No. 08-16478

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: DYNAMIC RANDOM ACCESS MEMORY (DRAM) ANTITRUST LITIGATION

PETRO COMPUTER SYSTEMS, INC., ET AL.

Plaintiffs-Appellants,

v.

MICRON TECHNOLOGY, INC., ET AL.

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California, No. M:02-cv-01486-PJH

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

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INTEREST OF *AMICUS CURIAE*

All parties have consented to the filing of this brief.[1] The American Antitrust Institute ("AAI") is an independent nonprofit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. The Advisory Board of AAI, which serves in a consultative capacity, consists of over 90 prominent antitrust lawyers, law professors, economists, and business leaders. For a description of AAI's activities and personnel, see http://www.antitrustinstitute.org. AAI frequently appears as *amicus curiae* in important antitrust cases including, most recently, arguing before the United States Supreme Court in *Pacific Bell Tel. Co. v. linkLine Communications, Inc.*, 129 S. Ct. 617 (2008). AAI's Board of Directors has approved the filing of this brief[2] not only because the district court's ruling below adversely affects consumers in this matter, but also because it threatens

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[1] Hynix, on behalf of all defendants, has indicated it does not oppose the filing; plaintiffs, through co-lead counsel, have also consented.

[2] The AAI is managed by its Board of Directors, which alone has authorized this filing. The individual views of members of the Advisory Board may differ from the positions taken by AAI. Certain members of the Advisory Board are counsel for appellants in this matter. However, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

seriously to undermine the compensation and deterrence objectives of state antitrust laws across the country.

SUMMARY OF ARGUMENT

The district court in this multidistrict litigation held that consumers who purchased products, such as computers, in which DRAM is a component, lack standing to seek damages under California's Cartwright Act and 14 other state antitrust statutes that provide a cause of action for indirect purchasers. The court reasoned that standing doctrine required plaintiffs to be "participants in the same market" as the price fixers (i.e., DRAM), and that merely purchasing end products containing DRAM did not satisfy this requirement. For those states without express precedent to the contrary, the court effectively adopted a blanket rule that no indirect purchaser of a product containing a price-fixed component has standing – a rule that it derived from a crabbed reading of Ninth Circuit standing precedent under the Clayton Act, rather than an analysis of the state laws at issue.

The court's rule risks undermining state indirect-purchaser litigation as a means of compensating the victims of price fixing or monopolistic abuses and of deterring cartels, because price fixing very often involves the fixing of prices of products or services used as components in other products, and the primary victims of such price-fixing conspiracies are usually

the final consumers. *See, e.g.,* Herbert Hovenkamp, *The Antitrust Enterprise* 307 (2005) ("Typically, the final consumer is the one most seriously injured by cartel or monopoly prices, while retailers and other intermediaries have relatively minor injuries caused by lost volume of sales.").[3] Indeed, much of the successful indirect-purchaser litigation in the years since states adopted laws "repealing" *Illinois Brick*, *see Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), has involved monopolized or price-fixed components. *See, e.g.,* Appellants' Opening Brief at 24 n.9 (listing California settlements). To deny standing to indirect purchasers of such components is inconsistent with the main object of the antitrust laws in general, and state *Illinois Brick* repealer laws in particular, which is to "preserve competition for the benefit of consumers." *American Ad Mgmt., Inc. v. General Tel. Co. of California*, 190 F.3d 1051, 1055 (9th Cir. 1999).

Moreover, the distinction between indirect purchasers who buy end products containing price-fixed components (such as computers containing DRAM), and those who buy "complete" end products at retail whose whole-

[3] The growing recognition of the importance of indirect-purchaser litigation is reflected in the report of the Antitrust Modernization Commission, which recommended that Congress abolish the *Illinois Brick* rule. *See* Antitrust Modernization Commission, *Report and Recommendations* 265-83 (2007) (*AMC Report*), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. It is noteworthy that the illustrative example of an indirect-purchaser claim discussed by the AMC involves price-fixed products that are incorporated into other products. *See id.* at 265.

sale prices have been fixed (for example, coffee beans), is a distinction that lacks any difference for policy purposes. A price-fixed component may be a substantial factor in the ultimate price paid by consumers, and the price-fixing overcharge may be only a step or two removed from the retail transaction, as alleged here. On the other hand, the price-fixed wholesale price of a "complete" product may be only a small fraction of the ultimate price paid by consumers, and the distribution of the product may involve several layers of distributors, jobbers, dealers, or other resellers. Indeed, there is no meaningful economic difference between a price-fixed component that an intermediary combines with other physical components, and a price-fixed "complete" product that intermediaries combine with services, such as transportation, packaging, storage, marketing, and retail shelf space.

