paper's sales." *Ibid*.

The Seventh Circuit nonetheless held that Nippon Paper could not be dismissed from the suit outright because it could still be held jointly and severally liable for the other defendants' direct sales to the plaintiffs. *Ibid.* The Seventh Circuit explained that "[n]othing in *Illinois Brick* displaces the rule of joint and several liability, under which each member of a conspiracy is liable for all damages caused by the conspiracy's entire output." *Ibid.*

To be sure, while describing the plaintiffs' claims against the other defendants, *Paper Systems* stated that "[t]he first buyer from a conspirator is the right party to sue." *Id.* at 631. Petitioners read that to mean that a so-called co-conspirator exception applies

"regardless of whether the conspirators expressly set the price paid by the plaintiff." Pet. 2.

Neither the facts nor the reasoning of *Paper Systems* support petitioners' broad interpretation. As for the facts, the price allegedly fixed was the price that the *Paper Systems* plaintiffs *directly* paid—they just paid them to members of the conspiracy other than Nippon.[2] Thus (unlike here), the allegedly inflated price was not passed on to the *Paper Systems* plaintiffs. As for the Seventh Circuit's reasoning, it simply applied traditional principles of joint and several liability. Indeed, the Seventh Circuit expressly recognized that *Illinois Brick* bars pass-on claims because determining "[h]ow much of any overcharge is passed on" is "exquisitely hard to pin down. The Supreme Court concluded that the game is not worth the candle." *Paper Systems*, 281 F.3d at 633.

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[2] Plaintiffs bought fax paper directly from some manufacturers and from other manufacturers' trading houses. *Paper Systems*, 281 F.3d at 631. The plaintiffs alleged that the manufacturers and trading houses agreed to fix the price at which paper was sold directly to the plaintiffs. Complaint at ¶ 30, *Paper Sys. Inc. v. Mitsubishi Corp.*, No. 96-C-0959 (E.D. Wis. Aug. 21, 1996), 1996 WL 34289088 (defendants "directed their co-conspirator trading houses to implement price increases to fax paper customers in North America"); *see also United States v. Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173, 184 (D. Mass. 1999) (evidence showed "the employees of Japanese and American trading companies" were " 'ordered' to implement a price increase" by the manufacturers).

Thus, at most, *Paper Systems* stands for the proposition that direct purchasers can recover damages both from the original manufacturers and from middlemen who also participated in the conspiracy *to set the price the plaintiffs paid*, even if the plaintiffs did not purchase directly from all of the conspirators. That proposition is in harmony with the decision below.

b. Petitioners' passing reliance on other decisions from the Seventh Circuit is likewise misplaced. Pet. 17. Indeed, in *In re Brand Name Prescription Drugs Antitrust Litigation*, the Seventh Circuit distinguished claims alleging a conspiracy to pass on fixed prices to the plaintiffs (which are barred by *Illinois Brick*) from claims alleging a conspiracy to fix prices the plaintiffs directly paid (which are not barred). 123 F.3d 599 (7th Cir. 1997).

In *Brand Name Drugs*, the Seventh Circuit addressed a claim by retail pharmacies that drug manufacturers and wholesalers had conspired to inflate the prices at which prescription drugs were sold directly to the pharmacies. The Seventh Circuit observed that if the manufacturers conspired with the wholesalers to fix prices the pharmacies paid directly to the wholesalers, the pharmacies would be "direct purchasers" not barred by *Illinois Brick*. *Id.* at 604-605. On the other hand, the Seventh Circuit noted that a claim that the wholesalers passed on inflated prices to the pharmacies "is just the kind of complaint that *Illinois Brick* bars." *Id.* at 606.

That decision is fully in accord with the Ninth Circuit's decision here. Like *Brand Name Drugs*, the court below concluded that the "co-conspirator exception" applies "only when the conspiracy involves setting the price paid by the plaintiffs" and that *Illinois Brick* bars suits, like petitioners', alleging a conspiracy where "the theory of recovery depends on pass-on damages." Pet. App. 24a; *accord Dickson v. Microsoft Corp.*, 309 F.3d 193, 215 (4th Cir. 2002) (explaining that although *Illinois Brick* does not bar an action alleging a conspiracy "with respect to the price paid *by a consumer*" (emphasis added), it does bar pass-on claims, even where the direct purchaser is alleged to have conspired with the seller).[3]

In short, there is no circuit conflict. Petitioners seek a new and far-reaching exception to *Illinois Brick* that no appellate court has ever adopted.

