No. 14-1122

IN THE

Supreme Court of the United States

MOTOROLA MOBILITY LLC,

Petitioner,

v.

AU OPTRONICS CORPORATION, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether U.S. antitrust law applies to Motorola's claims that its foreign subsidiaries overpaid for LCD panels that they purchased in foreign markets?

2. Whether a court of appeals may authorize a randomly assigned motions panel that invests substantial time in a case to retain the case for disposition on the merits?

RULE 29.6 STATEMENT

Chunghwa Picture Tubes, Ltd. has no parent company and no publicly held corporation holds 10 percent or more of its stock.

HannStar Display Corporation has no parent company and no publicly held corporation holds 10 percent or more of its stock.

LG Display Co., Ltd. has no parent company. The only publicly held entity that owns 10 percent or more of the stock of LG Display Co., Ltd. is LG Electronics, Inc. LG Display America, Inc. is a wholly owned subsidiary of LG Display Co., Ltd.

Samsung Electronics Co., Ltd. has no parent company and no publicly held corporation holds 10 percent or more of its stock. Samsung Semiconductor, Inc. is a wholly owned subsidiary of Samsung Electronics America, Inc. Samsung Electronics America, Inc. is a wholly owned subsidiary of Samsung Electronics Co., Ltd.

Samsung Electronics Co., Ltd. owns more than 10 percent of Samsung SDI Co., Ltd.'s stock. Samsung SDI America, Inc. is a wholly owned subsidiary of Samsung SDI Co., Ltd.

Sanyo Consumer Electronics Co., now Business Administration Department, SANYO Electric Co., Ltd., is a wholly owned subsidiary of Panasonic Corporation, a publicly held corporation.

Sharp Corporation has no parent company and no publicly held corporation holds 10 percent or more of its stock. Sharp Electronics Corporation is a wholly

owned subsidiary of Sharp Corporation, a publicly held corporation.

Toshiba Corporation has no parent company and no publicly held corporation holds 10 percent or more of its stock. Toshiba America Electronic Components, Inc. is a wholly owned subsidiary of Toshiba America, Inc., which is a holding company wholly owned by Toshiba Corporation. The Innovation Network Corporation of Japan owns 10 percent or more of the stock of Toshiba Mobile Display Co., Ltd. (n/k/a Japan Display, Inc.).[1]

[1] In its petition, Motorola erroneously identified Toshiba America Information Systems, Inc. as a party; that entity was dismissed from this action by stipulation in August 2012.

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INTRODUCTION

Motorola claims that its foreign subsidiaries were overcharged for LCD panels that were made, delivered, and paid for in foreign countries and used at foreign factories. Although some of the panels were incorporated into cellphones that were shipped to Motorola in the United States, Motorola expressly waived any claim that it overpaid for the cellphones. The question presented here is therefore a narrow one: does U.S. antitrust law apply to Motorola's claims that its foreign subsidiaries overpaid for panels that they purchased in foreign markets?

That question does not warrant this Court's review: unanimous Supreme Court and circuit authority holds that U.S. antitrust law does not apply to such foreign purchases. Nor is there any reason for this Court to review the Seventh Circuit's internal panel assignment procedures.

STATEMENT

A. The Foreign Trade Antitrust Improvements Act

Before the enactment of the Foreign Trade Antitrust Improvements Act ("FTAIA"), the foreign reach of the Sherman Act was governed by an "effects test" first articulated in *United States v. Alcoa*, 148 F.2d 416, 443-45 (2d Cir. 1945). Under that test, U.S. courts applied the Sherman Act to foreign conduct if the conduct "was meant to produce and did in fact produce some substantial effect" on U.S. commerce. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-96 (1993).

Although in theory the effects test recognized "the limitations customarily observed by nations upon the exercise of their powers," *Alcoa*, 148 F.2d at 443, in practice courts applying the test often failed "to consider other nations' interests." *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 611-12 (9th Cir. 1976). As a result, the test "was not warmly received in other countries, which as of the mid-1940s did not as a rule have antitrust laws and which resented the apparent effort of the United States to act as the world's competition police officer." *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 960-62 (7th Cir. 2003) (Wood, J., dissenting), *opinion adopted in Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012) (en banc).

Foreign governments often reacted to what they regarded as overreaching under the *Alcoa* test by refusing to cooperate with U.S. antitrust investigations, blocking U.S. discovery efforts, and barring enforcement of U.S. judgments. *See* Carl A. Cira, *The Challenges of Foreign Laws to Block American Antitrust Actions*, 18 Stan. J. Int'l L. 247 (1982). Congress therefore "became concerned that the broad jurisdictional language in the Sherman Act" had created a legal regime "excessively hospitable" to foreign application of U.S. antitrust law. Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272i (2006 ed.). Congress also grew concerned that the *Alcoa* test inappropriately relied on "inquiries into the actual, subjective motives of defendants." H.R. Rep. No. 97-686, at 9.

Congress responded by enacting the FTAIA to replace the intent-based *Alcoa* test with a "single, objective test" that would enable "businessmen . . . as

well as our trading partners" to determine whether U.S. law applies to their business dealings. *Id.* at 2-3. Under the FTAIA's objective test:

> [The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of [the Sherman Act].

15 U.S.C. § 6a.

This Court addressed the FTAIA in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), a case involving a global vitamins cartel. As *Empagran* explained, the FTAIA "initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach." *Id.* at 162. The statute then sets forth a two-part "domestic-injury exception to the general rule" that applies when anticompetitive conduct "(1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and

(2) 'such effect gives rise to a [Sherman Act] claim.'" 542 U.S. at 159.

Empagran applied this test to foreign vitamin purchasers who had been injured by the global cartel. *See id.* at 159-60. Although this Court recognized that U.S. vitamin purchasers were entitled to sue the cartel members under U.S. antitrust law, it held that the FTAIA barred the claims of the foreign purchasers because effects on U.S. commerce had not "given rise to" their claims. *See id.* at 164, 175.