An analysis of the context in which *Illinois Brick* repealers (such as the 1978 amendment to the Cartwright Act) were enacted demonstrates that these statutes provide for standing of indirect purchasers who purchase end products that contain components subject to price-fixing agreements, where plaintiffs allege that the price of the end product has been inflated as result of price fixing of the component. The Clayton Act standing factors articulated in *Associated General Contractors of Calif., Inc. v. Carpenters*, 459 U.S. 519 (1983) ("*AGC"*), including, in particular, the "same market" gloss

that the district court believed to be required by this courts' precedents, simply do not apply to such claims because those factors have been resolved in favor of standing by the state legislatures in their indirect-purchaser statutes. At a minimum, federal courts should not read limitations derived from federal law into state indirect-purchaser statutes "in the absence of a clear directive from those states' legislatures or highest courts." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1123 (N.D. Cal. 2008); *accord In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1097 (N.D. Cal. 2007); *D.R. Ward Constr. Co. v. Rohm & Haas Co.*, 470 F. Supp. 2d 485, 496 (E.D. Pa. 2006).

ARGUMENT

I. FEDERALISM PRINCIPLES COUNSEL AGAINST READING FEDERAL ANTITRUST POLICY PREFERENCES INTO STATE *ILLINOIS BRICK* REPEALERS.

For seventy years the jurisprudence of federalism has required that federal judges apply state substantive law in diversity actions just as state courts would do so. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The premise of *Erie* was that in diversity actions federal courts could not resolve state law claims in accordance with their own notions of what the law should be. That would violate the Constitution. Instead, when federal courts interpret state substantive law they must defer to the policy decisions of state

lawmakers. *See* Jack H. Friedenthal et al., *Civil Procedure* § 4.6, at 235 (4th ed. 2005) ("[D]istrict judges must shun the temptations of prematurely anticipating changes in state law, choosing principles they would prefer to apply rather than those actually used by state judges.").

The Class Action Fairness Act of 2005 ("CAFA") has put a great strain on this settled doctrine, particularly in antitrust cases, because the federal courts are accustomed to developing a common law for federal antitrust actions based on policy concerns. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Illinois Brick,* 431 U.S. 720. However, CAFA merely expanded federal court diversity jurisdiction; it did not change state substantive law. Federal courts must resist the urge to refashion state antitrust law in the image of federal antitrust common law. In particular, many states, including California, have explicitly decided to permit indirect purchasers to recover damages under state antitrust laws, *see California v. ARC America Corp.*, 490 U.S. 93, 103 (1989), even though federal courts for policy reasons generally limit damages actions to direct purchasers, *see Illinois Brick*, 431 U.S. at 746.

Antitrust standing is a matter of state substantive law, *see In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1026 (N.D. Cal. 2007); *D.R. Ward,* 470 F. Supp. 2d at 494-95, and, as a result,

depends on state legislative intent, *see Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 n.13 (1982) ("It bears affirming that in identifying the limits of an explicit statutory remedy, legislative intent is the controlling consideration."). State lawmakers have parted ways with the federal courts in a host of ways to ensure that state indirect-purchaser actions (including class actions) are viable and that indirect purchasers may obtain compensation under state antitrust laws. *See, e.g., Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224, 1232-33 (1993) (standing is broader under California antitrust law than federal antitrust law); *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.,* 191 Cal. App. 3d 1341, 1355 (1987) (interpreting certification requirements flexibly to allow for indirect-purchaser class and ensure effective enforcement of indirect purchasers' rights under California antitrust law); *see also Knevelbaard Dairies v. Kraft Foods, Inc*., 232 F.3d 979, 987 (9th Cir. 2000) (standing under California antitrust law is broader than under federal antitrust law); *D.R. Ward*, 470 F. Supp. 2d at 496-502 (standing is broader under various state indirect-purchaser statutes than under federal antitrust law).

Federal courts hearing state indirect-purchaser actions under CAFA must respect those decisions of state lawmakers. For federal courts to revise state antitrust law to accommodate the policy concerns of federal antitrust

law, and to create new obstacles to state indirect-purchaser actions, would take us back seventy years to the period before *Erie*, when federal courts usurped the powers of state courts in the name of "'a transcendental body of law'" that federal judges believed they had some special ability to discern. *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). Only great restraint by federal judges can prevent this violation of our constitutional commitment to federalism. As Judge Alsup recently stated in response to arguments similar to those made by defendants in this case,

> Standing under each state's antitrust statute is a matter of that state's law. It would be wrong for a district judge, in *ipse dixit* style, to bypass all state legislatures and all state appellate courts and to pronounce a blanket and nationwide revision of all state antitrust laws. The rule urged by the defense may (or may not) be sound policy but that is a matter for the state policy makers to decide, not for a federal judge to impose by fiat.

