No. 14-1122

IN THE

Supreme Court of the United States

MOTOROLA MOBILITY LLC,

Petitioner,

v.

AU OPTRONICS CORP., ET AL.,

Respondents.

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

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute (AAI) is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* www.antitrustinstitute.org.[1]

The AAI submits this brief in support of certiorari on the first question presented, namely whether a foreign cartel's delivery of price-fixed goods overseas for incorporation into finished products imported directly to the United States is immune from private damage suit under U.S. antitrust laws. Where, as here, the price fixing has a direct, substantial, and reasonably foreseeable effect on American consumers and businesses, there is no reason under the Foreign Trade Antitrust Improvements Act (FTAIA) or other-

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[1] The AAI notified counsel of record for all parties of its intent to file this brief at least 10 days prior to the filing. The written consents of all parties have been lodged with the Clerk. No counsel for a party has 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. No person or entity other than amicus curiae has made a monetary contribution to its preparation or submission. The AAI's Board of Directors alone has approved this filing for the AAI. Individual views of board members or members of the Advisory Board may differ from the AAI's positions. One of the attorneys representing petitioner, Kenneth Adams, is a member of the AAI's Advisory Board. He played no role in the directors' deliberations or the drafting of this brief.

wise to create such an exemption. On the contrary, doing so would significantly undermine the enforcement of federal antitrust law—"a central safeguard for the Nation's free market structures"—which "is 'as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.'" *N. C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1109 (2015) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).

INTRODUCTION AND SUMMARY OF ARGUMENT

In the last 25 years, international price-fixing conspiracies have cost consumers around the globe more than $1 trillion. *See* John M. Connor, *The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-2013*, at 23 (Aug. 9, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478271. This case arises out of one of the more significant of those cartels, namely the conspiracy by Asian manufacturers to inflate the price of liquid crystal display (LCD) panels used as screens in consumer electronics products such as televisions, computers, and cell phones sold by U.S. companies like Motorola, Apple, Dell, and Hewlett-Packard. The Justice Department prosecuted the cartel, obtained guilty pleas and criminal convictions from many of the respondents in this case, and imposed fines of more than $1.3 billion on the malefactors.

The harm to the U.S. economy was substantial. The price-fixing conspiracy affected well over $23.5 billion in sales of LCD panels imported into the

United States (as "raw" panels or as components of finished products), and enabled the conspirators to impose overcharges of more than $2 billion on those imports. *United States v. Hui Hsiung*, 778 F.3d 738, 759 (9th Cir. 2015), petition for cert. filed (U.S. March 16, 2015) (No. 14-1121); *United States v. AU Optronics Corp.*, 2012 WL 2120452, *4 (N.D. Cal. June 11, 2012).

Petitioner, Motorola Mobility LLC ("Motorola"), sought recovery under the Sherman Act for the overcharges it or its wholly owned foreign subsidiaries paid to the respondents. As relevant here, the court of appeals affirmed the dismissal of Motorola's claims with respect to LCD panels sold to Motorola's subsidiaries abroad for incorporation into cell phones imported into the United States by Motorola. Although the Seventh Circuit assumed that the price-fixing conspiracy as to such panels had "a direct, substantial, and reasonably foreseeable effect" on domestic commerce, it held that dismissal under the FTAIA was required because the price fixing did not "involv[e] . . . import trade or import commerce," and the effect on domestic commerce did not "give[] rise to a claim" under the Sherman Act. 15 U.S.C. § 6a; *see* Pet. App. 5a-7a.