Every court of appeals to consider the question likewise has held that foreign purchasers of price-fixed products fail to satisfy the FTAIA's requirement that effects on U.S. commerce must "give rise to" their antitrust claims. *See, e.g.*, *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 819-20 (7th Cir. 2015); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 989 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig. ("MSG")*, 477 F.3d 535, 539-40 (8th Cir. 2007); *Empagran S.A. v. F. Hoffmann-La Roche Ltd. ("Empagran II")*, 417 F.3d 1267, 1271 (D.C. Cir. 2005); *Den Norske Stats Oljeselskap As v. HeereMac v.o.f.*, 241 F.3d 420, 429 (5th Cir. 2001).

B. Factual Background

Petitioner Motorola Mobility LLC ("Motorola") is a global electronics company. Defendants are manufacturers of liquid crystal display (LCD) panels.

Motorola accuses defendants of fixing the prices at which they sold LCD panels to Motorola and its foreign subsidiaries. Pet. App. 2a.[2]

Motorola's complaint divided the panels purchased from defendants into three separate categories:

- **Category One**, consisting of panels imported into the United States for use in the United States (1% of total purchases);
- **Category Two**, consisting of panels that were purchased overseas, used at overseas factories, and incorporated into phones later sold in the United States (42% of purchases); and
- **Category Three**, consisting of panels that were purchased overseas, used at overseas factories, and incorporated into phones later sold in foreign countries (57% of purchases).

C.A. App. SA187-88 at ¶¶ 184-87, SA706.

Although Motorola is the named plaintiff in this action, the only panels that *it* purchased are the Category One panels, and those purchases are not at issue here. Pet. App. 3a. All of the Category Two and

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[2] Contrary to Motorola's suggestion, only *one* respondent pled guilty to antitrust violations relating to the type of "small" LCD panels at issue in this case, and its plea involved a single panel model sold over a period of less than a year. *See* C.A. App. SA47. Other respondents pled guilty solely with respect to "large" panels used in products such as televisions. Still other respondents deny any involvement in, and have never been charged with, LCD-related antitrust violations of any kind.

Three panels were purchased by Motorola's foreign subsidiaries. *Id.* 3a-4a. Motorola asserts the claims of these foreign subsidiaries as their contractual assignee under "Litigation Assignment Agreements." C.A. App. SA142-43 at ¶ 28, SA658-89, SA702-03.

Without exception, all of the Category Two and Three panels were manufactured, delivered, and paid for in foreign countries using funds maintained overseas. C.A. App. SA461-62 at ¶¶ 203-08, SA493-94, SA498-99, SA509-10, SA517-19, SA565-66, SA570-72. All of these panels, moreover, were sold pursuant to foreign-issued purchase orders in which Motorola's foreign subsidiaries required their suppliers to comply with foreign law, not U.S. law. *Id.* SA462-64 at ¶¶ 206, 213.

Although Motorola implies that Category Two and Three panels were merely "delivered" abroad and that Category Two panels were then "imported directly into the United States," Pet. i, that is not correct. Instead, Category Two and Three panels passed through an extended, multi-step foreign supply chain that ended with their incorporation into cellphones at foreign factories. *See* C.A. App. SA487-92, SA508-13, SA527-34, SA577-78, SA593-96. Moreover, contrary to the impression created by Motorola, the panels that ended up in cellphones that were shipped to the United States were identical to the panels that ended up in cellphones shipped to foreign countries. *See* C.A. App. SA583-84. Defendants did not know which were which and did not "target" U.S.-bound panels for different treatment. *See id.*

A total of ten different foreign subsidiaries purchased the Category Two and Three panels.

Motorola created these foreign corporations in order to take advantage of foreign tax incentives, foreign labor markets, and foreign regulatory environments. *See* C.A. App. SA546-47, SA588-92, SA595-99, SA708.

C. Proceedings

In multidistrict litigation (MDL) proceedings in San Francisco, defendants moved for summary judgment against Motorola's Category Two and Three claims on the ground that effects on U.S. commerce did not "give rise to" any of those claims. C.A. App. SA396. Although the MDL court denied the motion, the district court in Chicago later reconsidered that ruling and entered summary judgment for defendants. Pet. App. 46a, 61a.

Motorola sought and received permission for an interlocutory appeal under 28 U.S.C. § 1292(b). Based on the interlocutory appeal papers, the Seventh Circuit summarily affirmed the grant of summary judgment for defendants, finding that Motorola could not show either (i) that the Category Two and Three panel purchases had the requisite "direct" effect on U.S. commerce, or (ii) that any such effects on U.S. commerce "gave rise to" the alleged injuries to Motorola's foreign subsidiaries. Pet. App. 30a-33a.

Motorola petitioned for rehearing, asserting that the Seventh Circuit had erred and that the appeal should have been set for briefing and oral argument. The U.S. government supported Motorola's petition solely with respect to the Seventh Circuit's "directness" holding. *See* Apr. 29 U.S. C.A. Br. 7-13, 15. In response, the Seventh Circuit vacated its

opinion and set the case for full briefing and argument, after which it again affirmed the judgment of the district court. *See* Pet. App. 2a. This time, however, the court omitted the "directness" holding to which the government had objected. *See id.* 6a-7a.

In its revised opinion, the Seventh Circuit began by rejecting Motorola's argument under the FTAIA's carveout for anticompetitive conduct that restrains U.S. import commerce—the so-called "import commerce exclusion." As the Seventh Circuit explained, the collusive prices allegedly charged on Category Two and Three panels were charged in wholly foreign commerce, not in U.S. import commerce. *See id.* 4a, 5a-6a, 18a. Moreover, "[i]t was Motorola, rather than the defendants, that imported [Category Two] panels into the United States, as components of the cellphones that its foreign subsidiaries manufactured abroad." *Id.* 5a. Accordingly, although the court assumed that the prices charged for Category Two panels in foreign commerce "may well" have had direct effects on U.S. import commerce, *see id.* 5a-6a, it concluded that those effects must be analyzed under the "effects" provisions of the FTAIA's domestic injury exception, not the import commerce exclusion, *id.*

Turning to the domestic injury exception, the Seventh Circuit held that Motorola's foreign subsidiaries could not meet that exception's "gives rise to" requirement because effects on foreign commerce, not domestic commerce, had given rise to their claims. *See id.* 7a-9a. The U.S. government had expressed exactly that view in its amicus brief. *See* Sept. 5 U.S. C.A. Br. 20-22.

