No. 25-3929

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WORLD ASSOCIATION OF ICEHOCKEY PLAYERS UNIONS NORTH AMERICA DIVISION, ET AL.,

Plaintiffs-Appellants,

v.

NATIONAL HOCKEY LEAGUE, ET AL..,

Defendants-Appellees

On Appeal from the United States District Court
for the Western District of Washington, No. 2:24-cv-02135-TL

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

DAVID O. FISHER
Counsel of Record
RANDY STUTZ
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, D.C. 20036
(202) 304-0195
dfisher@antitrustinstitute.org

Counsel for Amicus Curiae

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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.

Date: November 19, 2025

/s/ David O. Fisher
David O. Fisher

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

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.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court has "reiterated time and time again that 'horizontal territorial limitations are naked restraints of trade with no purpose except stifling of competition,'" and so "are *per se* violations of the Sherman Act." *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972) (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)) (alterations omitted). Notwithstanding that clear prohibition, Defendants divided an integrated North American labor market for

[1] Plaintiffs and the CHL Defendants have consented to the filing of this amicus brief. *See* 1-ER-9–1-ER-13. (listing parties and defining "CHL Defendants"). NHL did not respond to AAI's request for consent. AAI submits that NHL's consent is not required under Rule 29(2) because it is no longer a party to this action, as it was dismissed below and Petitioner does not challenge its dismissal on appeal. 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 curiae or its counsel—has contributed money that was intended to fund preparing or submitting this brief.

[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Members of AAI's Advisory Board represent Plaintiffs, but those members played no role in AAI's deliberations with respect to the filing of the brief.

junior hockey players into three geographic regions, each made up of U.S. and Canadian territory, such that players can only be recruited to play on teams within their allocated, transnational territory.

Plaintiffs allege that this horizontal market division agreement had the direct and immediate effect of preventing Canadian and American junior hockey players from marketing their services to U.S. teams. Opening Br. at 7–10. By artificially preventing players from marketing their services to teams outside of their allocated territory, the agreement directly and foreseeably reduced players' wages below the competitive level in both countries. *Id.* at 11–14. It also forced the players to accept inferior non-wage conditions of employment relative to what they would have faced if they had been permitted to play for teams anywhere in the integrated North American market. *Id.* at 12–14.

Defendants do not deny that they divided the market horizontally into three transnational territories, or that their agreement caused anticompetitive effects in both countries. Instead, they argue that U.S. courts cannot or should not apply U.S. antitrust law to their conduct. *Id.* at 17–19. The district court agreed, finding that claims brought by Canadian players are beyond the Sherman Act's reach under the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, and do not fall under the FTAIA's domestic-effects exception. *Id.* at 19–20.[3] It also declined to exercise jurisdiction over U.S. players' claims as a matter of international comity

[3] Unless otherwise specified, we use the term "Canadian players" to refer to the hockey players who were recruited in Canada to play for Canadian teams, and the term "U.S. players" to refer to hockey players who were either recruited in the United States or played in the United States.

because, cumulatively, most of the injured players are Canadian. *Id.* at 20–21. In doing so, the court misapplied the FTAIA and left the U.S. players without any recourse for a clear violation of U.S. antitrust law.

To ensure that the U.S. antitrust laws continue to protect domestic competition in a world of increasingly transnational markets, this Court should hold the following: (1) when a market allocation agreement prevents foreign plaintiffs from participating in a U.S. portion of a transnational market, their injuries are proximately caused by the direct domestic effects of the agreement for purposes of the FTAIA's domestic-effects exception; and (2) the principles of adjudicative comity support exercising jurisdiction when failing to do so would leave U.S. antitrust victims without a legal remedy.

