No. 25-3854

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK BIEDERMAN, et al.,

Plaintiffs-Appellants

v.

FCA US LLC, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for
the Northern District of California
The Honorable Jacqueline Scott Corley, Case No. 23-cv-06640-JSC

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. Founded in 1977, WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF often appears as an amicus curiae in key cases construing the scope of civil liability under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. *See, e.g., RJR Nabisco Inc. v. European Cmty*., 579 U.S. 325 (2016); *Bridge v. Phoenix Bond & Indem. Co*., 553 U.S. 639 (2008).

WLF also regularly participates in appeals from important antitrust disputes, to urge strict adherence to the direct purchaser rule. *See, e.g., Apple v. Pepper*, 587 U.S. 273 (2019); *Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co.*, 29 F.4th 337 (7th Cir. 2022). That venerable rule, first set out in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 734 (1977), avoids complicated (and duplicative) damages calculations and more efficiently enforces federal antitrust law.

Because civil RICO was modeled on the Clayton Act's private enforcement mechanism, indirect purchasers also lack standing as civil-RICO plaintiffs. WLF is concerned that allowing the plaintiffs' civil-RICO damages claim to proceed here would undercut the core policy justifications for barring indirect purchaser suits.

[1] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of WLF's brief.

That result would make RICO litigation even more complex and uncertain, with more filings, more arguments among experts, and even longer times until resolution.

SUMMARY OF ARGUMENT

Congress modeled the civil remedy provision of RICO after the civil-action provision of Section 4 of the Clayton Act. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006).Limits on antitrust standing therefore should apply in the RICO context. All circuits to have considered this question have come to the same conclusion. *See, e.g., Fenner v. Gen. Motors, LLC*, 113 F.4th 585, 604 (6th Cir. 2024); *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 844 (3d Cir. 1996); *Carter v. Berger*, 777 F.2d 1173, 1175 (7th Cir. 1985). The District Court's decision in this case is in line with these decisions.

While *Illinois Brick's* rationale "will not apply with equal force in all cases," the Supreme Court has directed lower courts to apply it uniformly. *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216 (1990). Policy justifications are therefore secondary to text and precedent. But pragmatic and policy reasons also support maintaining the direct purchaser rule in the RICO context. The rule recognizes that the alternative to full direct purchaser recovery is an amorphous chain of causation in which the list of potential plaintiffs would be endless. Litigation with multiple levels of purchasers would only benefit secondary plaintiffs and experts who could

get paid for impossibly complex opinions about the butterfly effects of wrongful conduct.

All the reasons that antitrust standing is limited to those directly injured apply with special force here, where there are many intermediaries and potential causes between the remotely positioned plaintiffs and the defendants' alleged acts. As the District Court rightfully found, this litigation would harm effective RICO enforcement by subjecting defendants to duplicative damages and decreasing the incentive for direct purchaser plaintiffs to sue. That decision should be affirmed.

ARGUMENT

I. Text and Precedent Dictate That *Illinois Brick* Applies to RICO.

There is no question that RICO's civil remedy provision mirrors the federal antitrust remedy provisions in Section 4 of the Clayton Act. *Anza*, 547 U.S. at 457. A proper RICO plaintiff is "[a]ny person injured in his business or property by reason of" a RICO violation. 18 U.S.C. § 1964(c). A proper antitrust plaintiff is "any person who shall be injured in his business or property by reason of" an antitrust violation. 15 U.S.C. § 15(a). The District Court agreed that "RICO's civil enforcement provision, 18 U.S.C. § 1964(c) is nearly identical to that of the Clayton Act. And, the Supreme Court has noted that Congress modeled RICO's enforcement provision on the Clayton Act's Section 4." (ER-199).

The Supreme Court has determined that Section 4 of the Clayton Act does not allow indirect purchasers to sue. Because RICO contains the same language, *Illinois Brick*'s limit on standing applies to RICO actions. The District Court came to this straightforward conclusion: "the identical language present in RICO and the Clayton Act must be interpreted the same, and therefore, indirect purchasers may not sue." (ER-200).

