No. 24-4470

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEAGATE TECHNOLOGY LLC, ET AL.,
Plaintiffs-Appellants,
v.
NHK SPRING CO., LTD., ET AL.,
Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of California
Nos. 3:19-md-02918-MMC, 3:20-cv-01217-MMC
Hon. Maxine M. Chesney

[Proposed] BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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November 5, 2024

CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Rule 26.1(a), the American Antitrust Institute states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See http://www.antitrustinstitute.org.[1]

AAI has long recognized and advocated for private antitrust enforcement as an essential element of U.S. antitrust policy. U.S. antitrust law has, since its inception, relied on "private attorneys general" to uncover antitrust violations that would not otherwise have been exposed, to ensure victims are compensated, and to deter future wrongdoing. The district court's decision in this case threatens the availability of private antitrust enforcement for an entire category of actionable Sherman Act violations. AAI focuses in this brief on a specific issue: suppression

[1] No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus or their counsel—has contributed money that was intended to fund preparing or submitting this brief. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

of private Sherman Act liability for actions this Court has already acknowledged can be reached by U.S. government enforcement. Government and private antitrust actions are mutually reinforcing and complementary parts of the U.S. antitrust enforcement framework. Private antitrust actions are sometimes incorrectly viewed as an optional or lesser element of U.S. enforcement. But effective antitrust enforcement, particularly with respect to internationally-based cartels that raise prices for U.S. consumers, requires the availability and use of the full arsenal of private and governmental action.

INTRODUCTION AND SUMMARY OF ARGUMENT

On the central facts in this case, there is little debate. Defendants pleaded guilty to an illegal conspiracy that fixed the prices for suspension assemblies, an essential component in hard disk drives. These overpriced components were sold to Plaintiffs and incorporated in products shipped to and sold in the U.S. The Plaintiffs' U.S. consumers, as a result, overpaid for everyday electronics like laptop computers and electronic storage devices. DOJ's prosecution of the cartel led to a $28.5 million settlement and two criminal indictments, leaving no doubt that Defendants' actions caused direct harm to U.S. commerce. Defendants admitted as much as part of the plea.

Yet the district court's decision here would read the Foreign Trade Antitrust Improvement Act (FTAIA) to exempt Defendants from private civil liability under

the Sherman Act. If not reversed, its approach to the FTAIA eliminates a key element of the U.S. antitrust enforcement scheme for claims of this type. The two-tier enforcement framework that would result—a stricter standard for domestic cartels and certain international cartels, a lesser one for another category of international cartels—has no rational basis in the FTAIA statutory history or language. *See* Section I, *infra.* Nor is it required by precedent. *See* Section II, *infra.* Neither government enforcement nor private state law actions are sufficient to fill the resulting gap in private Sherman Act liability. *See* Section III, *infra.* And in a reality where cartel activity, and international cartel activity in particular, is already woefully under-deterred, the district court's decision creates a dangerous precedent by weakening protections for U.S. consumers. *See* Sections IV and V, *infra.*

ARGUMENT

I. The District Court's Reading of the FTAIA Is Not Consistent with the Act's Language or Intent

Interpretations of the Foreign Trade Antitrust Improvement Act (FTAIA) have been debated since it first became law in 1982, and courts have continued to differ on how to read its exclusions and exceptions. *Compare, e.g., Animal Sci. Prods., Inc. v. China Minmetals Corp.,* 654 F.3d 462, 471 (3d Cir. 2011) (applying the FTAIA's import commerce exclusion to U.S. sales "even if the defendants did not engage in importation of products into the United States"), *with Motorola Mobility v. AU Optronics,* 775 F.3d 816, 818 (7th Cir. 2015) (denying the import

commerce exclusion when plaintiffs imported the price-fixed products). Even so, there is agreement that any interpretation of the FTAIA must square with the original intent of the legislation. *See, e.g., F. Hoffman-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155, x (2004) ("If the statute's language reasonably permits an interpretation consistent with [the FTAIA's] intent, we should adopt it."). For several reasons, the district court's reading here does not.

First, the district court's reading violates a basic canon of statutory interpretation. As the Supreme Court has explained, interpretation of a statute must include "a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas,* 507 U.S. 529, 534 (1993). The district court's application of the FTAIA would eliminate the long-standing right to bring private damages actions for an entire category of Sherman Act violations subject to government enforcement. No such statutory purpose is evident in either the FTAIA's language or history. To the contrary, the FTAIA's legislative history anticipates ongoing, mutually-reinforcing private and government enforcement. *See, e.g.,* Foreign Trade Antitrust Improvements Act of 1982, H.R. Rep. No. 97-686, 6 (Aug. 2, 1982) (articulating goal of aligning standards in DOJ and private plaintiff suits).