ARGUMENT

We agree with Petitioners that the district court erred as a matter of law in holding that the FTAIA bars suit by Canadian players. Petitioners rightly argue that: (1) Defendants' agreement restrains competition in import commerce such that it is not covered by the FTAIA; and (2) in the alternative, the Canadian players' injuries are "inextricably bound up" with the domestic effects of that agreement for purposes of the FTAIA's domestic-effects exception. Opening Br. at 47–53 (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171–72 (2004) ("*Empagran I*")). Petitioners also rightly argue that the court erred by dismissing the claims of the U.S. players pursuant to principles of international comity. *Id.* at 53–66. We write separately to address the economic and legal principles supporting the conclusion that foreign market participants are

proximately harmed by the direct domestic effects of market allocation agreements that prevent them from participating in domestic portions of a transnational market. We also urge the Court to hold specifically that the principles of adjudicative comity support exercising jurisdiction when failing to do so would leave U.S. antitrust victims without recourse for a violation of U.S. antitrust law.

I. When a market allocation agreement prevents a foreign plaintiff from participating in a U.S. portion of a transnational market, that plaintiff's injury is proximately caused by a direct domestic effect of the agreement.

The district court correctly observed that the FTAIA exempts from the Sherman Act "much anticompetitive conduct that causes only foreign injury," 1-ER-22 (quoting *Empagran I*, 542 U.S. at 158), and that its domestic-effects exception carves out from the FTAIA (and thus applies the Sherman Act to) conduct which has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce that "gives rise to the claim." 1-ER-59; 15 U.S.C. § 6a. It also correctly observed that, in this circuit, foreign plaintiffs seeking to satisfy this requirement must show a "proximate" causal connection between their injury and the domestic effects of the defendant's conduct. 1-ER-60 (quoting *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.,* 546 F.3d 981, 987 (9th Cir. 2008) (*"DRAM"*)).

Applying the domestic-effects exception in this circuit therefore involves two separate tests: (1) the direct-effects test, which asks whether defendants' conduct has "a direct, substantial, and reasonably foreseeable effect" on domestic commerce; and (2) the proximate-cause test, which asks whether the domestic

effects of the defendants' conduct is a "proximate" cause of the foreign plaintiff's injury. 15 U.S.C. § 6a; *United States v. Hui Hsiung*, 778 F.3d 738, 758 (9th Cir. 2015); *DRAM*, 546 F.3d at 987.

The Court was wrong in applying that law to the facts. Defendants' transnational market allocation agreement did not cause "only foreign injury" because, as the district court recognized elsewhere, it injured U.S. players by preventing them from participating in U.S. portions of the transnational labor market. *Empagran I*, 542 U.S. at 158; 1-ER-61–62. By preventing junior hockey players from participating in U.S. portions of the market, the agreement had a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. 15 U.S.C. § 6a. And that domestic effect was the "proximate" cause of the Canadian players' injury. *DRAM*, 546 F.3d at 987.

This Court may well rule, as Petitioners argue, that Defendants' agreement involves domestic and import commerce and therefore falls outside the scope of the FTAIA. *See* Opening Br. at 40–45. But if it reaches the question of whether the Canadian players' claims are covered by the FTAIA's domestic-effects exception, it should hold as a matter of law that where, as here, a market allocation agreement prevents a foreign plaintiff from participating in the U.S. portions of a transnational market, the plaintiff's injury is proximately caused by the agreement's direct domestic effects, satisfying this circuit's direct-effect and proximate-cause tests.

a. Transnational market allocation agreements harm competition in the same way domestic ones do.

"Market allocation" and "market division" are interchangeable terms used to describe a phenomenon in which rivals agree to cooperate rather than compete. Rivals can illegally allocate or divide markets along a variety of different dimensions, including by product, customer, or—as here—geographic region. Department of Justice, *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For: An Antitrust Primer* 3 (updated Feb. 2021), https://www.justice.gov/d9/pages/attachments/2016/01/05/211578.pdf (hereinafter "*Antitrust Primer*") ("Market division or allocation schemes are agreements in which … competing firms allocate specific customers or types of customers, products, or territories among themselves."); *see also* José Azar & Ioana Marinescu, *Monopsony Power in the Labor Market: From Theory to Policy*, 16 Ann. Rev. Econ. 491, 500 (2024) ("Market allocation is an agreement among competitors to divide or allocate a market by geographic area, product, customer, or other criteria."); Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice § 5.2b4, p.207 (3d ed. 2005) ("A market division is an agreement among two firms that each will stay out of some portion of the market occupied by the other.").