Certiorari is warranted for three reasons. First, the question whether, as the Seventh Circuit held, a foreign cartel should be exempt from Sherman Act damages when it delivers price-fixed goods abroad for incorporation into finished products imported directly to the United States is of exceptional importance to American consumers and businesses. Government enforcement alone has never provided adequate deterrence against antitrust violations. And scholars

have documented that international cartels harming the U.S. economy are insufficiently deterred—by a large margin—under *existing* sanctions imposed by government and private enforcement combined. Creating an exemption from private damages for companies operating in what is a typical global supply-chain structure would diminish levels of deterrence that, empirically, demand expansion. Indeed, the court of appeals itself recognized the ubiquitous nature of component price fixing abroad and the substantial resulting harm to the U.S. economy.

Second, certiorari should be granted to resolve the conflict in the circuits over the scope of the import-commerce exclusion. The Seventh Circuit's narrow reading of the exclusion—to require that the defendant be the actual importer—is inconsistent with decisions of the Third and Ninth Circuits, as well as the language and intent of the FTAIA.

Third, certiorari should be granted to correct the illogical extension of this Court's reading of the FTAIA's "gives rise to a claim" requirement. In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), this Court held that foreign purchasers of priced-fixed products consumed abroad could not bring claims under the Sherman Act, even though the price-fixing conspiracy adversely affected U.S. commerce, because the effect on the foreign purchasers was entirely independent of the effect on U.S. commerce. In those circumstances, this Court read the FTAIA's requirement that the effect on domestic commerce "gives rise to a claim" under the Sherman Act *as if* the language read "gives rise to the plaintiff's claim" or "the claim at issue." However, the Seventh Circuit erred in applying the Court's inter-

pretative gloss to the situation here in which the domestic harm is proximately caused by, or depends upon, the foreign injury.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO AMERICAN CONSUMERS AND BUSINESSES

1. The Seventh Circuit's decision exempts foreign cartels from Sherman Act damages for fixing prices on products intended for the U.S. market as long as those products are initially sold abroad before they are imported into the United States as components of finished products. This is true regardless of whether the direct purchaser of the price-fixed product is a U.S. company or a foreign subsidiary of a U.S. corporation. And it is true notwithstanding that the price fixing has a direct, substantial, and reasonably foreseeable effect on American import commerce and consumers.

In this case, while Motorola's foreign subsidiaries paid higher prices on price-fixed LCD panels purchased abroad, the Seventh Circuit recognized that "the price of cellphones that incorporated them" would likely be higher for its American customers. Pet. App. 7a; *see Hui Hsiung*, 778 F.3d at 759 ("It was well understood that substantial numbers of finished products were destined for the United States and that the practical upshot of the conspiracy would be and was increased prices to customers in the United States."); *see also* Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 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."). Indeed, American consumers are the *only* consumers who would feel the effects of the price fixing of the LCD panels incorporated into their cell phones.

Nonetheless, the court of appeals made clear that the *Illinois Brick* rule, which ordinarily bars indirect purchasers from recovery, would prevent Motorola (the parent) or its American customers from seeking damages. Pet. App. 12a, 15a-16a. In *Illinois Brick*, this Court reasoned that "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws" was best served "by concentrating the full recovery for the overcharge in the direct purchasers." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735, 745 (1977). Otherwise, there was a risk that "those who violate the antitrust laws by price fixing . . . would retain the fruits of their illegality because no one was available who would bring suit against them." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968).

But the Seventh Circuit turned *Illinois Brick* on its head, holding that direct purchasers like Motorola's foreign subsidiaries *also* could not bring a Sherman Act suit because, under the FTAIA, the price fixing did not "involv[e] . . . import trade or import commerce" and the effect on U.S. import commerce and consumers did not "give[] rise to a claim" under the Sherman Act. 15 U.S.C. § 6a. The result is that "it is possible that no one could recover damages under the federal antitrust laws despite the tremendous harm in the United States threatened by off-

shore component price fixing." U.S. Ct. App. Br. 23 (Sep. 5, 2014).[2]

2. Precluding recovery by *both* indirect and direct purchasers when price-fixed imported products are first sold abroad is no small lacuna in the antitrust laws. For example, the vast bulk of the tens of billions of dollars of panels involved in the LCD price-fixing conspiracy prosecuted by the government were first sold abroad before they were imported into the United States as parts of finished consumer electronics products. *See Hui Hsiung,* 778 F.3d at 743, 759.