In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d at 1026.

Similarly, Judge Davis has noted that failing to follow the treatment of standing under the relevant state antitrust statutes

> carries the potential to disrupt the governmental power equilibrium upon which the federal system operates; the federal judiciary would be entitled to disregard the intent of the state legislature, as reflected in the literal language of the state antitrust statute, by applying federal, judicially-fashioned principles of practicality, now detached from their federal statutory moor-

> ings, to determine whether a particular plaintiff is a "worthy" or "proper" candidate to sue under state law in a diversity action.

D.R. Ward, 470 F. Supp. 2d at 495.

II. *ILLINOIS BRICK* REPEALERS WERE ADOPTED IN A CONTEXT THAT INDICATES THEY WERE INTENDED TO PROVIDE STANDING TO CONSUMERS THAT PURCHASE PRODUCTS CONTAINING PRICE-FIXED COMPONENTS.

Illinois Brick "repealers" must be interpreted in light of the *Illinois Brick* case to which they were a response. *Illinois Brick* was a price-fixing case against the manufacturers of concrete block, which was a component in buildings purchased by plaintiffs. As the Supreme Court explained:

> [Defendants] sell the block primarily to masonry contractors, who submit bids to general contractors for the masonry portions of construction projects. The general contractors in turn submit bids for these projects to customers such as the [plaintiffs] in this case, the State of Illinois and 700 local governmental entities in the Greater Chicago area, including counties, municipalities, housing authorities, and school districts. . . . [Plaintiffs] are thus indirect purchasers of concrete block, which passes through two separate levels in the chain of distribution before reaching [plaintiffs]. The block is purchased directly from [defendants] by masonry contractors and used by them to build masonry structures; those structures are incorporated into entire buildings by general contractors and sold to [plaintiffs].

431 U.S. at 726; *see also Illinois v. Ampress Brick Co.,* 67 F.R.D. 461, 463 (N.D. Ill. 1975) ("What these plaintiffs purchased were buildings: a package of goods and services of which concrete block was one component part."). The plaintiffs alleged that the prices they paid for the structures were in-

flated by the concrete block price-fixing conspiracy, as the masonry contractors passed on the concrete overcharges to the general contractors who in turn passed on the overcharges to the plaintiffs. 431 U.S. at 727.

The defendants had contended that plaintiffs, as indirect purchasers, were precluded from bringing suit under *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), which barred the defensive use of "pass on" arguments principally because of the evidentiary complexities and uncertainties of proving pass on. *See* 431 U.S. at 731-32 (noting that the "principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and out-put decisions 'in the real economic world rather than an economist's hypothetical model,' … and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." (quoting *Hanover Shoe*)).

The district court held that *Hanover Shoe* did not categorically preclude indirect purchasers from bringing suit. *Ampress Brick,* 67 F.R.D. at 466. However, the court nonetheless granted defendants' motion for partial summary judgment on the ground that plaintiffs lacked standing because, as ultimate consumers, they obtained a finished product from a middleman that altered or added to the goods received from the manufacturer. *Id.* at 468

("This Court therefore holds that, as to *ultimate* consumers, their injuries are too remote and consequential to provide legal standing to sue against the alleged antitrust violator."). The district court noted that indirect purchasers who acquired goods in the same condition as originally made and sold by the manufacturer, in contrast, were often granted standing. *Id.* at 466-67. The Seventh Circuit reversed. *Illinois v. Ampress Brick Co.*, 536 F.2d 1163 (7th Cir. 1976). The court agreed that *Hanover Shoe* did not categorically bar indirect-purchaser suits, but found no basis to deny standing to plaintiffs where they alleged an injury in fact within the target area of the Sherman and Clayton Acts. *Id.* at 1167. The fact that plaintiffs purchased buildings of which concrete block was merely a component part was not a bar to standing.

The Supreme Court, reversing the Seventh Circuit, held that the policy articulated in *Hanover Shoe* of avoiding the evidentiary difficulty and complexity of proving pass on, as well as other policy considerations,[4] barred

[4] The Court was concerned that apportioning damages among all potential victims would not only unduly complicate already complicated antitrust actions, but would undermine the effectiveness of the treble damages remedy by fracturing recoveries and thereby undercutting incentives to sue. *See Illinois Brick,* 431 U.S. at 746. The Court also expressed concern with the risk of multiple liability insofar as *Hanover Shoe* was not overruled and direct purchasers would still be permitted full recovery of the overcharge. *Id*. at 730-31.

indirect purchasers from bringing suit. In an oft-quoted paragraph, the Court stated:

> Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge – from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