That decision follows considerable precedent reaching the same conclusion. *See Fenner*, 113 F.4th at 604 ("The indirect-purchaser rule was initially developed in the anti-trust realm but applies to civil RICO claims with equal force."); *McCarthy*, 80 F.3d at 855 ("The precepts taught by *Illinois Brick* and *Utilicorp* apply to RICO claims, thereby denying RICO standing to indirect victims."); *Carter*, 777 F.2d at 1175-76 ("These [direct-purchaser] principles should apply to RICO cases, not the least because the damages provision in § 1964(c) is practically verbatim the damages provision in the antitrust laws."); *Humana v. Indivior, Inc*., No. 21-2573 and 21-2574, 2022 WL 17718342, at *3 (3d Cir. Dec. 15, 2022) ; *see also Mendoza v. Zirkle Fruit Co.,* 301 F.3d 1163, 1169 (9th Cir. 2002) (noting that indirect plaintiffs lack statutory standing under RICO); (ER-199-200) (citing above authorities); *Humana Inc. v. Teva Pharms. USA, Inc.*, No. 6:21-cv-72-CEM-DCI, 2025 WL 143068, *3 (M.D. Fla. Apr. 28, 2025) ("The two provisions at issue here serve the same purpose—they are civil remedy provisions—and the civil RICO

provision was expressly modeled after the Clayton Act provision. Thus, absent a compelling reason to deviate from the interpretation given to the same language in the Clayton Act—which does not exist here—the Court will not do so."); *Butler Auto Recycling v. Honda Motor Co. (In re Takata Airbag Prods. Liab. Litig.)*, 524 F. Supp. 3d 1266, 1285 (S.D. Fla. 2021) ("It logically follows that limits the Supreme Court has placed on anti-trust standing, namely the direct purchaser rule, would apply in the RICO context as well."); *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 546 F. Supp. 3d 1216, 1225 (S.D. Fla. 2021) ("Because the Supreme Court's message in *Holmes* was clear, the Court is persuaded to join the prevailing view that the indirect purchaser rule applies to RICO claims.")

Text and precedent support applying *Illinois Brick* to RICO without regard to any policy considerations. *Apple*, 587 U.S. at 285 ("As we said in *UtiliCorp*, however, the bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* 'apply with equal force' in every individual case.") (quoting *UtiliCorp*, 497 U.S. at 216). But the policy benefits of limiting recovery to direct purchasers remain clear. *Illinois Brick* has promoted proper enforcement of the antitrust laws for decades; there certainly is no lack of enthusiasm for private antitrust actions today. In contrast, there is no model for effective, multi-level recovery regimes. Abandoning *Illinois Brick* would have at best uncertain effects on RICO litigation and enforcement.

II. The Direct Purchaser Rule Promotes Efficient Litigation.

The direct purchaser rule is a neutral, bright-line rule that promotes proper enforcement and deterrence. The long history of the rule in the antitrust context is instructive. The Sherman Act, like RICO, has broad language and generous remedies. The sparse language of Section 1 declares "every contract" that is "in restraint of trade" to be illegal, and Section 2 is likewise brief, targeting persons who "monopolize" trade. 15 U.S.C. §§ 1-2. The antitrust laws also allow treble damages and recovery of costs. 15 U.S.C. § 15.

But the Supreme Court has also provided clear rules for antitrust cases. Courts and litigants know the proper bounds of litigation. For example, the Supreme Court clarified that the broad bar on "every contract, combination, or conspiracy in restraint of trade" only prohibits restraints that are unreasonable, otherwise almost every business transaction could be illegal. *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 51 (1911).

The Supreme Court also decided that not all ripples of damage from an antitrust violation should be recoverable. In *Illinois Brick*, the Supreme Court held that the Clayton Act did not provide remedies for all levels of injury. Plaintiffs—the state of Illinois and other government purchasers—claimed to have overpaid for buildings because those buildings included price-fixed concrete blocks. Plaintiffs were indirect purchasers. The issue was whether both indirect purchasers should be

able to recover. The Court decided that indirect purchasers could not recover, even though they might have suffered injury.