The FTAIA defines the extraterritorial boundaries of U.S. antitrust enforcement. The Supreme Court has long recognized that those boundaries are not

otherwise limited; they are coextensive with the reach of the Commerce Clause. *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 298 (1945) ("Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised *all the power it possessed.*'" (quoting *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495 (1940)) (emphasis in original)); *see also Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991) ("During the past century, as the dimensions and complexity of our economy have grown, the federal power over commerce, and the concomitant coverage of the Sherman Act, have experienced similar expansion.").

A Sherman Act violation thus either falls within the borders the FTAIA circumscribes, or it does not. *United States v. Hui Hsiung,* 778 F.3d 738, 752 (9th Cir. 2015) ("The FTAIA, like § 10(b) of the Securities Exchange Act, plainly 'removes *conduct* from the Sherman Act's reach.'" (quoting *Empagran*, 542 U.S. at 161) (cleaned up and emphasis added)). Nowhere in the FTAIA's language or history does the statute purport to set up different degrees of enforcement for categories of Sherman Act violations, making some conduct addressable through private action and other conduct not. Nor is it sensible that legislators would intend to make so significant a modification to the U.S. enforcement framework without clear language or rationale. And for good reason. The distinction the district court's decision sets out, based only on the vagaries of supply chain structure, says

nothing about a cartel's effect on U.S. commerce, but profoundly affects how effectively such cartels are deterred.

Second, the district court's distinction between private liability and government action runs counter to two fundamental principles behind the FTAIA: (1) the FTAIA does not compromise in protecting U.S. commerce from anticompetitive effects, and (2) it defines a "single clear" standard that reduces uncertainty about application of the U.S. antitrust laws.[2] H.R. Rep. No. 97-686 at 10. ("[The FTAIA] preserves antitrust protections in the domestic market for all purchasers, regardless of nationality or the situs of the business."); *id.* at 2 (defining as its purpose the "enactment of a single, objective test [that] will serve as a simple and straightforward clarification of existing American law and the Department of Justice enforcement standards.").

The district court's interpretation of the FTAIA would create a gap in private enforcement that would increase the vulnerability of U.S. commerce to anticompetitive conduct. But all evidence suggests the FTAIA was purposefully designed to avoid any such effect. *See, e.g., id.* at 10 (explaining that the FTAIA does not prohibit foreign purchasers from bringing Sherman Act cases with a

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[2] Another overarching goal of the FTAIA was to promote export trade and enable American companies to engage in joint export activities. This goal, too, is best served by alignment between private liability and government action. H.R. Rep. No. 97-686 at 2.

substantial nexus to the U.S. lest it "limit the deterrent effect of U.S. antitrust laws" by shrinking payable damages). In fact, courts have repeatedly recognized that the FTAIA does not affect the "well-established principle that the U.S. antitrust laws reach foreign conduct that harms U.S. commerce." *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 858 (7th Cir. 2012). *See also In re Vitamin C. Antitrust Litig.,* 904 F. Supp. 310, 317 (E.D.N.Y. 2012). (finding conduct directed at the U.S. import market outside the FTAIA's limitations). It would be poor statutory design indeed if a carefully structured international cartel could avoid federal civil liability for the same conduct, at least equally harmful to U.S. commerce, for which a domestic cartel would face treble damages. And that result would be perverse in an economy, as discussed in Section V *infra,* in which international price-fixing cartels are not only harder to detect and punish than domestic cartels but are also likely to cause greater harm to U.S. consumers.

Moreover, the district court's decision is inconsistent with the FTAIA's goal of a single clear enforcement standard. To create a class of antitrust violation subject to only one element of the Sherman Act's dual enforcement model muddies rather than clarifies the application of U.S. antitrust law. A business will not improve its pro-competitive planning by knowing that it might face U.S. government enforcement but not private Sherman Act liability. Instead, the only potential benefit to the defendant is an anticompetitive one. The divided

enforcement standard reduces the financial risk associated with price-fixing and makes it more likely a business will take the gamble that anticompetitive conduct targeting the U.S. is worthwhile.