As a matter of law, competitors' agreements to allocate or divide markets are "naked restraints of trade with no purpose except stifling of competition." *White Motor Co.*, 372 U.S. at 263. Such agreements are per se illegal because they are unambiguously anticompetitive and irredeemable: they "prevent open competition among parties who would otherwise be competing among themselves." *Horizontal*

Territorial Restraints And The Per Se Rule, 28 Wash. & Lee L. Rev. 457, 464 (1971) (citing *United States v. Sealy, Inc.*, 388 U.S. 350, 359 (1967) (Harlan, J., dissenting). As the Supreme Court has clarified, this is true "regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990).[4]

Here, Defendants split into thirds a North American labor market in which all teams do business. U.S. teams in each of the allocated territories were prevented from recruiting Canadian players they otherwise could have recruited. Conversely, Canadian players were prevented from marketing their services to U.S. teams they otherwise could have played for. Absent the market allocation agreement, for example, a player in Quebec whose most efficient match would be with a team in Washington or Montana could have played for that team. But the player cannot do so because Defendants' agreement prevents teams in those states from recruiting him.

Market allocation in labor markets is no less anticompetitive than in product or service markets. *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1038–39

[4] Market allocation is similar to price or wage fixing in that both reduce market output and raise prices for consumers or lower wages for workers. *See Antitrust Primer, supra*, at 2; Azar & Marinescu, *supra*, at 501–02. But whereas a price or wage fixing agreement sets a price floor or wage ceiling, market allocation goes further by also eliminating non-price or non-wage competition, leading not only to higher prices or lower wages but also diminished quality or innovation. Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 2031 (5th ed. 2025). It also enables cartel members to detect and punish cheating more easily, including because they do not have to police each other's prices or wages. *Id*.

(N.D. Cal. 2013) (Because "[a]ntitrust law does not treat employment markets differently from other markets," "the fact[] that [an] alleged market allocation . . . occurs in an input market, i.e. the employment market . . . do[es] not as a matter of law prevent the court from finding that the agreement as stated amounts to a 'classic' horizontal market division."); *see also* Areeda & Hovenkamp, *supra* n.4 at ¶ 2013b ("An agreement among employers that they will not compete against each other for the services of a particular employee or prospective employee is, in fact, a market-division agreement.").

And the allocation of a market that spans multiple jurisdictions is no less anticompetitive than the allocation of a market located entirely within the United States.[5] *See United States v. Nat'l Lead Co.*, 63 F. Supp. 513, 523 (S.D.N.Y. 1945) ("No citation of authority is any longer necessary to support the proposition that a combination of competitors, which by agreement divides the world into exclusive trade areas, and suppresses all competition among the members of the combination, offends the Sherman Act."). Economically, market allocation reduces competition in the same way regardless of whether the market is fully domestic or

[5] We use the term transnational rather than international to distinguish between markets that cross national boundaries and global ones. *See* Organization for Economic Co-operation and Development (OECD) Secretariat, *Defining Geographic Markets Across National Borders* 19 (Sept. 30, 2016), https://www.oecd.org/en/publications/defining-geographic-markets-across-national-borders_38203da9-en.html. ("[C]are must be taken not to rely on a global market definition without sufficient evidence, particularly when a regional, continental or even multi-continental grouping may be more accurate.").

crosses international borders. *See generally* OECD Secretariat, *Defining Geographic Markets Across National Borders, supra* n.5.

b. When the relevant market is transnational and includes U.S. territory, the domestic effects of a market allocation agreement are direct, substantial, and reasonably foreseeable.

A plaintiff seeking to show that his claim is covered by the FTAIA's domestic-effects exception must show that the defendants' conduct had a "direct, substantial, and reasonably foreseeable" effect on domestic commerce, 15 U.S.C § 6a, which this Court has interpreted to mean that "it follows as an immediate consequence of defendants' activity." 1-ER-60 (quoting *Hui Hsiung*, 778 F.3d at 758). "An effect cannot be 'direct' where it depends on . . . uncertain intervening developments." *United States v. LSL Biotechnologies*, 379 F.3d 672, 681 (9th Cir. 2004).[6] This case illustrates how, as a matter of law, this requirement is met by transnational market allocation agreements which include U.S. territory.