The Court applied this rule because it had a clear sense of the realities of litigation. It recognized that allowing multiple levels of recovery "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." *Illinois Brick*, 431 U.S. at 737. It anticipated that plaintiffs at different levels of a distribution chain might assert "conflicting claims to the same fund." *Id*. at 737. The argument in response was that the litigation process could manage these disputes. The Supreme Court disagreed, siding with experience instead: "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." *Id.*

The Court did not believe the rule would discourage robust antitrust enforcement. Rather, it was a rule needed to incentivize it. *Illinois Brick* encourages enforcement of the antitrust laws by providing clear rules incentivizing direct purchaser litigation. *Carter,* 777 F.2d at 1176-77 ("Both *Hanover Shoe* and *Illinois Brick* stressed the increased deterrence that is produced by granting the full recovery to a single person. The person with the best opportunity to uncover a violation is the

one directly injured; he has access to the essential facts that may be concealed from others.") (internal citations omitted). The Supreme Court has justified the direct purchaser rule by invoking "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws." 431 U.S. at 745. Preferencing direct purchasers promotes litigation at that level, while protecting defendants from double payments and the parties from inefficient litigation.

The Supreme Court recently confirmed the wisdom of the direct purchaser rule in a case about purchasing apps on the iPhone. The Court emphasized the continuing viability of three *Illinois Brick* rationales: "(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants." *Apple,* 587 U.S. at 286. The Court applied this rule even though some amici argued that *Illinois Brick* should be overruled so that damages could be allocated between multiple levels of harmed plaintiffs. *Id.* at 298 (Gorsuch, J. dissenting).

III. Civil RICO Requires Litigation Efficiency.

The policy arguments for the rule remain strong: preventing unnecessarily complex litigation benefits all parties, whether in antitrust or RICO cases. Plaintiffs have argued that there is some difference between antitrust and RICO cases, justifying a different rule. This is wrong. The advantages of promoting efficient litigation apply in both contexts.

The District Court rightly rejected the idea that some antitrust specific concern about "market efficiency" was at the root of the direct purchaser rule. The District Court instead said that concerns about "judicial economy," equally applicable outside of antitrust cases, justified limiting recovery to direct purchasers only. "Even so, this difference in rationale does not implicate the indirect purchaser rule, which is not driven by 'market efficiency' concerns. Rather, the rule exists to preserve judicial economy by preventing conflicting claims from direct and indirect purchasers, which 'not only burdens the courts but also undermines the effectiveness of treble-damages suits.'" (ER-201) (citing *Assoc. Gen'l Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 545 (1983)).

Every federal court of appeals to consider the issue agrees that concerns for judicial economy justify applying *Illinois Brick* to civil RICO actions. The Seventh Circuit explained that direct purchaser recovers all, while the indirect purchaser recovers nothing, is an "approach [that] prevails throughout the law." *Carter*, 777 F.2d at 1175. Contrary to Plaintiffs' assertion that the direct purchaser rule undermines enforcement, the Seventh Circuit concluded that a clear, no-exceptions rule promotes antitrust and RICO enforcement. *Id.* at 1175-76. The Third Circuit in *McCarthy* also saw no daylight between RICO and antitrust, noting that "all of the policy concerns expressed in *Illinois Brick* are implicated in the present case." *McCarthy*, 80 F.3d at 851. The Sixth Circuit, after noting that policy concerns should

not even matter, warned of the danger of courts wasting time developing complex exceptions to a clear rule. *Fenner*, 113 F.4th at 604 ("The bright-line rule applies, and we will not engage in an unwarranted and counterproductive exercise to litigate a series of exceptions.") (internal quotations omitted, quoting *Apple*, 587 U.S. at 285 and *UtiliCorp,* 497 U.S. at 217).

Stopping litigation based on attenuated connections to the wrongful act is particularly important in the RICO context. Congress created RICO as a tool to fight organized crime, but most civil RICO suits have nothing to do with that original purpose. Unlike in the criminal setting, there is no prosecutorial discretion to deter overly aggressive civil RICO theories. Just the opposite: RICO is particularly attractive because it allows for treble damages and full recovery of costs, including fees, to prevailing plaintiffs.

Many courts have noted the unique problems posed by RICO. *Sedima, S.P.R.L. v. Imex Co., Inc*., 473 U.S. 479, 504 (1985) (Marshall, J., dissenting); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991) (describing RICO as "the litigation equivalent of a thermonuclear device."); *US Airline Pilots Ass'n v. Awappa, LLC*, 615 F.3d 312, 317 (4th Cir. 2010).