Finally, international comity, often cited as a legal rationale for the FTAIA, offers no support for the district court's decision. This Court has already found that the anticompetitive conduct targeting the U.S. can be reached by government enforcers. *See Hsiung,* 778 F.3d at 748 (finding that jury's conclusion that defendants fixed prices of product "'targeted' for sale or delivery in the United States" sufficient to avoid limitations of the FTAIA). Defendants have not contested that finding. Private enforcement, while effective in increasing the deterrent effect of U.S. antitrust laws, is no greater an incursion on foreign sovereignty than government enforcement. The analyses for both private and government enforcement are the same: when, as here, the ultimate customers are U.S. customers and the remedy sought redresses *their* harm, there can be no comity concern. *See, e.g., Minn-Chem,* 683 F.3d at 860 (The "country whose consumers are hurt [is] the better enforcer.").

II. This Court's Standard Under the FTAIA for Private Enforcement Should Align with the Standard It Has Already Articulated for Government Enforcement

The district court's application of the FTAIA also finds no support in the precedent of the Supreme Court or this Circuit. Instead, the district court's Order

on Reconsideration relies on a handful of out-of-circuit decisions, principally the Seventh Circuit's *Motorola* case. Meanwhile, the district court gives short shrift and only passing reference to this Court's decision in *Hsiung*, which articulates a clear standard for applying the FTAIA to government enforcement. In so doing, the district court fails to grapple with its most applicable controlling precedent. This alone is basis for reversal.

The Supreme Court precedent on the FTAIA, *Empagran,* does not control here. That decision applied the FTAIA to respondents who sought to recover for independent foreign harm not linked to any domestic effects. 543 U.S 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 its opinion. The Court found, in that specified context, that allowing recovery was "not consistent with the FTAIA's basic intent." *Id.*

Empagran's conclusion does not fit the context where, as here, domestic harm is directly implicated. Indeed, *Empagran's* statutory intent rule would allow for and even compel a reading of the FTAIA to permit at least some private damages actions when governmental enforcement is available. For the reasons discussed above, Section I, *supra*, no other outcome is consistent with the FTAIA's intent to safeguard U.S. commerce.

This Circuit's decision in *In re Dynamic Random Access Memory* (DRAM), 546 F.3d 981, 988 (9th Cir. 2008) also does not control. The DRAM case involved foreign purchasers who claimed, much like the respondents in *Empagran*, that higher prices they paid abroad could only be sustained because of higher cartel prices in the U.S. This Circuit understandably found that the FTAIA barred those claims.

But by failing to take account of the different factual context here, the district court drew the wrong implications from the DRAM case. This Circuit's DRAM decision did not impose a blanket prohibition on a whole category of private Sherman Act claims in the way the district court's decision here would. U.S. DRAM purchasers directly harmed by any supracompetitive pricing remained free to sue—and did in fact do so. *See In re Dynamic Random Access Memory (Dram) Direct Purchaser Litig.*, No. 4:18-cv-2518-JSW (N.D. Cal. 2020). The decision simply identified certain plaintiffs as inappropriate for a U.S. case, leaving the dual private-public framework for Sherman Act enforcement uncompromised.

Here, by contrast, the district court would potentially rule out all private Sherman Act liability—direct purchaser actions would be barred by the FTAIA while indirect purchasers would be barred from seeking federal damages by the Supreme Court's *Illinois Brick* decision. The consequence is unacceptable:

immunity from private Sherman Act liability despite unquestionable harm to U.S. commerce.

The comparison between this litigation and the DRAM case illustrates perfectly the distinction this Circuit has drawn between the "proximate causation" of foreign injury and domestic effect, which satisfies the FTAIA's domestic effects exception, and insufficient "but for" causation, which does not. This distinction would have been evident if the district court engaged more directly with this Circuit's reality-based reasoning in *Hsiung,* 778 F.3d at 759. As this Court there laid out in careful detail, the various paths the price-fixed products took to the U.S. were irrelevant because it was "well understood that substantial numbers of finished products were destined for the United States and the practical upshot of the conspiracy would be and was increased prices to customers in the United States." *Id.* at 759. The logistical complexity of the supply chain did not matter because the domestic effect was neither "speculative nor insulated by multiple disconnected layers of transactions." *Id*. This Court looked past the minutiae to conclude that, at bottom, there was an "integrated, close and direct connection between the purchase of the price-fixed [components], the United States as a destination for the products, and the ultimate inflation of prices in finished products imported into the United States." *Id.* So too here.