Plaintiffs allege—and defendants do not dispute—that the labor market for junior hockey players includes the entire United States and Canada. 1-ER-29. Accepting this factual allegation as true means accepting that, absent defendants' agreement, North American players could have marketed their services to any team in either country. It follows that any Canadian player could have marketed his services to any U.S. team. Because the agreement prevents all players from marketing their services to some U.S. teams, the immediate anticompetitive effect

[6] Other courts have rejected this Court's definition of "direct" as too narrow. *See Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 398 (2d Cir. 2014); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (en banc).

of the agreement is a direct effect on domestic commerce: each player's inability to market their services to U.S. teams "follows as an immediate consequence" of the allocation agreement, *Hui Hsiung*, 778 F.3d at 758, without any "uncertain intervening developments." *LSL Biotechnologies*, 379 F.3d at 681.

This Court has found that conduct with less-immediate domestic effects falls within the FTAIA's domestic-effects exception. In *Hui Hsiung,* a jury found Taiwanese and Korean manufacturers guilty of fixing the prices of LCD display panels that were purchased outside the United States and later "incorporated into finished consumer products" like laptops and monitors that were "ultimately sold in the United States." *Hui Hsiung*, 778 F.3d at 742–45, 758–59. Defendants appealed, arguing that their conduct was "too attenuated from the United States and that the intervening development, manufacture, and sale of the products worldwide resulted in a diffuse effect" which could not satisfy the domestic-effects test. *Id.* at 758. A unanimous panel of this Court disagreed, holding that "the conduct was sufficiently 'direct, substantial and reasonably foreseeable' with respect to the effect on United States commerce" because, although the panels were not sold directly into the United States, they affected the prices of U.S. products in a way that "was neither speculative nor insulated by multiple disconnected layers of transactions." *Id.* at 759 (citing 15 U.S.C. § 6a). In reaching that holding, the Court distinguished anticompetitive agreements involving component goods within a supply chain from agreements in which the domestic effect "rested on speculation as to future innovation" or in which "action in a foreign country filters through many layers and finally causes a few ripples in the

United States." *Id.* at 759–60 (quoting *Minn-Chem*, 683 F.3d at 680) (citing *LSL Biotechnologies*, 397 F.3d at 681).

The domestic effects of a transnational market allocation agreement that includes U.S. territory, like the agreement at issue here, are much more direct than the domestic effects of a foreign price-fixing agreement covering component goods, like the agreement at issue in *Hui Hsiung*. Fixing the price of components sold abroad first inflates prices in foreign component-goods markets; only after the overpriced components are incorporated into finished goods sold at home do they then inflate prices in domestic markets. But a transnational market allocation agreement which includes U.S. territory, by definition, causes domestic anticompetitive effects in the U.S. territory in the first instance: it immediately prevents market participants from participating in U.S. portions of the market. *See supra* Part I.a. And it does so without any "intervening developments" or "disconnected layers of transactions" which may make the competitive harm "speculative" or "insulated." *LSL Biotechnologies*, 379 F.3d at 681; *Hui Hsiung*, 778 F.3d at 759. So long as the divided market contains U.S. territory, the directness of its domestic effects is a foregone conclusion.

c. Foreign market participants are proximately harmed by the domestic effects of transnational market allocation agreements.