431 U.S. at 737. The Court recognized that its decision cut against the policy of the antitrust laws to compensate victims of antitrust violations. *Id.* at 746 ("It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations."). But the Court concluded:

> In view of the considerations supporting the *Hanover Shoe* rule, we are unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages among all "those within the defendant's chain of distribution," especially because we question the extent to which such an attempt would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery in litigation over pass-on issues. Many of the indirect purchasers barred from asserting pass-on claims under the *Hanover Shoe* rule have such a small stake in the lawsuit that even if they were to recover as part of a class, only a small fraction would be likely to come forward to collect their damages. And given the difficulty of ascertaining the amount absorbed by any particular indirect purchaser, there

> is little basis for believing that the amount of the recovery would reflect the actual injury suffered.

Id. at 746-47 (citation and footnote omitted).

In a dissenting opinion joined by two other justices, Justice Brennan emphasized that the Court's decision undercut the compensatory objective of the treble damage remedy, which was "conceived primarily as a remedy for the people of the United States as individuals, especially for consumers." *Id.* at 754 (internal quotes omitted). Justice Brennan acknowledged that "the necessity of tracing a cost increase through several levels of a chain of distribution 'would often require additional long and complicated proceedings involving massive evidence and complicated theories[,]'" *id.* at 758 (quoting *Hanover Shoe*), but concluded that this difficulty was no different in kind from other complicated damages issues in antitrust cases, *id.* at 758-59. Importantly, Justice Brennan acknowledged the potential difficulty of tracing the incidence of an overcharge when the price-fixed product is a component of another product, but concluded that this was no bar to recovery, stating:

> *Nor should the fact that the price-fixed product in this case (the concrete block) was combined with another product (the buildings) before resale operate as an absolute bar to recovery.* It may well be true as the State claims, that the cost of the block was included separately in the project bids and therefore can be factored out from the price of the building with relative certainty. In any case, this is a factual matter to be determined based on the strength of the plaintiff's evidence. Admittedly, there will be many cases in which the plaintiff will

> be unable to prove that the overcharge was passed on. In others, the portion of the overcharge passed on may be only approximately determinable. But again, this problem hardly distinguishes this case from other antitrust cases.

Id. at 759 (emphasis added; citation and footnote omitted).

Justice Brennan conceded, "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable. Courts have therefore developed various tests of antitrust 'standing,' not unlike the concept of proximate cause in tort law, to define that point." *Id.* at 760 (citation omitted). Yet, like the court of appeals, Justice Brennan thought that the plaintiffs did have standing: "*But if the broad language of § 4 means anything, surely it must render the defendant liable to those within the defendant's chain of distribution.*" *Id.* at 761 (emphasis added). Justice Brennan cited several lower court decisions that had allowed standing for indirect purchasers of price-fixed components, including *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), where this court concluded that indirect purchasers of liquid asphalt used in construction projects had standing because they were "within the area of the economy which [defendants] reasonably could have or did foresee would be endangered by the breakdown of competitive conditions." *Id.* at 199.

It is against this background that state *Illinois Brick* repealers must be construed. In providing a cause of action for indirect purchasers, the legisla-

tures adopting these statutes have weighed the policy considerations differently from the Supreme Court, placing a higher value on the compensation objective and a lower concern with evidentiary complexity, as did Justice Brennan. Indeed, the California Supreme Court has noted that "California's 1978 amendment to section 16750 in effect incorporates into the Cartwright Act the view of the dissenting opinion in *Illinois Brick* … that indirect purchasers are persons 'injured' by illegal overcharges passed on to them in the chain of distribution." *Union Carbide Corp. v. Superior Court,* 36 Cal. 3d 15, 20 (1984); *see id.* at 21-22 ("The 1978 amendment ... implies legislative endorsement of those dissenting views, as applied to the Cartwright Act, and a mandate to avoid unnecessary procedural barriers to indirect purchasers' prosecution of California antitrust suits."). The most natural reading of the history of *Illinois Brick* repealers is that these "express state statutory provisions giving [indirect] purchasers a damages cause of action," *ARC America*, 490 U.S. at 100, provide standing to indirect purchasers who, like the plaintiffs in *Illinois Brick*, purchase products containing price-fixed components. (Indeed, *ARC America*, which held that the federal antitrust laws did not preempt state laws allowing indirect-purchaser suits, was also a component case, similar to *Illinois Brick*.)[5] At a minimum, such statutes should be so

[5] The price-fixed product (cement) was a component in projects or structures

construed absent some clear indication from the state legislatures or binding state authority to the contrary, which is absent here. Indeed, basic principles of statutory construction counsel against reading exceptions into an express statutory cause of action unless necessary to avoid frustrating the purposes of the statute.[6]

III. *ASSOCIATED GENERAL CONTRACTORS* IS NOT AN APPROPRIATE FRAMEWORK FOR ASSESSING STANDING UNDER STATE REPEALER STATUTES.