In the DRAM case, the alleged harms were based on a cross-border arbitrage theory. The foreign plaintiffs' injury and the effects on U.S. commerce were at best related by "but for" causation. Here, though, the harm to Plaintiffs and the U.S. effects are proximately linked—that is, one flows directly from the other—just as the price-fixed suspension assemblies moved directly from Defendant to Plaintiffs and on to U.S. customers. To look at it another way, it is a measure of the *independence* of the foreign injury in the DRAM case that barring the foreign plaintiffs' claims had no effect on the ability of U.S. purchasers to seek recovery. On the other hand, the *interdependence* of domestic effect and foreign injury here mean that barring Plaintiffs' claims has inescapable consequences for U.S. recovery. Rather than, as the DRAM case did, identifying that *some* private plaintiffs might lack standing to bring damages claims under the Sherman Act, the district court's view of the FTAIA would mandate that *no* private plaintiffs may do so.

III. Private Civil Liability is an Essential Part of the Sherman Act's Enforcement Framework

Eliminating private damages actions, even for a subset of Sherman Act cases, is no small matter. It threatens the integrity of the U.S. antitrust statutes, and it substantially reduces the deterrent value of antitrust enforcement.

Private enforcement has been an integral part of the U.S. antitrust laws since the Sherman Act was enacted more than 130 years ago. Its purpose is not only to

compensate injured parties but also to play a key role in deterring anticompetitive conduct. As the Supreme Court has explained, "the purpose of giving private parties treble damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-3 (1969). This principle is built into many DOJ plea agreements, including the one Defendants entered into for the conduct at issue here, which waives restitution in anticipation of private civil liability. *See United States Sentencing Memorandum: U.S. v. NHK Spring Co., Ltd.,* 19-cr-20503 (E.D. Mich. Dec. 2, 2019) ("[T]he parties have agreed that, in light of the availability of civil causes of action, which potentially provide for a recovery of a multiple of actual damages, the recommended sentence does not include an order of restitution.")

The effectiveness of U.S. cartel enforcement depends on the success of private cases. And private civil liability is often the most efficient way to address under-deterrence of hard-core cartel behavior.

First, private parties do not face the same resource limitations as the government. Private cases, for example, account for a much greater percentage of Sherman Act §1 enforcement than government actions, accounting for over 90% of the antitrust cases filed annually. *See* Bureau of Justice Statistics, Sourcebook of

Criminal Justice Statistics Online: Antitrust Cases Filed in United States District Courts by Type of Case, 1975-2012, *available at* https://tinyurl.com/2k2vyuh5.

Beyond the sheer number of enforcement actions, analyses of cases from 1990 to 2011 have shown that private actions also account for more than three times the deterrent value of government cases. *See* Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement,* 48 Ga. L. Rev. 1, 26 (2013). While the Davis & Lande analysis estimates total sanctions from government cases in that period to have a deterrent value of $11.7 billion, the private cases tracked during the same period represent an estimated $34-$36 billion in deterrent value. *Id.*

Second, private enforcement in practice functions as a complement to government action and plays a unique role in detecting wrongdoing. Contrary to assumptions that private cases largely pile further damages onto cases already unearthed by government enforcers, the 2013 Davis & Lande study showed that over half of the examined cases were not preceded by any government action or included substantially different claims than the government prosecutions. *Id.* at 30–31.

Third, private parties have different and arguably better incentives than government enforcers to bring the right mix of cases. The Davis & Lande study shows, for example, that private enforcers are less risk averse than government

authorities. Historically, DOJ has succeeded in "a very high proportion of its cases," often prevailing over 90% of the time. *Id.* at 32. Even without exact measures of success rates, private plaintiffs "almost certainly […] prevail at much lower rates." *Id.* Private plaintiffs have proven more willing to pursue riskier cases, expanding the potential for rooting out anticompetitive conduct. But that does not mean that private plaintiffs are willing to pursue merely speculative claims. Rather, attorneys for private plaintiffs have ample reasons to invest in meritorious cases rather than shaky ones. *Id.* (describing plaintiff attorneys' level of investment in developing cases, reliance on outcome-based contingency awards, and expectation of court scrutiny during class action settlements). This puts private enforcers in a position to detect and pursue harmful cartel behavior that may otherwise escape governmental attention.

To exempt an entire class of Sherman Act violations from private liability, as the district court's ruling here would, is to tie one hand behind the back of U.S. antitrust enforcement. The FTAIA cannot be read to create such a damaging result without unambiguous evidence that was its statutory intent. As described above, Section I, *infra,* no such evidence exists.