A panel of this Court ruled in *DRAM* that the FTAIA's language requiring that a domestic effect "gives rise to" a foreign plaintiff's claims requires a proximate—and not merely but-for—causal connection. 546 F. 3d at 988–90. Drawing on the Supreme Cout's opinion in *Empagran I*, and adopting the

reasoning of the D.C. Circuit in *Empagran S.A. v. F. Hoffmann-Laroche*, 417 F.3d 1267, 1270 (D.C. Cir. 2005) ("*Empagran II"*), and of the Eighth Circuit in *In re Monosodium Glutamate Antitrust Litig.,* 477 F.3d 535, 538–40 (8th Cir. 2007), the panel concluded that the FTAIA's text and history "suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not to *expand* in any significant way, the Sherman Act's scope as applied to foreign commerce." *Id.* at 987–88 (quoting *Empagran I*, 542 U.S. at 169) (emphasis in original). Adopting a but-for standard would "be expanding the Sherman Act's scope as applied to foreign commerce," the court reasoned, because "general antitrust principles . . . typically require a direct causal link between the anticompetitive practice and plaintiff's damages." *Id.* at 988. And it considered the narrower proximate-cause standard to be more consistent with the "principles of comity," which generally require courts to "construe ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 987 (quoting *Empagran I*, 542 U.S. at 164) (alterations omitted). "[T]o interpret the FTAIA broadly as requiring only 'but for' causation would risk the very sort of interference that [courts] ordinarily seek to avoid." *Id.* at 987. Thus, beyond merely focusing on the foreseeability of harm, the *DRAM* court settled on the proximate-harm standard based on principles of antitrust standing and prescriptive comity.[7]

[7] As Judge Noonan explained in her concurring opinion, "[w]hat turns cause in fact into a [proximate] cause is a value judgment that the cause in fact creates an unacceptable risk of injury to a protected interest." 546 F.3d at 991 (Noonan, J., concurring). Although negligence law treats proximate cause indicating what level of unacceptable risk is appropriate, "[a]ntitrust law, apparently, still offers 'proximate' as if it provided something more than a label for a judgment that the

DRAM addressed a global conspiracy to fix the prices for dynamic random access memory ("DRAM") "in both the United States and foreign countries." *Id.* at 981, 984. Plaintiff, a foreign computer manufacture who purchased DRAM abroad, "asserted that the domestic effect of the defendants' anticompetitive conduct—higher DRAM prices in the United States—gave rise to its foreign injury of having to pay higher DRAM prices abroad because the defendants could not have raised prices worldwide and maintained their global price-fixing arrangement without fixing the DRAM prices in the United States." *Id*. at 984. Applying the proximate-cause standard to the facts of that case, the panel found that it was not met: while "[t]he defendants' conspiracy may have fixed prices in the United States and abroad, and maintaining higher U.S. prices might have been necessary to sustain the higher prices globally," the court considered that "[o]ther actors or forces may have affected the foreign prices." *Id.* at 988. It held that the fact that "the conspiracy had effects in the United States and abroad does not show that the effect in the United States, rather than the overall price-fixing conspiracy itself, proximately caused the effect abroad." *Id*.

As with the direct-effects test, this case illustrates why foreign claims for injuries caused by transnational market allocation agreements also satisfy the proximate-cause test.[8] As explained above, Defendants' market allocation

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conduct in question is foreseeably harmful to a social interest worthy of protection." *Id*.

[8] The direct-effects test applied in *Hui Hsiung* shares common elements with the proximate-cause test applied in *DRAM*, but they arise out of different statutory language. The direct-effects test asks whether defendants' conduct has "a direct,

agreement directly prevents players from marketing their services in U.S. portions of the market. *See supra* Part I.b. That inability to participate in U.S. markets is the proximate cause of the Canadian players' injuries. There is no other possible cause of the Canadian players' inability to market themselves to portions of the U.S. market: no "other actors or forces" in the market would have had that effect. *DRAM*, 546 F. 3d at 988.

Indeed, the district court's explanation of why the domestic-effects exception is satisfied as to players who were recruited in the United States to play for Canadian teams illustrates the proximate causal link. The district court found that those players' claims fell under the domestic-effects exception because "the reason that they play in Canada is because they were scouted and recruited in the United States to play on teams and in locations that they did not choose—and the fact that players cannot choose where to play is part of the injury alleged by Plaintiffs." 1-ER-61. This reasoning applies in precisely the same way to Canadian players who had no choice but to play for a team within their allocated territory instead of on another team in the United States that would be a more efficient match: "the fact that players cannot choose where to play"—including throughout the United States—"is part of the injury alleged by" these Canadian players. *Id*. Because the market includes both countries, Canadian players were harmed just as

substantial, and reasonably foreseeable effect" on domestic commerce, while the proximate-cause test asks whether the domestic effects of the defendants' conduct "gives rise to" the foreign plaintiff's injury. 15 U.S.C. § 6a.

directly by the reduced demand for their services in the United States as their U.S. counterparts. *See supa* Part I.a.