The Seventh Circuit next addressed the supposedly separate claims of Motorola itself—the U.S. parent of the foreign subsidiaries—and rejected those claims on several grounds. Pet. App. 9a-19a.

As an initial matter, the Seventh Circuit found that Motorola had waived any claim that it overpaid for the cellphones it acquired from its foreign subsidiaries. *Id.* 16a-17a. First, Motorola expressly waived that claim in discovery responses in which it stated that "'Motorola is not basing its claims on the purchase of finished LCD Products [*i.e.*, cellphones].'" *Id.* 17a (addition in original). Second, Motorola waived any such claim when its damages expert failed to quantify any alleged increase in the prices at which Motorola acquired cellphones (as opposed to the prices at which its foreign subsidiaries acquired stand-alone panels). *Id.* Finally, Motorola again waived any claim that it overpaid for cellphones in its opposition to defendants' summary judgment motion. *Id.* 16a-17a.

In addition to finding these waivers, the Seventh Circuit also rejected Motorola's newly-asserted claims on the merits. As the court observed, the "immediate victims" of the alleged price-fixing were Motorola's foreign subsidiaries, not Motorola. *Id.* 8a. As a result, settled principles of antitrust standing barred Motorola from asserting claims of "derivative injury" under U.S. law, rather than relying on the foreign remedies available to the foreign subsidiaries. *Id.* 10a-11a. For similar reasons, the court found that Motorola's claims were precluded by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which bars indirect purchasers of price-fixed goods

from seeking damages under the Sherman Act. Pet. App. 11a-15a.

The Seventh Circuit concluded by emphasizing that considerations of international comity weigh strongly against Motorola's claims. *Id.* 18a-19a. Permitting Motorola to apply U.S. law to the alleged foreign injuries of its foreign subsidiaries, the court reasoned, "would be an unjustified interference with the right of foreign governments to regulate their own economies." *Id.* Four foreign governments—Belgium, Japan, Korea, and Taiwan—had urged the court to reach that conclusion in amicus submissions.

REASONS THE WRIT SHOULD BE DENIED

This case presents a narrow and straightforward question that has not divided the courts of appeals and that this Court answered in *Empagran*.

Motorola's foreign subsidiaries purchased LCD panels that were made, delivered, and paid for in foreign countries and used at foreign cellphone factories. Although the subsidiaries later shipped some of the completed cellphones to Motorola in the United States, Motorola waived any claim that it overpaid for these cellphones. As a result of that waiver, the narrow question presented here is whether Motorola may apply U.S. antitrust law to its allegations that its foreign subsidiaries purchased price-fixed goods in foreign markets.

This Court resolved that question in *Empagran*. There, the Court held that foreign plaintiffs who purchased price-fixed goods in foreign markets failed to satisfy the FTAIA's requirement that effects on U.S. commerce must "give rise to" the plaintiff's

injuries. Consistent with *Empagran*, the decision below rejected Motorola's claims on the ground that effects on foreign commerce, not domestic commerce, gave rise to the alleged injuries to Motorola's foreign subsidiaries.

The decision below does not, as Motorola argues, create a circuit split on the FTAIA. In the wake of *Empagran*, the courts of appeals have unanimously rejected attempts to apply U.S. antitrust law to the claims of foreign plaintiffs whose injuries arise in foreign markets. The Seventh Circuit's decision is in harmony with this unanimous precedent. No court of appeals has accepted Motorola's argument that it makes a difference if the foreign plaintiff is owned by a U.S. parent company. Nor has any court of appeals endorsed Motorola's position that a party injured in foreign commerce may sue under U.S. law merely because *other* parties have suffered a downstream injury in the United States.

Motorola is equally mistaken in suggesting that the decision below will immunize foreign cartels from private damages suits under U.S. antitrust law. Although the Seventh Circuit held that *Motorola* could not sue under U.S. law because the injuries it asserted arose in foreign commerce, the court did not consider whether Motorola *customers* who allegedly were injured in *domestic* commerce could sue under U.S. law, or even whether Motorola itself could have sued under theories of recovery that it elected to waive. The court made clear, moreover, that the U.S. government may sue over injuries that arise in U.S. commerce.

The decision below is consistent with all other appellate authority; it properly respects the rights of

foreign governments to regulate foreign commerce; and it preserves and promotes the U.S. government's ability to prosecute international cartels. Certiorari should therefore be denied.

I. There Is No Conflict In Circuit Authority.

Motorola argues that the Seventh Circuit's decision conflicts with *United States v. Hsiung*, 778 F.3d 738 (9th Cir. 2015), as to the domestic injury exception, and conflicts with *Hsiung* and *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3rd Cir. 2011), as to the import commerce exclusion. Neither of these so-called conflicts has any substance.

A. There Is No Conflict Regarding The Domestic Injury Exception.

Contrary to Motorola's assertion, the Seventh Circuit's interpretation of the domestic injury exception is fully consistent with the Ninth Circuit's decision in *Hsiung*.

As noted above, the domestic injury exception creates a two-part exception to the FTAIA that applies when (i) anticompetitive conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce, and (ii) this domestic effect "gives rise to" the plaintiff's claims. *See* 15 U.S.C. § 6a(1)-(2). The Seventh Circuit's decision cannot possibly conflict with *Hsiung* as to these requirements because *Hsiung* addressed only the first of the two requirements, whereas the Seventh Circuit addressed only the second.