IV. State Indirect Purchaser Liability Is Not a Sufficient Substitute for the Deterrent Effect of Direct Purchaser Claims

Some may argue that these enforcement concerns are overblown because state law indirect purchaser claims, like those pending in this case, can still be

brought and serve a similar deterrent function. But, in reality, these state law claims are no substitute for direct purchaser liability under the Sherman Act.

As an initial matter, it is illogical and dangerous to interpret the FTAIA in a way that puts the onus on state law to protect U.S. commerce against anticompetitive conduct. State laws can vary and change over time. And in fact, the state laws on indirect purchaser claims look quite different from one another and look different today than they did ten or twenty years ago. Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 Ala. L. Rev. 447, 451–65 (2010). And practically speaking, the protection indirect purchaser cases offer is limited in several important respects.

First, many states have no such laws. The Supreme Court's decision in *Illinois Brick v. Illinois Co.*, 431 U.S 720 (1977), barred indirect purchaser damage claims under the Sherman Act well before the enactment of the FTAIA. Over time, several states have recognized that this leaves the ultimate consumer, often the one who must bear the brunt of increased prices, without recourse. But only a subset of states have enacted so-called Illinois-Brick-repealer statutes or have precedent that allows indirect purchaser suits under state law. Purely as a matter of numbers, indirect purchaser cases necessarily fall short of the deterrent effect of direct purchaser liability.

Second, even in states where indirect-purchaser claims are permitted, they have limited deterrence value absent companion direct-purchaser claims. While indirect purchasers sometimes are the frontline enforcer, such as when the direct purchaser lacks incentive to sue or is afraid to disrupt a supply relationship, they often have more difficulty detecting and policing antitrust violations. Because they are one step removed from the defendant in the chain of commerce, indirect purchasers often have less access to the information needed to determine whether a price increase is due to higher costs or if it is a product of cartelization. Lande, 61 Ala. L. Rev. at 452–53. Far fewer cartels will be uncovered if the only victims motivated to investigate do not deal directly or maintain an ongoing relationship with the defendant. *Id*.

Third, problems associated with calculating indirect purchasers' damages also have proven, if not insurmountable, difficult, costly, and "especially acute in component part cases." *Id*. at 468. Whereas *Illinois Brick* "concentrat[es] the full recovery for the overcharge in the direct purchasers," 431 U.S. at 735, no state has a corollary rule that concentrates the full recovery in the indirect purchasers. Rather, every state that has enacted an Illinois-Brick-repealer law permits recovery by both direct and indirect purchasers. Accordingly, most such states have rules that limit indirect purchaser recoveries—sometimes sharply—in the name of preventing duplicative recovery. *See, e.g.*, *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th

758, 787 (2010) (allowing defendants to assert a pass-on defense when sued by both direct and indirect purchasers under the Cartwright Act); Newburg on Class Actions § 20:12, at 435-39, 439 n.6 (5th ed. 2011) ("[M]any [repealer] states require courts to ensure that defendants are not subject to multiple liability.") (citing statutes); Lande, 61 Ala. L. Rev. at 459–60 (noting that some Illinois-Brick-repealers are limited to suits brought by the attorney general or restrict recovery to single damages or restitution, and others are "extremely limited" insofar as they apply only in specific industries or narrow circumstances).

As a result, indirect-purchaser recoveries often are calculated according to pass-on effects, which "depend crucially on the nature of competition, the market shares of the firms that are affected by the wrongful activity, and on the shapes of the relevant demand and cost curves." Daniel L. Rubinfeld, *Quantitative Methods in Antitrust Law*, *in* 1 Issues in Competition L. & Pol'y, ABA Section of Antitrust Law 723, 727 (2008).[3] Depending on the market, pass-on can range anywhere from

[3] The "existence and magnitude" of pass-on effects vary according to the nature of input costs subject to overcharge, the nature of the product demand that the direct or indirect customers face, the strength and intensity of competition in the markets where the direct or indirect customers are active, and numerous other elements such as price adjustment costs, the proportion of a firm's costs affected by the overcharge, buyer power, vertical integration of direct and indirect customers, price regulation, and the timing of the pricing decision undertaken at various levels of the supply chain. European Commission, Guidelines for National Courts on How to Estimate the Share of Overcharge Which Was Passed On to the Indirect Purchaser, 2019 O.J. (C 267) 4, 24 (2019), *available at* https://tinyurl.com/ht73dzkw.