Transnational market allocation cases such as this one are categorically different from global price-fixing cases like *DRAM*, in which defendants fix the price of a global commodity in such a way that it affects global prices and thereby also affects prices in the United States. *See* 1-ER-60–1-ER-61 (citing *DRAM*, 546 F.3d at 988–89; *Empagran II,* 417 F.3d at 1270; *In re Optical Disk Drive Antitrust Litig.*, No. C10-2143, 2017 WL 11513316, at *6 (N.D. Cal. Dec. 18, 2017); *In re Capacitors Antitrust Litig.*, No. C14-3264, 2015 WL 3638551, at *6 (N.D. Cal. June 11, 2015)). Each of the global price-fixing cases relied on by the district court focuses on those courts' inability to determine that the foreign plaintiffs' overcharge was caused by the domestic—rather than the foreign—effects of the alleged global price-fixing scheme. *DRAM*, 546 at 988 ("The defendants' conspiracy may have fixed prices in the United States and abroad, and maintaining higher U.S. prices might have been necessary to sustain the higher prices globally, but [plaintiff] has not shown that the higher U.S. prices proximately caused its foreign injury of having to pay higher prices abroad."); *Empagran II*, 417 F.3d at 1271. ("It was the foreign effects of price-fixing outside of the United States that directly caused or 'gave rise to' the [plaintiffs'] losses when they purchased vitamins abroad at super-competitive prices."). But this is not an issue in transnational market allocation cases like this one, in which the foreign plaintiffs' injuries arise from their complete inability to participate in a U.S. portion of a market. *See supra* Parts. I.a, I.b. The court need not trace a supply chain and

calculate overcharges to determine whether this injury is a direct and proximate cause of the defendants' conduct; the inability to participate in the U.S. portion of the market *is* the injury.

Furthermore, recognizing liability in this instance does not "expand in any significant way" the scope of the Sherman Act. *DRAM*, 546 F.3d at 987; *Empagran I*, 542 U.S. at 169. Because the market includes both countries, Canadian players were harmed just as directly by the reduction of competition for their services in the United States as their U.S. counterparts. On the other hand, allowing defendants to avoid liability for the harm their agreement caused to Canadian players would allow them to keep significant ill-gotten gains and, as explained below, *see infra* Part II, leave the Canadian players without a remedy. *See Pfizer, Inc. v. Gov't India*, 434 U.S. 308 (1978), 314–15 ("To deny a foreign plaintiff injured by an antitrust violation the right to sue would . . . permit a price fixer or monopolist to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers.").

Nor does exercising jurisdiction over foreign competitors' claims arising out of transnational market allocation agreements which include U.S. territory risk "unreasonable interference with the sovereign authority of other nations," either in this case or as a general matter. *DRAM*, 546 F.3d at 987. Because the transnational market at issue will by definition include some U.S. territory—and therefore satisfy the direct-effects test, *see supra* Part I.b—such market allocation agreements necessarily impact U.S. markets in addition to foreign ones. And, as

further explained below, the principles of comity do not support declining to exercise jurisdiction where, as here, foreign plaintiffs are unable seek recovery in their own countries. *See infra* Part II.[9]

II. Principles of adjudicative comity support exercising jurisdiction when failing to do so would leave U.S. antitrust victims without a legal remedy.

Petitioners argue that the district court erred by dismissing the claims of the U.S. players pursuant to principles of international comity because adjudicative comity provides no basis for dismissing the U.S. players' claims. Opening Br. at 53–66. Petitioners also contend that Canadian law does not provide a remedy for either the Canadian plaintiffs or U.S. plaintiffs in this case. *Id.* at 63. We agree. We also urge this Court to hold, as a matter of law, that principles of adjudicative comity support exercising jurisdiction when failing to do so would leave U.S. antitrust victims without recourse for violations of U.S. antitrust law.