The Court in *Illinois Brick* did not technically rely on standing doctrine to bar indirect-purchaser suits, but rather concluded that indirect purchasers were not "injured" for purposes of § 4. *See* 431 U.S. at 728-29 n.7 (observing "that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4"). Thus, it is argued that state statutes repealing *Illinois Brick* should not be construed automatically to grant stand-

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built for plaintiff state governmental entities. *See In re Cement & Concrete Antitrust Litig.*, 437 F. Supp. 750, 751 (J.P.M.L. 1977).

[6] Reading *Illinois Brick* repealers to bar indirect purchasers from recovering for price-fixed components would also be anomalous insofar as those statutes have "repealed" *Hanover Shoe* as well as *Illinois Brick*, and permit defendants to reduce their damages to direct purchasers of components by showing that such purchasers passed on some or all of the overcharge to their finished-product customers. *See, e.g., Clayworth v. Pfizer, Inc.*, 85 Cal. Rptr. 3d 694 (Cal. 2008) (granting review to decision upholding pass-on defense under Cartwright Act).

ing to indirect purchasers, but merely to eliminate a categorical bar. And, indeed, state courts do recognize standing limitations on indirect-purchaser suits. *See, e.g., Lorix v. Crompton Corp.*, 736 N.W.2d 619, 630-31 (Minn. 2007) ("In spite of the apparently limitless language of [the Minnesota anti-trust statute], however, there are injuries so remotely related to antitrust violations that courts simply cannot provide relief.").

However, whatever the standing limitations on indirect-purchaser suits may be under state law, it is inappropriate to derive those limitations from the *AGC* test for standing under the Clayton Act. The reason is simple: *AGC* essentially applies the same considerations that underlay the *Illinois Brick* rule, which were obviously rejected by the repealer states.[7] As the Minnesota Supreme Court recently noted in refusing to apply *AGC* to indirect-purchaser claims under Minnesota law, "*AGC* was informed by *Illinois Brick* and repeated, as antitrust standing guidelines, *Illinois Brick's* reservations about indirect purchaser suits." *Lorix*, 736 N.W.2d at 629 (noting that *AGC* refers to "same concerns" that guided *Illinois Brick*).[8] Thus, the court

[7] The *AGC* factors are usually summarized as follows: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages." *American Ad Mgmt.,* 190 F.3d at 1054.

[8] *See also* Phillip Areeda et al., *Antitrust Analysis* 66 (6th ed. 2004) (reasoning of *AGC* is "generally parallel to that invoked in *Illinois Brick* to deny

concluded, "We do not believe that the legislature repudiated *Illinois Brick* and invited indirect purchaser suits only for courts to dismiss those suits on the pleadings based on the very concerns that motivated *Illinois Brick*." *Id.; see id.* at 626 (noting that the "desire for harmony between federal and state antitrust law relates more to prohibited conduct than to who can bring a law-suit"); *see also In re TFT-LCD (Flat Panel) Antitrust Litig.,* 586 F. Supp. 2d at 1123 ("[I]t is inappropriate to broadly apply the *AGC* test to plaintiffs' claims under the repealer states' laws in the absence of a clear directive from those states' legislatures or highest courts."); *D.R. Ward,* 470 F. Supp. 2d at 496 (holding that *AGC* is not appropriate framework for analyzing standing under Tennessee, Arizona, and Vermont antitrust statutes); *Moniz v. Bayer Corp.*, 484 F. Supp. 2d 228, 231 (D. Mass. 2007) (holding that *AGC* test did not apply to standing of indirect purchasers under Massachusetts law); *In re Intel Corp. Microprocessor Antitrust Litig.,* 496 F. Supp. 2d 404, 410 (D. Del. 2007) (*AGC* factors other than antitrust injury and speculativeness of injury "carry less weight in the standing analysis in jurisdictions rejecting *Illinois Brick*"); *Teague v. Bayer AG*, 671 S.E.2d 550, 557 (N.C. App. Ct.

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standing to indirect consumers"); Roger D. Blair & Jeffrey L. Harrison, *Re-examining the Role of* Illinois Brick *in Modern Antitrust Standing Analysi*s, 68 Geo. Wash. L. Rev. 1, 17 (1999) ("it is hard not to see the policies of *Illinois Brick* throughout *AGC*"). The one *AGC* factor that is not part of the rationale for the *Illinois Brick* rule is the antitrust injury requirement, which cuts *in favor* of indirect-purchaser standing. *See infra*.