100% to 0%. *Compare, e.g., Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 205 (1990) (direct purchaser allegedly passed on 100% of overcharges), *with Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 48, 494 (1968) (indirect purchasers would have "only a tiny stake in the lawsuit"). A system that permits recovery solely under state indirect purchaser laws thus can generate only partial deterrence at best. When pass-on is absent it may generate no deterrence.

Finally, indirect purchaser class actions can face higher obstacles to class certification. However misguided courts may be on this point, the obstacles have been particularly steep in component cases, where defendants have sometimes weaponized the wide range of products impacted by their illegal conduct to challenge class certification. *See, e.g., In re Flash Memory Antitrust Litig.,* 2010 U.S. Dist. LEXIS 59491, 2010-1 Trade Cas. (CCH) P77,051, 64-9 (D.N.D. Cal. March 31, 2010) (denying class certification for indirect purchasers on questions of impact and ascertaintability because, in part, "there are numerous categories and types of [chips]" and "myriad types of products that incorporate [the technology]").

For these reasons, indirect purchaser suits, while necessary to compensate the ultimate victims of price-fixing, can never substitute for the deterrent effect of direct purchaser suits. And as a creature of variable state law, it cannot and should

not be relied upon to take on the frontline role of protecting U.S. commerce from the effects of internationally-based price-fixing cartels.

V. Price-Fixing Cartels are Significantly Under-Deterred

Preserving private rights of action for all Sherman Act claims is vital given overwhelming evidence that cartels are under-deterred. Hard core cartels remain all too common in the U.S. economy. In the past ten years alone, the U.S. Department of Justice has charged over 100 corporations and more than 300 individuals with criminal antitrust violations. Total criminal fines and penalties imposed—one approximation of the economic harms caused by these cartels—reached more than $5 billion in the same period. *See* DOJ Antitrust Division, Criminal Enforcement Trends Chart (last updated Oct 29, 2024), *available at* https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

But these measures only include the cartels that have been detected and prosecuted criminally. Many more go undetected. It is impossible to know exactly how many price-fixing cartels operate undiscovered every year, but a wide range of different studies have all estimated that fewer than a third of cartels are detected. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays,* 34 Cardozo L. R. 427, 462–66 (2012) (cataloguing studies estimating probabilities of cartel detection ranging from 13%-30%).

Estimates of the economic harms caused by undetected cartels also vary, but all are significant. The U.S. Sentencing Guidelines are based on an estimated average cartel overcharge of 10%. Other methods, however, suggest higher average overcharges are more likely. Connor and Lande, for example, compiled comprehensive datasets of overcharges based on scholarly articles and antitrust cases in which a neutral finder of fact reported overcharges that could be converted into percentages. Based on this information, they calculated median overcharges that hover around 25%. *Id.* at 455–57.

Regardless of how one calculates overcharges, it is clear the harm cartels do is massive. Adding to the damage, those harms often are visited on the most financially vulnerable populations. Past cartels have raised the prices of key consumer goods, like groceries, and have targeted products consumers cannot do without, like the computers and other electronics that allow people to work, to study, and to relax. As scholars have observed, “cartel overcharges [..] resemble a system of regressive taxes…that is, effective collusion in the great majority of markets transfers income from relatively low-income buyers to relatively high-income owners and managers of the companies” by raising price. John M. Connor & Robert H. Lande, *The Prevalence and Injuriousness of Cartels Worldwide,* Univ. of Baltimore School of Law Legal Studies Research Paper 14 (2023), *available at* https://tinyurl.com/mr2mc7a2.

The temptation to engage in cartel conduct is strong. The harm to consumers translates almost directly into profits for the cartel participants. The draw is so powerful that cartels continue to proliferate despite threats of significant financial punishments, criminal prosecution, and potentially years of imprisonment. *Id.* at 6–8 (describing a growing number of detected cartels despite significant levels of punishment); *see also* William E. Kovacic, Robert C. Marshall & Michael J. Meurer, *Serial Collusion by Multi-Product Firms*, 6 J. Antitrust Enforcement 296 (2018) (Empirical evidence of repeat collusion suggests "collusion is simply a way of doing business for many firms.").

Academics studying optimal deterrence attribute the persistence of cartel behavior to (1) the high likelihood that the cartel will go undetected and unpunished, and (2) insufficiently stiff penalties. *See, e.g.,* Connor & Lande, *Cartels as Rational Business Strategy, supra,* at 479. In short, despite vigorous prosecution by the U.S. antitrust agencies, the risk/reward ratio still tilts all too often in favor of illegal behavior. It is not just the relatively low likelihood of detection that emboldens potential cartelists. As some analyses have found, cartel activity might still be profitable even if the cartel members are caught. *Id*. Taken together, the available evidence suggests very significant under-deterrence of cartel behavior.