In *Hsiung*, the Ninth Circuit applied the first requirement of the domestic injury exception—the

requirement of a "direct" effect on U.S. commerce. *Hsiung* was a criminal case in which the government prosecuted AU Optronics ("AUO") for fixing the prices of "large" LCD panels used in products such as televisions and laptops. *See Hsiung*, 778 F.3d at 758. Some of the panels at issue had been sold in foreign countries and then incorporated into consumer products later sold in the United States. *See id.* AUO argued that these foreign panel sales were beyond the reach of U.S. prosecutors because the prices charged for the panels had no "direct" effect on U.S. prices for the resulting products. *Id.* The Ninth Circuit disagreed, finding a sufficiently "direct" effect to satisfy the domestic injury exception. *See id.* The Ninth Circuit said nothing, however, about the domestic injury exception's separate "gives rise to" requirement because AUO had never argued that the government failed to satisfy that requirement. *See* Br. of AUO, *Hsiung*, 778 F.3d 738 (9th Cir. 2015) (Nos. 12-10500, 12-10514, 12-10558).

In *Motorola*, by contrast, the Seventh Circuit relied *exclusively* on the "gives rise to" requirement in rejecting Motorola's claims. The court began by "assum[ing]" the existence of direct effects on U.S. commerce. Pet. App. 6a-7a. It then went on to hold that any such U.S. effects were not the effects that "gave rise to" Motorola's foreign injury claims. Pet. App. 7a-9a. In reaching that conclusion, moreover, the Seventh Circuit expressly stated that if the requisite effects on U.S. commerce existed, those effects *would* give rise to government enforcement actions such as the government's prosecution of AUO. *See id.* 21a ("If price fixing by the component manufacturers had the requisite statutory effect on

cellphone prices in the United States, the [FTAIA] would not block the Department of Justice from seeking criminal or injunctive remedies.").

Motorola and *Hsiung* are thus in accord with one another. Motorola's contrary argument rests on a vague and misleading discussion of *Hsiung* in which it erroneously implies that *Hsiung*'s discussion of "directness" is actually a discussion of "gives rise to." *See* Pet. 15-16, 17-18. Motorola's attempt to manufacture a conflict between the two decisions is further undermined by the fact that each decision cites the other with approval. *See Hsiung*, 778 F.3d at 760 (amended after publication to cite and quote *Motorola* with approval); *Motorola*, Pet. App. 21a (approving the result in *Hsiung*); *see also* U.S. Br. in Opp. 11, *Hsiung v. United States*, No. 14-1121 (U.S. May 15, 2015) (*Hsiung* "is consistent with" *Motorola*).

Motorola's argument also ignores the obvious distinction between (i) government prosecutions based on effects on U.S. commerce and (ii) civil damages claims based on allegations of foreign injury. Where, as in *Hsiung*, direct effects on domestic commerce are found to exist, those effects clearly "give rise to" government enforcement actions aimed at protecting the U.S. economy. *See Empagran* 542 U.S. at 170-71; Pet. App. 21a. But where, as here, a private party sues over injuries allegedly sustained in foreign markets, effects on foreign

commerce—not domestic commerce—give rise to the plaintiff's claims.[3]

B. There Is No Conflict Regarding The Import Commerce Exclusion.

Motorola is no more successful with its argument that the Seventh Circuit's decision conflicts with *Hsiung* and *Animal Science* with respect to the import commerce exclusion. As shown below, *Hsiung* applied the import commerce exclusion the same way the Seventh Circuit applied it. Similarly, although *Animal Science* did not actually apply the import commerce exclusion, the language that the court used to describe the exclusion is entirely consistent with the decision below.

1. *Hsiung*.

The Seventh Circuit's *Motorola* decision and the Ninth Circuit's *Hsiung* decision apply the import commerce exclusion in precisely the same way. Both

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[3] Motorola is also mistaken in arguing that the decision below is inconsistent with "language" in *Empagran II*, 417 F.3d 1267. In *Empagran II*, the D.C. Circuit stated in dicta that a foreign injury proximately caused by anticompetitive effects on U.S. commerce might give rise to a U.S. antitrust claim. *See id*. The court's language suggests, for example, that a British company might have a claim if it purchased price-fixed products in the United States but paid for the products from a London bank account. *See id*. The Seventh Circuit did not hold otherwise. Rather, it found that Motorola failed to satisfy the "gives rise to" requirement because its alleged injuries originated "entirely in foreign commerce." Pet. App. 7a. This reasoning is completely consistent with this Court's ruling in *Empagran* that the FTAIA is not satisfied when "foreign harm alone gives rise to the plaintiff's claim." 542 U.S. at 166-67.

courts applied the exclusion to panels that were imported "directly" into the United States, and both declined to apply the exclusion to panels that were originally sold abroad and then shipped to the United States as components of consumer products. Motorola's contrary arguments rest on a clear misreading of *Hsiung*.

In *Hsiung*, the Ninth Circuit separately analyzed (i) panels imported directly to the United States, and (ii) panels originally sold in foreign countries. *See* 778 F.3d at 753-60. According to the Ninth Circuit, AUO and its co-conspirators "sold hundreds of millions of dollars of price-fixed panels *directly* into the United States." 778 F.3d at 760 (emphasis added). For these panels alone, the court found that the government had satisfied the import commerce exclusion. *See id.* at 754-55 & n.8, 760. The court expressly declined to decide whether the import commerce exclusion might reach beyond these directly-imported panels, stating that "[w]e need not determine" whether the exclusion extends beyond "the heartland situation" of direct importation. *Id.* at 755 n.8.

Having thus concluded its import commerce analysis, the Ninth Circuit proceeded to analyze whether the government could reach a different group of panels—"$23.5 billion in price-fixed panels [that] were imported into the United States as part of finished products"—under the domestic injury exception. *See id.* at 759. The court ultimately concluded that the government *could* reach those panels under the domestic injury exception because the government's prosecution of AUO arose out of "direct" effects on U.S. commerce. *Supra* pp. 12-13.