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[3] The Eleventh Circuit decision petitioners cite is also in accord with the court of appeals' decision here. Pet. 19 n.5 (citing *Lowell v. American Cyanamid Co.*, 177 F.3d 1228 (11th Cir. 1999)). *Lowell* involved the alleged fixing of a retail price charged directly to the plaintiffs. 177 F.3d at 1229. Because there was no pass-on claim, the court there held that "*Illinois Brick* has no application." *Ibid.*

Nor did *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980), involve a pass-on claim. *Contra* Pet. 17. The Seventh Circuit held Fontana could pursue its claim because "Fontana does not seek damages for an illegal indirect overcharge passed on to it as is prohibited by *Illinois Brick*, but sues on the basis of a combination of acts allegedly causing competitive injury which destroyed its avionics business." *Fontana*, 617 F.2d at 481.

B. The Decision Below Is Correct

The court of appeals' decision is correct. *Illinois Brick* and *UtiliCorp* bar claims—like petitioners'—alleging that a "fixed" price was passed on to plaintiffs as part of a separate price. And they do not permit the expansive exception to that rule petitioners now seek.

1. *Illinois Brick* announced a strict rule that only purchasers who directly paid the allegedly fixed price can sue under Section 4 of the Clayton Act. 431 U.S. at 729. Plaintiffs claiming injury from fixed prices that were passed on to them as part of a separate price are categorically precluded from suing for damages. This Court reasoned that permitting pass-on claims would require courts to undertake the "nearly insuperable" task of determining how much of a "fixed price," if any, was passed on to the plaintiffs. *Id.* at 725 n.3; *see id.* at 741-746. The Court also expressly considered and rejected the argument—advanced by petitioners here, *see* Pet. 26-27—that pass-on theories should be permitted in factual circumstances where "these difficulties and uncertainties [are] less substantial." *Illinois Brick*, 431 U.S. at 743.

The court of appeals thus correctly concluded that where, as here, "the theory of recovery depends on pass-on damages," the plaintiffs "run into the *Illinois Brick* wall." Pet. App. 24a. Petitioners do not assert that respondents agreed to fix the level of the foreign ATM fees petitioners themselves pay, or even

that respondents agreed whether such fees would be charged at all. Pet. App. 6a, 19a. Under petitioners' theory, if foreign ATM fees are inflated, it is only by virtue of the cost of the allegedly "fixed" interchange fee purportedly being passed through to them as part of the foreign ATM fee. *See*, *e.g.*, Pet. 8. But such pass-on claims would mire courts in "[t]he intricacies of tracing the effect of [the alleged] overcharge on the [direct] purchaser's prices, costs, sales, and profits." *Illinois Brick*, 431 U.S. at 744. That is "the very complexity that *Hanover Shoe* and *Illinois Brick* sought to avoid." *UtiliCorp*, 497 U.S. at 210.

Petitioners turn a blind eye to the serious tracing and apportionment problems that would be created by their suit, asserting baldly that "there should be no concern about 'apportioning overcharges.'" Pet. 26. They argue that the interchange fee is a "floor" for the foreign ATM fee, and that the "overcharge," therefore, is the amount of the interchange fee. Pet. 24-26. But that argument simply assumes (contrary to the summary judgment record) that the interchange fee is always passed on in its entirety to the petitioners.

This Court has twice rejected the contention that plaintiffs alleging pass-on theories may make such an assumption. In *Illinois Brick*, the Court observed that even in industries where businesses "charge a fixed percentage above their costs," tracing and apportionment are required because "the extent of the markup" will vary depending on market conditions. 431 U.S. at 744. And in *UtiliCorp*, the Court

barred plaintiffs' pass-on claim even though regulation entitled a public utility to "pass on 100 percent" of the fixed price to the plaintiffs, observing that tracing and apportionment would still be required. 497 U.S. at 208-209.