The 2012 study by Connor and Lande used a sample of 75 cartels sanctioned in the U.S. between 1990 and 2005 to estimate whether the total penalties imposed over- or under-deterred their illegal conduct. The authors estimated the net consumer harm caused by each cartel and compared this to an estimate of total penalties imposed in the U.S., including fines for corporations and individuals, prison terms, restitution payments, civil treble damages verdicts, and settlements in private antitrust actions. After discounting the net consumer harm, a measure of the cartel's profitability, by the estimated likelihood of detection and punishment, the authors determined that only one of the 75 cartels was arguably over-deterred. Of the remaining, a remarkable 73 of the cartels were under-deterred, sometimes drastically so. Based on their estimates, the authors conclude that the cartel sanctions would have had to be approximately five times larger to reach an optimal level of deterrence. *Id.* at 478.

The ample evidence of under-deterrence is certainly an argument for steeper penalties, but it is also an argument for broadening opportunities for cartel detection, including through private enforcement. These findings debunk concerns that the treble damages awarded in private cartel actions are excessive. This, in turn, undermines the rationale courts sometimes seem to embrace for narrowing the path to recovery for private plaintiffs. In the case of the FTAIA, it discredits the often-repeated warning that private damages actions by foreign plaintiffs risk

"flooding" into U.S. courts. *See, e.g., Motorola*, 775 F.3d at 826 (claiming the "mind boggles at the thought of the number of antitrust suits that major American corporations could file against the multitudinous suppliers of their prolific foreign subsidiaries if Motorola had its way."). These findings not only raise questions about whether fears of a flood of suits have any basis in fact; they also show that, regardless, this concern pales in comparison to the significant harm that U.S. consumers continue to suffer because cartels are inadequately deterred.

VI. International Cartels Are Especially Damaging to U.S. Commerce

The district court's decision here is particularly dangerous because it would disproportionately affect deterrence of international cartels. Even more than domestic cartels, international cartels have a widespread effect on commerce and everyday consumers.

For most of the last century, domestic price-fixing cartels were the core concern of antitrust enforcement. But given economic and practical realities, that time has unquestionably passed. In response to global trade expansion and its exploding effect on U.S. consumers, the DOJ's Antitrust Division in the mid-1990s transformed international enforcement from a tiny percentage of its activity to its highest priority focus. As officials in the Antitrust Division noted at the time, that reallocation was based on the reality that "international cartels tend to be more complex, broader in scope, larger in terms of affected volumes of commerce, and

more harmful in terms of numbers of businesses and consumers injured than their domestic counterparts." Gary R. Spratling, *International Cartels: The Intersection Between FCPA Violations and Antitrust Violations*, Remarks at the Am. Conf. Inst. 7th Nat'l Conf. on the Foreign Corrupt Practices Act (Dec. 9, 1999). As of last year, for example, 142 of the DOJ's 157 cartel cases resulting in fines of more $10 million (all since 1995) have been international cases. These fines, which offer a direct measure of the harm to U.S. commerce, show that enforcement against international cartels has exponentially more impact on U.S. consumers than enforcement against domestic cartels.[4]

Comprehensive datasets paint a similar picture of the economic damage caused by international cartels. In his analysis of the largest collection of legal-economic information on contemporary price-fixing cartels, Professor John M. Connor estimates that during the period from 1990 to 2017, consumers worldwide suffered gross overcharges of $64 to $286 trillion from private international cartels. A staggering two-thirds of those damages were attributable to the global cartels active in more than one geographic region.[5]

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[4] The Antitrust Division calculates fines starting with a base fine of 20% of the volume of affected commerce. It then applies a multiplier based on the entity's "culpability score." USSG§2R1.1

[5] John M. Connor, *The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-2019* (Aug. 25, 2020), *available at* https://ssrn.com/abstract=3682189 or http://dx.doi.org/10.2139/ssrn.3682189.

Several factors account for the greater adverse impact of international cartels. Because these cartels involve industries engaged in global trade, they often affect crucial inputs across multiple economic sectors, resulting in higher consumer prices for a broad range of products. The present case is such an example, but there are many others. To highlight just a few:

- The capacitors cartel of the early 2000s increased prices for products in industrial and in consumer electronics markets, including products as wide-ranging as smartphones and automobiles.

- The rubber chemicals cartel of the late 1990s increased production costs for automobiles, tires, and industrial products.