This is exactly the same approach that the Seventh Circuit employed below. The Seventh Circuit recognized that the one percent of panels that the defendants sold directly into the United States—the Category One panels—fell within the import commerce exclusion. *See* Pet. App. 5a. It then proceeded to analyze whether Category Two panels—panels that were sold abroad and later imported into the United States as components of cellphones—could be reached under the domestic injury exception. *See id.* 6a. None of this analysis creates any tension, much less an actual conflict, between *Motorola* and *Hsiung*.[4]

Motorola nevertheless asserts that the two decisions are in conflict because *Hsiung* supposedly applied the import commerce exclusion to "the equivalent of Motorola's Category 2 purchases." Pet. 15. Motorola bases this argument on a tortured inference that it attempts to draw from a statement in *Hsiung* that AUO and its co-conspirators "earned over $600 million from the importation of [panels] into the United States." 778 F.3d at 756. Motorola somehow infers from this statement that the Ninth Circuit (1) believed that the $600 million figure included Category Two-type panels that were imported as components of consumer products, and (2) applied the import commerce exclusion to these Category Two-type panels. *See* Pet. 15.

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[4] The National Association of Manufacturers requests review to resolve "uncertainty" allegedly created by the decision below, but that request proceeds from the wholly mistaken assumption—adopted at face value from Motorola's petition—that the decision below conflicts with *Hsiung*. *See* NAM Br. 2.

Motorola is wrong on both counts. First, as the government explained in *Hsiung*, the $600 million did *not* include any Category Two-type panels; it consisted solely of panels that the alleged conspirators sold directly into the United States. *See* Br. of U.S. 8, *Hsiung*, 778 F.3d 738 (9th Cir. 2015) (Nos. 12-10492, 12-10493, 12-10500, 12-10514) ($600 million figure relates to panels "shipped from the conspiring manufacturers to customers in the United States"); *see also* Opp. to Pet. for Rehearing 6 (Oct. 10, 2014). Second, *Hsiung* explicitly stated that it was *not* applying the import commerce exclusion outside "the heartland situation of the direct importation of foreign goods into the United States." *Hsiung*, 778 F.3d at 755 n.8.

Motorola completely ignores this "heartland" language. It also ignores the Ninth Circuit's favorable citation to an earlier Seventh Circuit decision holding that, in cartel cases, the import commerce exclusion applies to "'transactions that are directly between the [U.S.] plaintiff purchasers and the defendant cartel members.'" *See Hsiung*, 778 F.3d at 755 (quoting *Minn-Chem*, 683 F.3d at 855). This, of course, is the same rule of law that the Seventh Circuit applied in *Motorola*. *See infra* p. 28. For all these reasons, Motorola's attempt to manufacture a conflict between the decision below and *Hsiung* lacks merit.

2. *Animal Science.*

There is also no conflict between the decision below and the language that Motorola cites from *Animal Science*.

In *Animal Science*, the Third Circuit's discussion of the import commerce exclusion consisted solely of a "brief instruction" that it offered to a district court in the course of reversing the district court on a different issue. *See* 654 F.3d at 470. The Third Circuit's instruction cautioned that although the import commerce exclusion "must be given a relatively strict construction," *id*., the exception does not necessarily require "that the defendants function as the physical importers of [price-fixed] goods." Instead, the court counseled that "the relevant inquiry is whether the defendants' alleged anticompetitive behavior 'was directed at an import market.'" *Id*. at 470 (citation omitted). "[T]o phrase it slightly differently," the court continued, "the import trade or commerce [exclusion] requires that the defendants' conduct target import goods or services." *Id*.

Motorola argues that this "targeting" language conflicts with the Seventh Circuit's treatment of the import commerce exclusion, but that is wishful thinking. *Animal Science* emphasized that the requisite "targeting" of import commerce does not exist in cases like this one, in which the challenged prices are charged in wholly *foreign* commerce and therefore "target[] a foreign market," not a domestic one. *See id*. Applying that reasoning here, the prices charged for Category Two and Three panels were charged in wholly foreign commerce and therefore targeted foreign markets, not domestic ones.

Animal Science also emphasized that the import commerce exclusion is not satisfied when anticompetitive prices are charged abroad and "[a]ny subsequent 'importing' of these rates into the United

States occurred as a result of the plaintiffs' own activities." 654 F.3d at 470. That is simply another way of saying the same thing that the Seventh Circuit said below: "[i]t was Motorola, rather than the defendants, that imported these panels into the United States, as components of cellphones that its foreign subsidiaries manufactured abroad." Pet. App. 5a.

For similar reasons, there is no conflict between the decision below and *Animal Science*'s statement that the import commerce exclusion does not necessarily require that the defendants "function as the physical importers of goods." 654 F.3d at 470. *Animal Science* explained this statement by observing that the exclusion would apply to a conspiracy to *boycott* import commerce even though such a conspiracy would involve no physical importing by the conspirators. *See id.* at 470-71. Nothing in the decision below suggests that the Seventh Circuit would take a different view. Nor did the decision below suggest that cartel conduct would fall outside the import commerce exclusion in the situation highlighted by the government's amicus brief in the Seventh Circuit—a situation in which cartel members sell their goods directly into the United States but hire a third party to do the physical importing. *See* Sept. 5 U.S. C.A. Br. 9.

II. The Court Of Appeals Correctly Resolved The Narrow Issue Presented.

The Seventh Circuit correctly held that Motorola failed to satisfy either the FTAIA's domestic injury exception or its import commerce exclusion. As discussed below, the claims of Motorola's foreign

subsidiaries are squarely foreclosed by this Court's decision in *Empagran*. The purportedly separate claims of Motorola itself, in turn, are barred by a series of waivers and by settled rules of antitrust standing. Finally, Motorola's assertion that the decision below will impede effective antitrust enforcement is meritless.

A. The Court Of Appeals Correctly Analyzed The Domestic Injury Exception.

Motorola argues that it satisfies the domestic injury requirement because effects on U.S. commerce "gave rise to" three different types of claims: (1) claims that Motorola's foreign subsidiaries overpaid for LCD panels, (2) claims that Motorola itself overpaid for cellphones it acquired from its subsidiaries, and (3) claims that Motorola and its subsidiaries should be viewed as a single indivisible entity that overpaid for LCD panels that were later imported into the United States as components of cellphones. None of these arguments has merit.

1. Motorola's claims that its foreign subsidiaries overpaid for panels they purchased in foreign markets are foreclosed by this Court's decision in *Empagran*.