The court of appeals recognized that "[n]othing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers," and that as a result of weak foreign antitrust laws, "the prices of many products exported to the United States doubtless are elevated to some extent by price fixing or other anticompetitive acts." Pet. App. 17a-18a. But rather than see this harm to American businesses and consumers as a reason for full application of Sherman Act treble damages liability, the court viewed the widespread harm as justification for creating a blanket antitrust exemption for imports that are first sold abroad.

American consumers will be the losers. International cartels are a scourge of American commerce. The Justice Department "has prosecuted international cartels affecting billions of dollars in U.S.

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[2] As petitioner notes, the United States argued below that insofar as the FTAIA bars direct purchasers from suit, there should be an exception to *Illinois Brick* for the first indirect purchaser in affected U.S. commerce.

commerce" in numerous sectors of the world economy, cartels "cost[ing] U.S. businesses and consumers billions of dollars annually." Scott D. Hammond, Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program 17 (March 26, 2008), http://www.justice.gov/atr/public/speeches/232716.pdf. The U.S. antitrust laws, including the FTAIA, were specifically designed to deter this kind of injury to the American economy. H.R. Rep. No. 97-686, at 13 (1982) ("Any major activities of an international cartel would likely have the requisite impact on United States commerce.").

To be sure, the Seventh Circuit's decision does not call into question the ability of the Justice Department to continue to prosecute international cartels that first deliver their products abroad. Pet. App. 24a. However, government enforcement alone plainly cannot provide adequate deterrence. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators."); Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. Rev. 315, 317 ("quantitative analysis of the facts demonstrates that private antitrust enforcement probably deters more anticompetitive conduct than the DOJ's anti-cartel program"); *cf. POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2239 (2014) ("Allowing [private]

Lanham Act suits takes advantage of synergies among multiple methods of regulation.").[3]

Effective deterrence requires penalties that exceed ill-gotten profits, adjusted for the likelihood of getting caught. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427, 429 (2012). An exhaustive survey of cartel detection literature shows that, conservatively, detection rates are at most 25-30%, meaning price-fixing cartelists have about a 75% chance of getting away with their crimes. *Id*. at 462-65. Accordingly, the ratio of a cartel's total economic penalties for getting caught relative to the amount of monopoly profits it can extract from American consumers (the "penalty-to-harm ratio") must exceed 400% to adequately deter international cartels that would otherwise prey on Americans. *See* Connor, *Private Recoveries,* at 16.

The collective efforts of the Justice Department and private attorneys general have not come close to achieving this level of deterrence. Combining fines and payments resulting from both government and private cases, the penalty-to-harm ratio for international cartels affecting the United States does not even reach 100% on average. *Id*. at 15. In other words, typically it is *net profitable* for international cartels to illicitly appropriate wealth from U.S. con-

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[3] Notably, many successful private cases against global cartels are not cases that merely "follow on" government prosecutions. *See* John M. Connor, *Private Recoveries in International Cartel Cases Worldwide: What do the Data Show?* 11 (Am. Antitrust Inst., Working Paper No. 12-03, Oct. 15, 2012), http://www.antitrustinstitute.org/sites/default/files/WorkingPaperNo12-03.pdf.

sumers, even if they are caught. And the situation has been getting worse, not better. From 2000-2010, as compared to 1990-1999, the penalty-to-harm ratio for international cartels has significantly *declined*. *Id*. Predictably, international cartels are proliferating. Over the last 16 years, 116 of the 123 antitrust cases yielding DOJ corporate fines of $10 million or more involved international cartels, the bulk of which produced component goods incorporated into other goods. *See* U.S. Dep't of Justice, Antitrust Div., Sherman Act Violations Yielding a Corporate Fine of $10 Million or More (March 11, 2015), http://www.justice.gov/atr/public/criminal/sherman10.pdf.