2009) ("[T]he *AGC* factors do not apply in determining which indirect purchasers have standing to sue under the North Carolina antitrust statutes.").

IV. CONSUMERS WHO PAY INFLATED PRICES FOR PRODUCTS CONTAINING PRICE-FIXED COMPONENTS HAVE SUFFERED ANTITRUST INJURY.

In its ruling on the second amended complaint, the district court largely retreated from its earlier analysis of the *AGC* factors, and concluded that all but one factor – antitrust injury – actually militated *in favor* of standing. The requirement of antitrust injury is indeed "a *sine qua non* for standing" under § 4 of the Clayton Act, Herbert Hovenkamp, *Federal Antitrust Policy* 616 (3d ed. 2005), and its basic precepts presumably apply to state antitrust laws as well, since the doctrine is essentially an application of the proximate or "legal" cause doctrine cause in torts, *see McCready*, 457 U.S. at 477 & n.13 (1982); *AGC,* 459 U.S. at 535-36. However, only by ignoring the basic function of the antitrust injury doctrine in favor of irrelevant dicta in certain Ninth Circuit precedents could the district court have reached the conclusion that the inflated prices allegedly incurred by the plaintiffs did not constitute antitrust injury.

The antitrust injury doctrine requires a private plaintiff to prove that its alleged "injury is of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*

Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). Like the doctrine of proximate cause, it ensures that injuries caused by an antitrust violation that are essentially fortuitous and not within the intended scope of the antitrust statute or rule are not compensable. *See* Dan B. Dobbs, *The Law of Torts* 446 (2000) (judgments about proximate cause "attempt to limit liability to the reasons for imposing liability in the first place"); *Lorix*, 736 N.W.2d at 628 ("Minnesota courts should analyze an alleged injury's relation to the goals of antitrust law"). The antitrust injury doctrine makes sure the injury to the plaintiff is not remote from the *purpose* of the statute; remoteness from the violation in time or space may be relevant to other standing considerations. *See supra* note 7; Ronald W. Davis, *Standing on Shaky Grounds: The Strangely Elusive Doctrine of Antitrust Injury*, 70 Antitrust L.J. 697 (2003) (showing that antitrust injury doctrine has often been misunderstood and misused by the lower courts).

The injury suffered by consumers as a result of price fixing, whether of "complete" products or components, is clearly of the type the antitrust laws were designed to prevent and flows from that which makes price fixing unlawful. *See Illinois Brick*, 431 U.S. at 749 ("[I]n many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of

distribution." (Brennan, J., dissenting)). Indeed, the majority in *Illinois Brick* never suggested otherwise. *See id.* at 746 (noting that § 4 was also designed to compensate victims of antitrust violations, citing *Brunswick*); *cf. McCready*, 457 U.S. at 482-83 ("an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress").

Ignoring the purpose of the state indirect-purchaser statutes, the district court relied on Ninth Circuit cases stating that there can be no antitrust injury unless "the injured party [is] a participant in the same market as the alleged malefactors." *E.g., American Ad Mgmt.,* 190 F.3d at 1057 (internal quotes omitted). The "same market" requirement was first stated "as a corollary" to the "requirement that the alleged injury be related to anti-competitive behavior." *Bhan v. NME Hosps., Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985).[9] But it hardly follows that the injury suffered by plaintiffs in a

[9] *Bhan* cited *AGC* to support its "same market" requirement. However, while the Supreme Court in *AGC* noted that "the Union was neither a consumer nor a competitor in the market in which trade was restrained," 459 U.S. at 539, the essential point was that the "Union's labor-market interests seem to predominate" and the injury to those interests was not of the type that the antitrust statute was intended to forestall, *id.* at 540. *Bhan* also cited *Ostrofe v. H.S. Crocker Co.,* 740 F.2d 739, 744 (9th Cir. 1984), a case in which the court *found* standing even though the plaintiff (a terminated employee) was not a participant in the same market as the conspirators, and *Haff v. Jewelmont Corp.*, 594 F. Supp. 1468 (N.D. Cal. 1984), a Robinson-Patman Act case in which the plaintiff lacked standing because "he was not

market "different" from the wrongdoers is not of the type that the antitrust laws were intended to prevent, particularly when the plaintiffs are *consumers*, who "have always been antitrust's preferred plaintiffs." Hovenkamp, *Federal Antitrust Policy* at 617. The importance of this latter point cannot be overstated.

Indeed, even in cases that do not involve consumers – for example, where competitors combine to boycott a rival's customers or suppliers in order to discourage them from doing business with the rival – courts have had no trouble granting standing to the victims of the boycott who are in markets wholly unrelated to the wrongdoers'. *See, e.g., McCready*, 457 U.S. at 484 n.21 (noting that "[i]f a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions").