As discussed above, *Empagran* involved a global vitamins cartel that had inflated the prices of vitamins both here and abroad. *See* 542 U.S. at 159-60. This Court concluded that although domestic purchasers of vitamins were entitled to sue the cartel under U.S. antitrust law, foreign purchasers could not do so because effects on U.S. commerce did not "give rise to" their claims. 542 U.S. at 173-74. Any

other result, the Court observed, would create an unjustified risk of "interference with a foreign nation's ability independently to regulate its own commercial affairs." *Id*. at 165.

Motorola's foreign subsidiaries occupy the same position as the plaintiffs in *Empagran*—they are foreign companies whose injuries accrued in foreign commerce, independent of any downstream effects on U.S. commerce. 542 U.S. at 164. Thus, as the government concluded in its amicus brief below, the foreign subsidiaries "fail[] . . . to satisfy the gives-rise-to requirement" because any effect that defendants' conduct may have had on U.S. cellphone prices "does not give rise to the [panel overcharge] claims of Motorola's foreign affiliates." *See* Sept. 5 U.S. C.A. Br. 21-22. Every court of appeals to decide the question likewise has concluded that downstream effects on U.S. commerce do not give rise to upstream claims of foreign injury. *See Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 414 (2d Cir. 2014); *Den Norske*, 241 F.3d at 426-27; *see also DRAM*, 546 F.3d at 989; *MSG*, 477 F.3d at 539-40; *Empagran II*, 417 F.3d at 1271.

Motorola responds that as long as defendants' conduct had anticompetitive effects in the United States, it does not matter whether those U.S. effects gave rise to the claims of its foreign subsidiaries. *See* Pet. 26-27. That argument, however, was rejected in *Empagran*, which held that it is not enough if adverse effects on U.S. commerce give rise to "a" claim or "someone else's claim," as opposed to "the plaintiff's claim" or "the claim at issue." 542 U.S. at 173-74. Motorola's contrary reading of the gives-

rise-to requirement, the Court explained, "is not consistent with the FTAIA's basic intent." *Id.* at 174.

Motorola also argues that some of the anticompetitive conduct at issue occurred in the United States. Pet. 23. Once again, however, its argument is foreclosed by *Empagran*, which held that it was irrelevant that "some of the anti-competitive price-fixing conduct alleged here took place in America." *See* 542 U.S. at 165-66. As *Empagran* recognizes, the relevant question under the FTAIA is not the site of the anticompetitive *conduct*, but rather the site of the effects on *commerce* that give rise to the plaintiff's claim. *See id.* (holding that "Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm"); *accord Den Norske*, 241 F.3d at 427 (rejecting contrary argument as "not true to the plain language of the FTAIA").

2. Motorola argues that even if its foreign subsidiaries have no claim, *it* has a claim because it overpaid for cellphones it acquired from the foreign subsidiaries and imported into the United States. That argument, however, was repeatedly waived at the trial court level—first in Motorola's discovery responses, then again when Motorola's expert failed to quantify any effects on cellphone prices, and yet again when Motorola failed to raise the argument in response to defendants' summary judgment motion. *See* Pet. App. 16a-17a; *supra* p. 9. As the Seventh Circuit put it, "How the overcharge may have affected Motorola's cellphone business because of the

component price fixing was a path that Motorola stepped off of after the pleadings." Pet. App. 17a.[5]

Motorola's argument is also barred by settled principles of antitrust standing. As the Seventh Circuit correctly observed, any injuries to Motorola itself were wholly derivative of earlier injuries to its foreign subsidiaries—the parties that allegedly overpaid for price-fixed LCD panels. Pet. App. 4a, 10a-11a. Motorola's claims are therefore barred by the rule that derivative injuries are not antitrust injuries, *see id.*, and by the related rule that antitrust remedies ordinarily extend only to the "immediate victims" of antitrust violations, *see Assoc. Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 541 (1983).

Motorola's claims are additionally precluded by the indirect purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), since it was the subsidiaries, not Motorola, that made direct purchases of LCD panels. *See* Pet. App. 11a-15a. Motorola is wrong to argue that a footnote in *Illinois Brick* creates an "ownership or control" exception permitting *offensive* antitrust claims by *indirect* purchasers. To the contrary, the cited footnote states only that ownership or control "might" afford a passing-on *defense* to the claim of a *direct* purchaser.

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[5] Motorola asserted in the Seventh Circuit that it raised this argument in the district court and that defendants responded to it in their summary judgment brief, but those assertions are incorrect. The discussion that Motorola cited pertained to Motorola's (irrelevant) argument that injuries to its foreign subsidiaries ultimately flowed into its own balance sheet as a result of alleged repatriations of profits.

See 431 U.S. at 736 n.16. Furthermore, Motorola asserts that it "dictated" the internal prices at which it acquired cellphones from its subsidiaries. Pet. 30. As the Seventh Circuit correctly observed, "it would be odd to think" that internal prices that Motorola "dictated" could cause it antitrust injury. Pet. App. 16a; *see also Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 749-51 (1st Cir. 1994) (Breyer, C.J.).

3. Finally, Motorola argues that this Court should view it and its subsidiaries as a single entity for purposes of analyzing their antitrust claims. Pet. 28. This argument, however, ignores a "general principle of corporate law deeply ingrained in our economic and legal systems" that a "corporation and its stockholders are generally to be treated as separate entities." *United States v. Bestfoods, Inc.*, 524 U.S. 51, 61 (1998) (internal quotation marks and citation omitted). Put differently, "Motorola can't just ignore its corporate structure whenever it's in its interest to do so." Pet. App. 8a-10a, 13a-14a.

Motorola answers that *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), allows it to ignore the separate incorporation of its foreign subsidiaries, but *Copperweld* says nothing of the kind. There, the Court held only that the Sherman Act's conspiracy provisions do not apply to corporations that allegedly conspire with their own subsidiaries. *See id.* at 777. The mere fact that these Sherman Act provisions do not reach "intra-corporate conspiracies" in no way suggests that Motorola and its subsidiaries may be treated as a single plaintiff for purposes of asserting offensive antitrust claims.