Here, the quantum of petitioners' alleged damages depends on how much, if any, of the foreign ATM fee is actually attributable to the cost of the interchange fee. Making that determination would be exceedingly complex, given that foreign ATM fees vary from bank to bank and that many bank customers pay *no* foreign ATM fees.

Petitioners try to sweep aside this difficulty, asserting that the "prospect of calculating the overcharge is present in every cartel case and can be addressed through economic analysis." Pet. 26-27 (internal quotation marks omitted). They assert that the overcharge could be determined by "calculating 'the elasticities of supply and demand.'" *Id.* at 18 (quoting *Paper Systems*, 281 F.3d at 633). But *Illinois Brick* expressly rejected that argument as well. 431 U.S. at 731-732. The Court explained that "it is unrealistic to think that elasticity studies introduced by expert witnesses will resolve the pass-on issue." *Id.* at 742. The only way a court could determine whether and to what extent a foreign ATM fee includes a purportedly passed-on, inflated interchange fee would be to mire itself in precisely the analysis that *Illinois Brick* strictly forbids.

2. The court below correctly refused to create a broad exception to *Illinois Brick* for petitioners' claims. In *UtiliCorp*, this Court reaffirmed that *Illinois Brick* operates as an inflexible rule of general application. 497 U.S. at 210, 216-217. Recognizing that the "economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case," the Court nonetheless refused to endorse a case-by-case approach to determining whether some pass-on claims should be permitted. *Id.* at 217. It would be an "unwarranted and counterproductive exercise to litigate a series of exceptions" to *Illinois Brick*. *Ibid.*

Petitioners nevertheless ask this Court to create an expansive "co-conspirator exception" to permit pass-on claims whenever the plaintiff "purchases directly from members of a price-fixing conspiracy." Pet. 14. As the court below concluded, however, petitioners are not "direct purchasers" merely because they purchased "directly" from an alleged conspirator. Pet. App. 12a-13a. *Illinois Brick* is concerned with pass-on, not privity. 431 U.S. at 736. The rule asks whether the plaintiff is challenging a price he did not pay on a theory that the price was

passed on to him. Petitioners do not dispute that they are indirect purchasers in this sense, and calling themselves "direct purchasers" does not eliminate the tracing and apportionment problems inherent in their use of a pass-on theory.[4]

Nor are petitioners "direct purchasers" merely because they alleged that the cost of the interchange fee is a "part of" the foreign ATM fee. Pet. 24-25 & n.6. The decisions they cite to support this assertion do not involve pass-on theories or the application of the *Illinois Brick* rule. Indeed, petitioners' argument would vitiate that rule. Every pass-on plaintiff effectively alleges that the fixed price is "part of" the price it pays. And as the court of appeals recognized, "*Illinois Brick* rejected this argument when it rejected 'mark up' claims." Pet. App. 18a (citing 431 U.S. at 744). "Mark up" claims present the same concerns as other types of pass-on claims, and creating an exception for them "would substantially erode" the no-pass-on

[4] As the treatise cited by petitioners (Pet. 23) explains in discussing the scope of the "co-conspirator exception": "*Illinois Brick* does not limit suits by consumers against a manufacturer who illegally contracted with its dealers to set the latter's *resale* price." Phillip E. Areeda et al., Antitrust Law ¶ 346h (3d ed. 2007) (emphasis added). That is because the "consumer plaintiff is a direct purchaser from the dealer who, by hypothesis, has conspired illegally with the manufacturer *with respect to the very price paid by the consumer*." *Ibid.* (emphasis added). In the "co-conspirator" cases (unlike petitioners' allegations here), the allegedly "fixed" price had not been passed on to the plaintiff, and there was "no tracing or apportionment to be done." *Ibid.*

rule "without justification." *Illinois Brick*, 431 U.S. at 744.

Finally, petitioners' contention that the Court should adopt their broad exception because they are the only parties with an incentive to sue (Pet. 23-24) is belied by the record below and, in any event, invokes an argument this Court has already rejected. Contrary to petitioners' suggestion (Pet. 24), the vast majority of Star's members do not "profit" from higher interchange fees. Of the Star Network's "4,750 members, approximately 4,100 pay *more* in interchange fees than they take in"—including the bank respondents themselves. Pet. App. 44a (emphasis added). As the district court explained, the undisputed evidence (*contra* Pet. 9) demonstrated "a very realistic possibility that these entities (or some subset of them) would file suit to challenge the fixing of interchange fees at artificially high rates." *Id.* at 44a-45a.