-The air cargo cartel of the early 2000s affected prices across a range of industries dependent upon air transport for raw materials and finished goods. This included electronics, automobiles, pharmaceuticals, fashion, food, and e-commerce.

Cartels operating across multiple jurisdictions also appear to last longer than their more geographically narrow equivalents. Professor Connor's 2019 analysis showed that global cartels on average lasted roughly 30% longer than regional examples, amplifying their effects on consumers. *See* Connor, *supra* note 5, at 70. This is logical given the difficulties in detecting and prosecuting such cartels, as described below.

VII. International Cartels Are Difficult to Detect and Prosecute

Difficulties in detecting and prosecuting internationally-based cartels exacerbate the serious damage they do to U.S. commerce. Both U.S. authorities and international organizations have for years recognized the significant obstacles to detection of international cartels. Despite extensive efforts over the past few decades to increase cooperation among antitrust authorities, many of those challenges still exist. *See* OECD, *Review of the Recommendation of the Council Concerning Effective Action against Hard Core Cartels* 78 (2019), *available at* https://one.oecd.org/document/DAF/COMP(2019)13/en/pdf (identifying as challenges to cooperation on cartel cases strict data privacy laws, other legal and practical obstacles to information exchange, and differing investigative and prosecutorial powers). As a result, international cartels still too often escape detection, and their anticompetitive conduct is under-deterred.

Successful detection of, and ultimately prosecution of, cross-border cartels can be frustrated because evidence and witnesses are often scattered across jurisdictions. *See* Antonio Capobianco, John Davies & Sean Ennis, *Implications of Globalization for Competition Policy* 43 (June 20, 2014), *available at* https://dx.doi.org/10.2139/ssrn.245013. Cartel communications are likely to occur abroad and may be difficult to detect and prove. Pricing effects may not be as visible as they would be for a domestic cartel that engages in transparent parallel

price increases. Finally, difficulties in obtaining evidence from abroad and uncertainty in securing extradition of cartel members hinder prosecution and reduce deterrent effects. *See, e.g.,* Lauren Briggerman, *DOJ is Losing the Battle to Prosecute Foreign Executives*, Law360 (Mar. 3, 2015) (describing DOJ's challenges in extraditing indicted executives in the auto parts cartels).

As new technologies, like algorithmic pricing software, threaten to make it easier for international cartels to coordinate price fixing and market allocation, the need for additional deterrence is only likely to grow. Leniency, the cornerstone of international cartel enforcement, may become less effective as participants, shielded by technology, become less fearful of detection. *See* OECD, Executive Summary of the Roundtable on the Future of Effective Leniency Programs 2 (2023), *available at* https://tinyurl.com/yw4r9kvt (noting that the recent decline in leniency applications may be attributable to new "sophisticated collusion methods, the blurred line between lawful and anticompetitive leniency programs, and the adoption of digital tools such as algorithms for collusion"). For these reasons, the most recent recommendations of international organizations like OECD urge additional deterrent measures against cartels, especially expansion of private damages actions. *See, e.g.,* OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels, OECD/LEGAL/0452 (2024) (including a formal recommendation that all jurisdictions "[p]rovide a mechanism

that gives anyone who has suffered harm caused by a hard core cartel the right to obtain redress […] from [those] that caused it."). Many foreign jurisdictions have followed suit. *See* International Competition Network, Cartel Working Group, Development of Private Enforcement of Competition Law in ICN Jurisdictions 3 (2019), *available at* https://tinyurl.com/mvndruey (noting that, as of 2018, 31 of 33 national competition authorities surveyed had laws allowing for private enforcement).

If the district court's misapplication of the FTAIA is not corrected, it will take the U.S.—ironically the antitrust regime most experienced with and most dependent on private antitrust enforcement—in the opposite direction of its international counterparts. The restrictions on private civil liability would reduce deterrence and leave U.S. consumers more vulnerable to international cartels at the exact moment when the threat those cartels pose is growing and morphing in ways our system may not be prepared to address. The FTAIA does not require that senseless result.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the opinion of the district court and direct it to apply the FTAIA to allow, at a minimum, direct purchaser suits like Plaintiffs' for sales into the U.S. of products incorporating price-fixed components.

Respectfully submitted,

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I hereby certify that on this 5th day of November, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate ACMS system. Counsel for all parties to the case are registered ACMS users and will be served by the appellate ACMS system.

s/ *Kathleen W. Bradish*

Dated: November 5, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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