In any event, even if Motorola and its foreign subsidiaries were treated as a single entity, the fact would remain that this "single entity" made no purchases in U.S. markets. Rather, a theoretical single entity "would have been injured abroad when 'it' purchased the price-fixed components," Pet. App. 16a, and therefore would have to look to foreign law to redress its foreign injuries, *see id.*; *see also* H.R. Rep. No. 97-686, at 9 ("A transaction between two foreign firms, *even if American-owned*, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws." (emphasis added)).

B. The Court Of Appeals Correctly Analyzed The Import Commerce Exclusion.

Motorola fares no better with its unprecedented argument under the import commerce exclusion. According to Motorola, defendants' Category Two and Three sales qualify as "import commerce" even though the goods in question were sold in foreign markets for use at foreign factories. The U.S. government rejected that conclusion in the Seventh Circuit, *see* Sept. 5 U.S. C.A. Br. 9-10, and no court of appeals has ever accepted it.

The import commerce exclusion emanates from a parenthetical phrase in the FTAIA's opening clause, which states that the Sherman Act "shall not apply to conduct involving trade or commerce (*other than import trade or import commerce*) with foreign nations." 15 U.S.C. § 6a (emphasis added). Congress added the parenthetical late in the legislative process to accomplish a modest purpose: to "remove

any possible doubt" that "import restraints" remain covered by U.S. antitrust law. H.R. Rep. No. 97-686, at 9.

As courts have recognized, the import commerce exclusion "must be given a relatively strict construction" in order to differentiate it from the domestic injury exception. *Turicentro, S.A. v. Am. Airlines*, 303 F.3d 293, 304 (3d Cir. 2002). The domestic injury exception addresses, among other things, conduct that has a direct and foreseeable "effect" on "import trade or import commerce." 15 U.S.C. § 6a. Courts therefore analyze conduct that has an "effect" on import commerce under the domestic injury exception, and apply the import commerce exclusion only to conduct that directly restrains import commerce itself. *See Minn-Chem*, 683 F.3d at 855 (exclusion applies to conduct directed at "pure import commerce," *i.e.*, "trade involving only foreign sellers and domestic buyers"); *Animal Science*, 654 F.3d at 470-71 & n.11 (exclusion applies when "seller's actions were directed at a United States import market, rather than some foreign market"); *Turicentro*, 303 F.3d at 303 (exclusion applies only to activities that "directly increase or reduce imports into the United States"); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438 n.3 (6th Cir. 2012) (applying import commerce exclusion only to claim "limited to [plaintiff's] domestic [import] purchases"); Areeda & Hovenkamp, *Antitrust Law* ¶ 272i (import commerce "involves transactions in which the seller is located abroad while the buyer is domestic and the goods flow into the United States").

Here, the collusive prices allegedly charged for Category Two and Three panels did not apply to

import commerce itself; rather, they applied to wholly *foreign* commerce between foreign sellers and foreign buyers. *See* Pet. App. 3a-5a, 7a. Moreover, although Motorola later imported Category Two panels into the United States as components of cellphones, *that* conduct is irrelevant because "[t]he dispositive inquiry is whether the conduct of defendants, not plaintiffs, involves 'import trade or commerce.'" *Turicentro*, 303 F.3d at 303. The Seventh Circuit therefore correctly held that Category Two and Three claims fall outside the import commerce exclusion, a conclusion the U.S. government endorsed at oral argument and in its amicus brief. *See* Pet. App. 5a; Sept. 5 U.S. C.A. Br. 9-10; Oral Arg. Rec. at 24:56-25:07.

Motorola counters that defendants' conduct "involved" import commerce because the same conspiratorial activities that affected Category Two and Three panels also affected Category One panels that were imported directly into the United States. Pet. 24. That reasoning, however, would have the bizarre consequence of extending the import commerce exclusion even to Category Three panels that never entered the United States. It would also overrule *Empagran*: under Motorola's reasoning, the foreign plaintiffs in *Empagran* should have been permitted to sue under U.S. antitrust law because the same conspiratorial conduct that raised foreign vitamin prices also raised domestic vitamin prices. *See Empagran*, 542 U.S. at 158.

Motorola next contends that the import commerce exclusion applies here because the defendants knew and intended that some of the panels they sold in foreign commerce eventually would reach the United

States, *see* Pet. 24, but this argument fails for two independent reasons.

First, defendants' intent is irrelevant. The text of the FTAIA focuses on the objective nature of the restraint of trade, not the subjective intent of the defendants. Specifically, the FTAIA asks whether the defendants' anticompetitive conduct involves "import trade or import commerce," or whether it instead involves "trade or commerce . . . with foreign nations." 15 U.S.C. § 6a. Congress's avowed purpose in choosing this objective language was to replace "inquiries into the actual, subjective motives of defendants" with a "single, objective test" governing the international reach of the Sherman Act. H.R. Rep. No. 97-686, at 2, 9.

Second, it is not correct that the defendants *intended* that the panels they sold in foreign countries would make their way to the United States. Defendants' goal was simply to sell as many panels as they could to Motorola and its subsidiaries. It was a matter of indifference to defendants where those panels ended up, and Motorola cites no evidence to the contrary.

Defendants no doubt would have *foreseen* that some of the panels at issue would end up in the United States, but foreseeability alone is not enough to invoke even the domestic injury exception, much less the narrower import commerce exclusion. *See* 15 U.S.C. § 6a(1)-(2) (requiring a "direct, substantial, *and* reasonably foreseeable" domestic effect that "gives rise to" the plaintiff's claim (emphasis added)). Indeed, if a foreseeable effect on U.S. import commerce were sufficient to invoke the import commerce exclusion, the portion of the domestic

injury exception that addresses "direct, substantial, and reasonably foreseeable effect[s] . . . on import trade or import commerce" would be a nullity. It would reach nothing not already covered by the import commerce exclusion.