But even if this were not the case, petitioners' assertion that the decision below would create "inappropriate immunity" for price-fixing conspiracies is incorrect. Pet. 22. *Illinois Brick* expressly recognized there will be some circumstances in which direct purchasers "may refrain from bringing a treble-damages suit." 431 U.S. at 746. Yet despite that risk, this Court concluded that "on balance," enforcement of the antitrust laws would be best served by strict application of the direct purchaser rule, even when the "rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations." *Ibid.*

In sum, the court of appeals correctly held that permitting petitioners' pass-on claim to proceed "would be contrary to the Supreme Court's direction not to carve out exceptions to the *Illinois Brick* rule." Pet. App. 17a.

C. Petitioners' Atypical Claim Presents A Poor Vehicle To Consider Whether To Create A New, Far-reaching Exception To *Illinois Brick*

1. The price-fixing conspiracy that petitioners allege is as counterintuitive as it is atypical. In a typical price-fixing conspiracy, the conspirators agree to raise the prices they charge others in order to increase their revenues. By contrast, petitioners' novel theory is that the bank respondents conspired to increase their own *costs* by inflating the level of interchange fees "*paid* to the ATM owners *by the banks*." Pet. 8 (emphasis added). Indeed, the record shows that the bank respondents are all substantial "net payers" of interchange fees. Pet. App. 35a; *see supra* pp. 10-11.

As the district court observed, "these data cast serious doubt on the central theory of Plaintiffs' case." Pet. App. 35a-36a n.4. It is "somewhat implausible that [the banks] would conspire to set the interchange fee at artificially high levels, in contravention to their financial interests." *Ibid.* "If anything, these entities would presumably conspire to ensure that interchange fees were set as low as possible." *Ibid.* Nor is there any reason for the Star Network to set

interchange fees above competitive levels. ATM networks compete to maximize their revenue by increasing the number of card issuers and ATM owners that participate in them. C.A. Supp. E.R. 159, 235. To be successful, ATM networks must "balance the divergent interests of these institutions" by "selecting an interchange fee that is sufficient to encourage broad deployment of ATMs without unduly discouraging participation by the card issuers" who pay the fee. C.A. Supp. E.R. 159. If Star or any other network sets interchange fees above competitive levels, it would lose transaction volume and members to other networks. C.A. Supp. E.R. 234.

Petitioners' theory is further belied by their assertion that the bank respondents are able to charge higher foreign ATM fees only because cardholders are unaware of them at the time of the transaction. Pet. App. 91a-92a. According to petitioners, cardholders are relatively insensitive to foreign ATM fees because the foreign ATM fee "is not displayed to the customer at the time he withdraws money; instead, it may appear on the customer's bank statement weeks later." Pet. 7.[5] But as the district court observed, if

[5] Contrary to petitioners' suggestion, the customer's bank statement is not the only time the customer is provided the amount of any foreign ATM fee. "Rather it is provided to consumers in information they receive when they open their account, in fee disclosures, and on their periodic statements when they incur the fee." GAO Report 7. The reason it does not appear on the ATM screen at the time of the transaction is that the fee is not charged by the ATM owner.

petitioners were correct that banks are able to charge foreign ATM fees without fear of customer backlash, then banks could charge the same foreign ATM fees regardless of how much the banks pay in interchange fees. Pet. App. 45a. That makes the notion that banks conspired to raise their interchange costs in order to pass them on via foreign ATM fees all the more unusual. It would make far more sense for banks to eliminate the cost of the interchange fees, while still charging the same foreign ATM fees to their customers.

2. This uncommon and counterintuitive claim presents a poor vehicle to consider whether to create a new exception to *Illinois Brick*. The analysis of pass-on claims is inherently complicated in the best of circumstances—which is precisely why this Court has maintained the strict *Illinois Brick* rule. *Illinois Brick*, 431 U.S. at 743-745; *UtiliCorp*, 497 U.S. at 216-217. Petitioners' claim presents the very concerns that informed this Court's decisions in *Illinois Brick* and *UtiliCorp*, as well as complexities and implausible assumptions not present in a run-of-the-mill case alleging a price-fixing conspiracy.