Allowing added layers of recovery could increase the volume of RICO litigation, without promoting enforcement and deterrence. Again, the direct-purchaser rule avoids complex and speculative damages evidence. *Illinois Brick*, 431

U.S. at 731-32. The current system incentives direct purchasers and their counsel to bring claims for full recovery. Adding another layer (or layers) of lawyers and claimants will not promote deterrence. *Carter*, 777 F.2d at 1176-77 ("The class action and the entrepreneurial lawyer may be the best possible solution to some legal problems, but here the assignment of all claims to a single entity is a superior solution.") Allowing indirect purchasers to share in recovery would allow for pass-on inquiries that will "greatly complicate and reduce the effectiveness of already protracted treble damages proceedings." *Illinois Brick*, 431 U.S. at 731-32. Unsurprisingly, in states that allow them, indirect purchaser suits have been "problematic and disruptive in both federal and state courts." Edward D. Cavanagh, Illinois Brick: *A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 49 (2004).

Plaintiffs (and amici supporting plaintiffs) argue that not allowing indirect-purchaser enforcement will harm end-user consumers and allow RICO loopholes. These types of arguments have been made for years in the antitrust context. Since *Illinois Brick*, there have been many efforts to scrap or alter the direct purchaser rule. *See, e.g.,* Antitrust Modernization Commission, Report and Recommendations (2007), https://perma.cc/55R6-7HAC. None have succeeded, yet private antitrust enforcement remains robust. The direct purchaser rule remains in force but there is more antitrust activity than there has been in decades; *see also* Cavanagh, 17 Loy.

Consumer L. Rev. at 48-49 ("Robust enforcement activities by direct purchasers in the past decade belie any contention that Illinois Brick has had a negative impact on deterrence.")

Yes, there is always a possibility that, in some instances, the direct purchaser might not have the incentive to sue. But again, experience with state antitrust law has shown that "in virtually every instance in which indirect purchasers have sued, direct purchasers, who have the right to sue for the full overcharge under current law, have sued as well." William H. Page, *Class Interpleader: The Antitrust Modernization Commission's Recommendation to Overrule Illinois Brick*, 53 Antitrust Bull. 725, 735-36 (2008). "Even in the Microsoft litigation, where most direct purchasers, mainly computer manufacturers, were exclusively dependent on Microsoft for the supply of an essential input," those direct purchasers with plausible claims of antitrust injury against Microsoft pursued them. *Id*. at 736. Beyond that, there is no known mechanism for forcing disparate groups of plaintiffs—never mind plaintiffs' lawyers—to agree on anything, let alone on abandoning claims to avoid duplicative recoveries that drain judicial resources. In the aggregate, the general rule of allowing only direct purchaser enforcement encourages RICO suits and deters violations.

Plaintiffs' amici argue that there should be some different rule for an intermediary between the antitrust violator and the consumer. But there is nothing

special about RICO claims in this regard. Many antitrust cases involve the sale of a price-fixed good through multiple levels of distribution—televisions, laptops, batteries, auto parts. Plaintiffs' suggestion that RICO cases are more likely to involve consumer products simply makes no sense. *Illinois Brick* itself detailed how antitrust cases could involve competing claims from direct purchasers and consumers, explaining that allowing pass-on theories would create fights between "all potential plaintiffs that could have absorbed part of the overcharge – from direct purchasers to middlemen to *ultimate consumers*." *Illinois Brick*, 431 U.S. at 737 (emphasis added). In an *Illinois Brick* construction scenario, those injured by overpriced construction materials could include subcontractors who purchased from the manufacturers, general contractors who purchased from the subcontractors, building owners who purchased from the general contractors, businesses that paid rent to those owners, and consumers who purchased goods from those businesses.

Plaintiffs here propose that this Court adopt an untested scheme allowing for flexible standing rules, forcing courts to sort out these rules case by case. Amici contend that the "RICO statute empowers private parties to litigate claims based on a wide array of violative predicate acts. No single answer to the who-can-sue question can meet those needs, and the real-world circumstances of the industry, claim, and setting must inform the proximate cause analysis." (Dkt. 17.1 at 14). This is an admission that Plaintiffs want bespoke standing rules for every potential

plaintiff up and down the chain in a buyer-seller relationship. And Plaintiffs also want separate rules for separate industries, arguing here that there is something special about automobiles.

Yet if one wanted to impose a rule that served as a lawsuit-generating machine, an unending source of billable hours for lawyers, one could hardly do better than to scrap the direct purchaser rule in civil RICO cases. The Court should instead follow the reasoning of the Supreme Court: a single answer to the who-can-sue question promotes efficiency and proper private enforcement.

CONCLUSION

The judgment should be affirmed.

October 10, 2025

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
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