Regardless of whether the "same market" requirement is appropriate under the Clayton Act, it is plainly inapposite to *Illinois Brick* repealers whose premise is that consumers in retail markets can recover from manufacturers in different (i.e., wholesale) markets. *See Lorix*, 736 N.W.2d at 629 (rejecting market-participant requirement, noting that it "does not follow

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injured 'by reason of' that which made defendants' actions unlawful," *id.* at 1477-78 (citing *Brunswick*, 429 U.S. at 489).

from" antitrust injury doctrine in *Brunswick* "that Minnesota antitrust law provides a remedy only to participants in the immediately restrained market, and *Brunswick* itself mentioned no such restriction"); *D.R. Ward*, 470 F. Supp. 2d at 502-03 ("There is no indication that [Arizona, Virginia and Tennessee antitrust statutes] were enacted to provide remedies to certain types of indirect purchasers, such as those who participate in the immediate market subject to the price-fixing conspiracy, but not to other categories of indirect purchasers which function at a lower level in the distribution chain, such as end consumers who purchase products containing an ingredient subject to the price-fixing conspiracy."); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d at 1124 (finding that plaintiffs who purchased electronic products containing price-fixed components have sufficiently established standing under numerous state *Illinois Brick* repealers, even if they are not participants in the relevant market, "because they have alleged the kind of injury that the antitrust laws were designed to address, namely that they were overcharged for products containing TFT-LCD panels as a result of defendants' horizontal price-fixing agreement"); *Teague*, 671 S.E.2d at 558 ("If Plaintiff can demonstrate that the increased [component] prices affected the price of the goods he purchased, then he will have established the type of in-

jury to indirect purchasers that the General Assembly intended to remedy by allowing indirect purchaser suits.").[10]

V. POLICY CONSIDERATIONS DO NOT SUPPORT THE DISTRICT COURT'S RULE.

The district court justified its rule barring standing for indirect purchasers of price-fixed components on policy grounds that do not withstand scrutiny. In fact, the district court's rule undermines effective antitrust policy. The court opined that interpreting the "market participation" requirement to allow standing to purchasers of price-fixed components "runs the risk of opening the floodgates to potential litigation." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp. 2d 1129, 1141 (N.D. Cal. 2008). The court said,

> In today's current business climate, and with increasingly globalized markets, nearly all markets that service one another can be said to be "related" to such a degree that the impact of one upon another could allegedly be "proven" with the use of econometrics. If such is the standard for market participation, it is difficult to imagine a scenario in which any two markets would not serve as the platform for a lawsuit similar to the in-

[10] Assuming, *arguendo*, that the "same market" requirement applied to indirect-purchaser statutes, there would be no linguistic or policy rationale to fail to treat indirect purchasers of end products containing price-fixed components as participating in the component market, particularly where, as here, the component is alleged to be a significant part of the end product. *See In re TFT-LCD (Flat Panel) Antitrust Litig.,* 586 F. Supp. 2d at 1123 (accepting allegation that "the indirect purchaser plaintiffs 'have participated in the market for LCD panels through their purchases of products containing such panels'").

> stant one in the event of anticompetitive conduct, regardless whether the ultimately injured plaintiffs themselves have tenuous ties with the alleged malefactors and even the allegedly restrained market itself.

Id.

On its face, the logic of closing the courthouse door to consumers whom the court has found are not remote from the price-fixing violation because consumers in other cases could be too remote, is not obvious. Courts are not only well-equipped to decide standing on a case-by-case basis; basic standing principles require it. *See, e.g., Vinci v. Waste Mgmt., Inc.*, 80 F.3d 1372, 1375 (9th Cir. 1996) (*AGC* factors "should be considered on a case-by-case basis"). To be sure, consumers who purchase products containing price-fixed components, like consumers who purchase price-fixed finished products, may not be able to prove their damages, or they may fail adequately to account for other factors that may have inflated consumer prices.[11] But these are issues of fact that should be decided at trial, or summary judg-

[11] Commentators have recognized that the difficulties of proof emphasized by the majority in *Illinois Brick* were overstated. As Professor Hovenkamp notes, "while apportioning passed-on damages is very difficult, the methodologies that we use for assessing overcharge damages rarely require apportioning. Indirect purchaser damages are typically estimated by comparing the price that the indirect purchaser paid before or after the violation (the 'before and after' method) or the price that similarly situated purchasers in a different market paid (the 'yardstick' method). Neither methodology typically requires apportioning." Hovenkamp, *Antitrust Enterprise* at 306-07.

ment if there is no genuine issue of disputed fact; they are not grounds for dismissing an adequately pleaded complaint. As Justice Brennan noted, "there will be many cases in which the plaintiff will be unable to prove that the overcharge was passed on," but "this is a factual matter to be determined based on the strength of the plaintiff's evidence." *Illinois Brick*, 431 U.S. at 759 (Brennan J., dissenting); *see also Knevelbaard Dairies*, 232 F.3d at 989 ("disputed claims of causation and injury cannot be decided on a Rule 12(b)(6) motion"); *Lorix*, 736 N.W.2d at 635 ("If [plaintiff's] claims are purely speculative or unmanageably complex, they will be barred at the summary judgment stage.").