In short, given that the damages and fines imposed on international cartels are already inadequate, it is a question of significant importance to American consumers and businesses whether such cartels are entirely exempt from damages under the Sherman Act as to price-fixed products intended for the U.S. market that are first sold abroad.

3. The gaping hole in the enforcement of U.S. antitrust law against international cartels created by the decision below is not ameliorated by the possibility of suit under foreign antitrust laws. It is doubtful that foreign countries that are home to price fixers have an interest in providing a remedy to foreign victims of their export cartels, just as U.S. law affords no such relief against U.S. export cartels. *See Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 860 (7th Cir. 2012); 15 U.S.C. § 6a. In any event, private antitrust actions in foreign countries are underdeveloped, to say the least, as the court of appeals recognized. Pet App. 22a ("foreign antitrust laws rarely authorize private damages actions"); *see generally The Interna-*

tional Handbook on Private Enforcement of Competition Law xi (Albert A. Foer & Jonathan W. Cuneo eds., 2010).

Moreover, while several foreign jurisdictions are moving slowly towards permitting private damages remedies for antitrust violations, many of those jurisdictions, unlike the United States, will allow a pass-on defense. *See, e.g.,* Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, 2014 O.J. (L 349) 16, Art. 13 (requiring Member States to permit defendant to show that claimant passed on the whole or part of the overcharge).[4] Perversely, then, under the law in those jurisdictions, the more that direct purchasers abroad pass on to American indirect purchasers, the less cartelists will be deterred. And if they pass on the full amount of the overcharge to American indirect purchasers, the Seventh Circuit's decision means cartels would escape all potential liability for damages in the United States *and abroad* for products imported into the United States by direct purchasers.

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[4] While the EU directive also requires Member States to adopt laws allowing indirect purchasers to sue, American consumers are unlikely to be able to take advantage of such remedies, particularly since collective redress mechanisms (class actions) are neither required, nor generally available. *See* Directive 2014/104/EU, L 349/3, at ¶ 13; Bojana Vrcek, *Overview of Europe*, in *International Handbook on Private Enforcement* at 277.

Nor is the gap in enforcement likely to be filled by consumer indirect-purchaser suits brought under state laws. Indirect purchasers of TVs, monitors, and notebook computers (but not cell phones) in twenty-three states did obtain substantial settlements from the defendants in the LCD price-fixing conspiracy. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900 (N.D. Cal. April 3, 2013). However, roughly half the states lack *Illinois Brick* repealers. *See* Herbert Hovenkamp, *Federal Antitrust Policy* 680-81 (4th ed. 2011). Moreover, as a rule, direct-purchaser recoveries typically dwarf those of indirect purchasers. *See* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U. L. Rev. 1269, 1286-87 (2013) (study of successful private actions showed that indirect purchasers obtained about 15% of the compensation that direct purchasers received); Connor, *Private Recoveries*, at 5-7 (ratio of direct to indirect recoveries in cartel cases is 12 to 1).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE SCOPE OF THE IMPORT-COMMERCE EXCLUSION

The Seventh Circuit held that the price-fixed LCD panels that Motorola's foreign subsidiaries purchased abroad and incorporated into cell phones imported into the United States did not involve import commerce because "[i]t was Motorola, rather than the defendants, that imported these panels into the United States." Pet. App. 5a. But this view of the import-commerce exclusion, invoked without any citation or analysis, is inconsistent with the holdings of

other courts of appeals, as well as the statutory text and purpose of the FTAIA. Any requirement that the "defendants function as the physical importers of goods" was rejected by the Third Circuit in *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011). Rather, the Third Circuit held that the "import [exclusion] is not limited to importers, but also applies if the defendants' conduct is directed at an import market." *Id.* at 471 n.11; *see also Hui Hsiung*, 758 F.3d at 756 ("To suggest, as the defendants do, that AUO was not an 'importer' misses the point. The panels were sold into the United States, falling squarely within the scope of the Sherman Act."). As the government argued below, "Anticompetitive conduct often can involve import commerce, even though the perpetrators are not themselves importers." U.S. Ct. App. Br. 8.