First, while petitioners claim that the bank respondents allegedly conspired to increase their own costs "for the purpose of raising foreign ATM fees" (Pet. 11) (emphasis omitted), it is undisputed that the bank respondents do not recover all of those costs through foreign ATM fees. It is uncontested that foreign ATM fees are set independently by banks in competition with each other. Pet. App. 3a, 6a. Some

banks do not charge foreign ATM fees at all. GAO Report 14. Other banks charge the fees only to certain customers. *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d at 1017; C.A. E.R. 690, 723, 972; C.A. Supp. E.R. 1-14, 249, 254, 258, 261, 266. And the fees, when charged, vary widely from bank to bank. C.A. Supp. E.R. 1-14 (petitioners' bank statements show Wells Fargo charged a foreign ATM fee of $1.50, while Bank of America charged $2.00). *See also* GAO Report 15 (foreign ATM fees ranged from $0.25 to $5.00 in 2012).

The fact that the fee through which the pass-on purportedly occurs (the foreign ATM fee) is not charged evenhandedly, and in some cases is not charged at all, would greatly complicate any pass-on analysis. Those facts mean that the bank respondents necessarily bear much of the cost of the allegedly inflated interchange fee, or recover it through other means (*e.g.*, general account charges or other fees), and do *not* pass it on in its entirety through a foreign ATM fee. Any court adjudicating petitioners' claim thus would have to undertake a factual analysis to determine how much, if any, of those payments the bank respondents actually recovered from petitioners through the alleged pass-on. Indeed, petitioners acknowledged the need for such an inquiry when they submitted the declaration of an economist purporting to analyze how much the bank respondents would benefit if interchange fees were higher, given consumer price sensitivities, the interplay between

foreign ATM fees and other fees, and other factors. C.A. E.R. 991-997.

Second, any pass-on analysis would be even more complicated here because this case involves the alleged pass-through of a purely financial cost, which may be recovered through numerous means. ATM cards are just one of many related services that banks provide their customers, and the interchange fee is just one of many financial costs a bank incurs in providing this bundle of services. There is no reason to assume that the cost of interchange is necessarily passed on to customers through the foreign ATM fee; the bank could recover this cost through other account fees or minimum balance requirements. *See* C.A. Supp. E.R. 173.

The concerns underlying this Court's decision in *Illinois Brick* are exacerbated in this context. It is far more difficult to trace whether a financial cost has been passed on through a particular fee. And there is a greater potential for duplicative recoveries, as different plaintiffs may allege that the cost was passed on in part to them through different or additional fees those plaintiffs pay. Even were this Court inclined to consider at some point whether to create a new, expansive exception to *Illinois Brick*'s strict rule, this case presents a poor vehicle for doing so.

3. Finally, this case presents no issue worthy of this Court's review. Petitioners' assertion that such claims will multiply because "savvy" conspirators will simply "agree on the price of an upstream input

rather than the end-product itself" (Pet. 15) ignores commercial reality. Petitioners fail to explain why direct purchasers of an upstream input would agree to increase their own costs for that input when, as here, there would be no assurance of passing on those higher costs. And even if banks could pass on those costs, petitioners cannot explain why the banks would bother to inflate their own interchange costs merely to recover those costs through foreign ATM fees. There is nothing "savvy" about direct purchasers entering into a conspiracy to pay tens of millions of dollars more in costs than necessary, as petitioners allege the bank respondents did here. Petitioners also cannot explain why non-conspiring middlemen—who also would pay higher prices to the conspiring sellers—would allow the conspiracy to go unchallenged. If anything, petitioners' argument, if accepted, would create an incentive for indirect purchasers to seek to circumvent *Illinois Brick* through the simple expedient of alleging that direct purchasers are "co-conspirators" with their sellers. *Dickson*, 309 F.3d at 215.

There is no indication that the distinctive scenario here recurs with any frequency. But even were it true, as petitioners assert, that this "issue keeps arising in the district courts" (Pet. 28), this Court will have the opportunity to consider the issue in the context of a more typical case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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