The United States has a strong interest in ensuring that its antitrust laws are enforced. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955) (recognizing "the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action"); *FTC v. Swedish Match N. Am., Inc.*, 131 F. Supp. 2d 151, 173 (D.D.C. 2000) ("There is a strong public interest in effective enforcement of the antitrust laws."). It also has a strong interest in deterring antitrust violations that harm U.S. markets. Without strong

[9] Indeed, the court in *DRAM* emphasized that the foreign plaintiff in that case made the relevant purchases in their home jurisdiction and could have brought the claim there, "making real the risk of interference with a foreign nation's ability to regulate its commercial affairs." *DRAM*, 546 F.3d at 987, n.8.

deterrence, the profits to be gained by harming competition will outweigh its risks, and anticompetitive conduct will flourish, undermining the goals of Congress in passing the Sherman Act. *See* John M. Connor & Robert Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo Law. Rev. 427, 429 (2012) ("[C]orporations and individuals contemplating illegal collusion will be deterred only if the expected rewards are less than the expected costs divided by the probability the illegal activity will be detected and sanctioned.").

If Petitioners' interpretation of Canadian law is correct, and the district court's opinion is upheld, U.S. hockey players harmed by defendants' conduct cannot bring a claim for a violation of U.S. antitrust law in any court. *See Hui Hsiung*, 778 F.3d at 743 (addressing "defendants' efforts to place their conduct beyond the reach of United States law and to escape culpability under the rubric of extraterritoriality").

The Supreme Court has repeatedly emphasized "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Accordingly, it has never authorized a court to abstain from exercising jurisdiction in favor of a foreign court, except under the doctrine of forum non conveniens. William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2110 (2015); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996) (distinguishing forum non conveniens from comity in a domestic context on the ground that comity gives "deference to the paramount interests of another sovereign," while forum non conveniens reflects a broader range of considerations

like "convenience to the parties."). Some circuit courts have recognized a doctrine of international comity abstention where a parallel foreign proceeding is pending and "exceptional circumstances" are shown. *See, e.g., Royal & Sun All. Ins. Co. of Can. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92–94 (2d Cir. 2006); Dodge, *supra*, at 2112–13.

Nonetheless, a divided panel of this Court has upheld abstention on the basis of international comity where there was no pending proceeding in the foreign jurisdiction. *Mujica v. AirScan Inc*., 771 F.3d 580 (9th Cir. 2024). In dismissing state-law claims in a human rights suit filed by foreign nationals against two U.S. corporations, the majority in *Mujica* gave significant weight to the view of the U.S. executive branch that the case should be dismissed. *Id.* at 610. Judge Zilly dissented from this part of the opinion, finding the doctrine inapplicable in the absence of a pending foreign proceeding. *Id*. at 622.

No court has done what the district court did here, which is to abstain from hearing a case brought by U.S. nationals under the principles of international comity where (1) there is no pending proceeding in the foreign jurisdiction; and (2) doing so would leave U.S. victims without recourse for violations of U.S. law. *See generally* Dodge, *supra*.

Viewed in this context, the district court's comity assessment makes little sense. Considering the U.S.'s strong interest in ensuring enforcement of its antitrust laws within its territory, and in deterring violations of its antitrust laws which affect U.S. markets, the principles of comity do not support deferring to the courts of another country that provides U.S. antitrust victims no remedy.

CONCLUSION

If upheld, the district court's opinion provides an avenue for an antitrust defendant to "escape full liability for his illegal actions" and "deny compensation to certain of his victims"—including U.S. victims—"merely because he happens to deal with foreign customers." *Pfizer*, 434 U.S. at 314–15. For the foregoing reasons, the district court's opinion should be reversed.

Respectfully submitted,

/s/ David O. Fisher
DAVID O. FISHER
Counsel of Record
RANDY STUTZ
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 304-0195
dfisher@antitrustinstitute.org

Counsel for Amicus Curiae

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