To the extent that foreign price fixers' products are imported into the United States (either as components or as raw materials), and the price fixers intend such a result, there is simply no basis in comity or policy to treat such conduct as *not* "involving" import commerce. *See* H.R. Rep. No. 97-686, at 9 (1982) (bill modified "to remove any possible doubt" that the legislation could be interpreted to apply to "imports").

The argument that a strict construction of the import-commerce *exclusion* is necessary in order to give meaning to the import-commerce *exception* is incorrect. The exception applies to all forms of non-import commerce, including exports.[5] So, for exam-

[5] What is left after import trade is excluded is "conduct . . . other than import trade or import commerce." 15 U.S.C. § 6a. This refers to exports and "wholly foreign" transactions. H.R. Rep.

ple, an export cartel would not "involve" import commerce, but would come within the import exception if it created a worldwide shortage that raised the prices of U.S. imports. *See id.* at 13. Accordingly, there is every reason to read the import-commerce exclusion broadly, as Congress plainly intended.

Of course, accepting that defendants' conduct involved import commerce does not necessarily mean that Motorola could recover for harm attributable to price-fixed products that were not imported into the United States. *See* U.S. Ct. App. Br. 10 (where foreign injury is unrelated to import commerce, antitrust standing and antitrust injury rules may bar claims). Moreover, conduct that is exempt from the FTAIA as involving import commerce still must satisfy the non-FTAIA domestic effects test. *See Hartford Fire Ins. v. California,* 509 U.S. 764, 796 (1993) ("Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

III. CERTIORARI SHOULD BE GRANTED TO CORRECT THE ILLOGICAL EXTENSION OF *EMPAGRAN*'S GLOSS ON THE "GIVES RISE TO" REQUIREMENT

While assuming that defendants' price fixing has a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce by raising the price of cell phones in the United States, the Seventh

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No. 97-686, at 10 (1982) ("It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment, but that import transactions are not."); *Empagran*, 542 U.S. at 163.

Circuit erroneously concluded that Motorola cannot satisfy the FTAIA's second requirement—that "such effect gives rise to a claim" under the Sherman Act.

The court of appeals offered no analysis to support its conclusion; it merely asserted that Motorola could not recover for the overcharges it paid on price-fixed components because the injury "occurred entirely in foreign commerce." Pet. App. 7a. The court apparently accepted defendants' argument that *Empagran* requires a private plaintiff in every case to show that the effect on U.S. commerce "gives rise to *the plaintiff's* claim" or "the claim at issue." Under this reading, Motorola's overcharge claims fail because higher prices for cell phones in the United States did not give rise to those claims. Def. Ct. App. Br. 23-24 (Oct. 3, 2014); *see also Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 414 (2d Cir. 2014) ("direction of causation runs the wrong way"); U.S. Ct. App. Br. 21-22 (same).[6]

This argument simply misreads *Empagran*, which recognized that the purpose of the "gives rise to" requirement was to ensure that the conduct "has an effect of a kind that antitrust law considers harmful," 542 U.S. at 162, not to establish an independent

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[6] The government had previously taken the position that in *Empagran* "the Supreme Court directed lower courts to distinguish claims arising from independent foreign injury—which are barred by the FTAIA—from claims sufficiently linked to the anticompetitive conduct's effects on U.S. commerce," and that Motorola might be able to establish that its injuries "were sufficiently intertwined with the effect on U.S. commerce to satisfy the 'gives rise to' requirement." U.S. Supp. Ct. App. Br. 15 (June 27, 2014).

standing requirement.[7] To be sure, *Empagran* offered that, in the circumstances, it "makes linguistic sense to read the words 'a claim' *as if* they refer to the 'plaintiff's claim' or 'the claim at issue.'" *Id.* at 174 (emphasis added). But this Court could not have been clearer that it based its reading on the assumption that respondents sought recovery solely for *independent* foreign harm. *Id.* at 158 ("We here focus upon anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury.").