Rather than avoiding the risk of opening the floodgates to litigation, the court's ruling risks increasing the tide of corporate price fixing. A significant share of the economy is devoted to producing intermediate goods that are incorporated or used in the production of other goods.[12] If damages caused to consumers by price fixing of such intermediate goods is not recoverable, then a significant share of the harm from cartels will go unremedied. Indeed, most of the largest price-fixing cases brought by the U.S. Depart-

[12] According to the latest available census figures, manufacturers spent about $1.8 trillion on parts, components and raw materials used in the production of manufactured goods in 2002, which accounted for almost half of the value of all manufacturing output. *See* U.S. Census Bureau*, 2002 Economic Census, Manufacturing, Subject Series* 1, 37, App. A-3 (Oct. 2005), *available at* http://www.census.gov/prod/ec02/ec0231sg1.pdf.

ment of Justice in recent years involved goods used as inputs into other goods, including vitamins, LCD panels, DRAM, graphite electrodes, lysine and citric acid, and rubber. *See* U.S. Dept. of Justice, Antitrust Division, *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More* (Dec. 16, 2008), http://www.usdoj.gov/atr/public/criminal/240596.htm.[13]

The issue is not simply about compensating the real victims of cartels; it also implicates the antitrust laws' deterrence objectives. Any gap in the recovery available to indirect purchasers undermines deterrence because direct purchasers are often reluctant to sue their suppliers. As Justice Brennan observed, "in many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers, acting as middlemen, and ordinarily reluctant to sue their suppliers pass on the bulk of their increased costs to consumers farther along the chain of distribution." *Illinois Brick*, 431 U.S. at 764; *see also AMC Report* at 273 (noting that "indirect purchasers can bring actions in circumstances in which direct purchasers choose not to sue, for example, to avoid injuring business relationships with suppliers").

[13] A comprehensive study of international cartels shows that cartels selling industrial intermediate goods accounted for almost 75% of all cartel sales in North America. *See* John M. Connor & C. Gustav Helmers, *Statistics on Modern Private International Cartels, 1990-2005* 17 (2007), http://ssrn.com/abstract=944039.

Indeed, even if direct purchasers sue under federal law, "indirect purchaser suits can provide additional deterrence by increasing the liability faced by violators," *id.*, which is important in light of the fact that direct purchasers rarely, if ever, recover actual treble damages under the Sherman Act. *See* Robert E. Lande, *Are Antitrust "Treble" Damages Really Single Damages?* 54 Ohio St. L.J. 115 (1993) (explaining that because the Sherman Act does not provide for recovery of prejudgment interest and other factors, "treble damages" provide for recovery of no more than the actual harm caused); *AMC Report* at 274 ("no one identified an instance of unfair or multiple recovery").

The current regime of federal and state antitrust remedies already provides insufficient deterrence to price fixers, as the steady stream of price-fixing cartels prosecuted by the Justice Department and other countries attests. *See The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President* 42-43, 229-30 (Albert A. Foer ed., 2008), *available at* http://www.antitrustinstitute.org/archives/transitionreport.ashx. Further eroding that deterrence by substantially narrowing the scope of state indirect-purchaser laws would be unwise public policy. Accordingly, insofar as policy is relevant to the interpretation

of the state laws at issue, it militates against the district court's rule barring standing for purchasers of price-fixed components.

CONCLUSION

Given the context in which they were enacted, *Illinois Brick* repealers should be presumed to provide standing of indirect purchasers who purchase end products (such as computers) that contain components (such as DRAM) subject to price-fixing agreements where, as here, plaintiffs adequately alleged that the price of the end product was inflated as result of price fixing of the component. Any other conclusion, absent clear state authority to the contrary, would conflict with the purpose of *Illinois Brick* repealers and threaten to undermine indirect-purchaser litigation as an important tool in combatting and remedying price-fixing and monopolistic conduct.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

Pursuant to Fed. R. App. P. 29(d) and Ninth Circuit Rule R. 32-1, this amicus brief is proportionally spaced, has a type of face of 14 points or more and contains 7000 words or less.

s/ Richard M. Brunell

Dated: March 5, 2008

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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