Indeed, the Court referred to "independent" foreign harm more than 20 times in the opinion. As a matter of comity and history, the Court could find no justification for reading the FTAIA to extend to claims by foreign plaintiffs based on independent foreign harm. Accordingly, although the statute uses the words "*a* claim," and "respondents' reading [may be] the more natural reading of the statutory language,"[8] *id.* at 173-74, the Court rejected it where the

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[7] The panel's conclusion that the "gives rise to" requirement was intended to establish a separate rule of standing ("who may bring a suit," Pet. App. 5a) is inconsistent with the legislative history and the obvious interpretative difficulty that the exact same "gives rise to" formulation was added to the FTC Act, which only the FTC may enforce. 15 U.S.C. § 45(a)(3). That Congress knew how to address "who may bring a suit" when it wanted to is evident in the last sentence of section 6a, which provides that insofar as anticompetitive conduct has an effect on the export trade of a domestic exporter, the Sherman Act applies, but "only for injury to export business in the United States." 15 U.S.C. § 6a.

[8] It is not just that the statute says "*a* claim," but "a claim *under the provisions of sections 1 to 7 of this title, other than this section*." 15 U.S.C. § 6a (emphasis added).

foreign harm for which respondents sought recovery was not linked to any domestic effects. On those facts, the Court held that "respondents' [literal] reading is not consistent with the FTAIA's basic intent," and respondents had failed to show "we *must* accept [it]." *Id* at 174.[9]

However, the "more natural" reading *should* govern where, as here, there is a close link between the foreign and domestic harm, and the basic purpose of the FTAIA and the Sherman Act—protecting U.S. consumers—would be undermined by adopting *Empagran*'s linguistic gloss applicable to cases of independent harm. Here, the foreign conduct proximately caused domestic harm *by virtue* of foreign injury; there is no logical reason or statutory purpose for treating this situation differently from cases of domestic harm proximately causing foreign injury. If anything, the case for allowing relief is stronger when causation runs in this direction because then relief redresses harm to the domestic economy. U.S. Supp. Ct. App. Br. 3 (June 27, 2014) (foreign government amicus briefs do not "explain[] why allowing Motorola to recover damages for overcharges it paid on panels incorporated into . . . cellphones [resulting in higher domestic prices] could not reasonably redress that domestic injury.").

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[9] Indeed, reading the statute to mean "gives rise to plaintiff's claim" was not necessary to the result because the Court could have held that foreign plaintiffs lacked antitrust standing in cases of independent harm, as the Solicitor General had alternatively argued. U.S. Amicus Br. at 25-30, *Empagran*, 542 U.S. 155 (No. 03-724).

In fact, *Empagran* specifically recognized that the Sherman Act may apply where "the domestic harm depended in part upon the foreign injury." 542 U.S. at 172 (distinguishing *Dominicus Americana Bohio v. Gulf & Western Indus.,* 473 F. Supp. 680 (S.D.N.Y. 1979)); *see also Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998) (foreign plaintiff's exclusion by monopolist abroad satisfied requirements of FTAIA where foreign injury caused higher prices for U.S. purchasers).

The Court should grant certiorari to correct the Seventh Circuit's extension of *Empagran*'s linguistic gloss to a situation entirely unsupported by the Court's reasoning. *Empagran* reflects the recognition that "America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165. However, the Court immediately added:

> But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is . . . reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.

Id. That is exactly the case here.

CONCLUSION

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

Respectfully submitted,

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