C. The Court Of Appeals' Ruling Promotes International Comity And Effective Antitrust Enforcement.

The decision below is also supported by considerations of international comity and effective antitrust enforcement.

Motorola created its foreign subsidiaries in a deliberate attempt to take advantage of foreign tax incentives, foreign labor costs, and foreign regulatory environments. *See supra* p. 7. The subsidiaries then purchased LCD panels in foreign markets and used those panels at foreign factories. *Id.* 5-6. Under these circumstances, applying U.S. law to the purchases of Motorola's foreign subsidiaries would be precisely the type of U.S. overreaching that creates "friction with many foreign countries and resentment at the apparent effort of the United States to act as the world's competition police officer." Pet. App. 19a (internal quotation marks and citation omitted).[6]

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[6] Amici Economists and Professors assert that "international supply chains . . . are likely to be distorted" if foreign antitrust law applies to foreign transactions, *see* Br. 24, but (i) there is no evidence whatsoever that corporations base their supply-chain decisions on antitrust choice-of-law concerns, (ii) their argument rests on the imperialist premise that it is a "distortion" if foreign transactions are governed by foreign law rather than U.S. law, and (iii) any such "distortions" (continued…)

Nor is there any justification here for interfering with "foreign nation[s'] ability independently to regulate [their] own commercial affairs." *Empagran*, 542 U.S. at 165. Although extraterritorial application of U.S. antitrust law can be "reasonable" when it "redress[es] *domestic* antitrust injury that foreign anticompetitive conduct has caused," *id.*, the U.S. interest in redressing *foreign* injuries is "insubstantial," *id.*, and wholly unpersuasive to foreign governments. For that very reason, several foreign governments—Belgium, Japan, Korea, and Taiwan—submitted briefs in the courts below to express their opposition to Motorola's position. *See* Pet. App. 2a.

Motorola's proposed interference with foreign governments is troubling in its own right, but it also has a practical cost. By generating friction with foreign governments, Motorola's approach would "undermine the cooperative relationships that this Nation's antitrust agencies have forged with their foreign counterparts in recent years." Br. of the United States as Amicus Curiae 22, *Empagran*, 542 U.S. 155 (No. 03-724); *see also* U.S. Br. in Opp. 27 n.6, *Hsiung v. United States*, No. 14-1121 (U.S. May 15, 2015) ("Foreign governments have expressed concern about attempts by foreign plaintiffs to recover treble damages in U.S. courts for purchases in foreign markets."). Such international cooperation is vital to obtaining access to the foreign documents and witnesses needed to prosecute international

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presumably could be addressed by including choice-of-law provisions in purchase contracts.

cartels. *See id.*; *supra* p. 2. Motorola's approach also "would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty." 542 U.S. at 168 (referring to amicus arguments of foreign governments); *see also* Belgium C.A. Amicus Br. 5-8.

Motorola counters that the Seventh Circuit decision will undermine *private* enforcement of the antitrust laws, but its arguments are unpersuasive. As an initial matter, *public* enforcement efforts "deter[] cartel behavior more effectively" than private litigation, and public enforcement efforts are impeded by overly expansive use of U.S. treble damages actions to police foreign commerce. *See* Br. of the United States as Amicus Curiae 21, *Empagran*, 542 U.S. 155 (No. 03-724). For several reasons, moreover, Motorola is seriously mistaken in suggesting that the decision below will "immunize" foreign cartels from private suit so long as they initially deliver price-fixed goods to foreign delivery sites.

First, the facts here are narrower than Motorola suggests. The panels at issue were not merely "delivered" overseas and then imported "directly" into the United States. Pet. i, 12. Rather, after Motorola's foreign subsidiaries purchased these panels, the panels passed through a multi-step supply chain that culminated in their incorporation into cellphones at foreign factories. *Supra* p. 6.

Second, even on the narrow facts of this case, the Seventh Circuit did not hold that defendants are "immune" from private antitrust liability. Pet. 12. The court did not decide, for example, whether

Motorola could have asserted a claim that it *lost U.S. cellphone sales* as a result of higher overseas component prices—a claim that some have suggested would survive the bars to Motorola's foreign injury claims—because Motorola waived that claim. Pet. App. 8a. Nor did the Seventh Circuit decide whether Motorola's U.S. customers could assert private damages claims based on the government's suggestion that an *Illinois Brick* exception could be created for the first true U.S. purchaser of goods affected by foreign price-fixing. *See* Apr. 29 U.S. C.A. Br. 14 n.2.[7] Nor did the Seventh Circuit address potential treble damages actions under state-law indirect purchaser statutes—yet another category of claims that Motorola expressly waived in the district court. *See* C.A. App. SA379-87.

Finally, Motorola and its foreign subsidiaries remain free to seek relief under foreign law. *See* Pet. App. 9a. Motorola invites this Court to presume that foreign antitrust remedies are inferior to U.S. remedies, but this Court rejected that presumption in *Empagran*. Pet. App. 19a.

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[7] If such an exception to *Illinois Brick* were deemed appropriate (a point that respondents dispute), the exception should permit claims only by the first party that makes an external, market-based purchase in U.S. commerce, not parties like Motorola that engage in internal, non-market transactions with their own subsidiaries. *See Caribe BMW*, 19 F.3d at 749-51.

III. This Court Should Not Review The Seventh Circuit's Internal Assignment Procedures.

Motorola's second question presented, relating to the panel composition in the court of appeals, likewise does not warrant review.

Congress has provided that the courts of appeals may act through three-judge panels "assigned as the court directs." 28 U.S.C. § 46(a)-(b). Acting through such panels, the courts of appeals possess the "inherent power" to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962), and they are expressly authorized to vary ordinary procedures in order to "expedite [] decision or for other good cause," Fed. R. App. P. 2.

This appeal was resolved by a randomly assigned three-judge motions panel of active Seventh Circuit judges. A well-reasoned decision was reached after full briefing and argument. The full Seventh Circuit denied Motorola's petition for en banc review, with no judge calling for a vote. There was no irregularity here that warrants this Court's review.

Motorola nevertheless asks this Court to invoke its seldom-used supervisory authority to strike down the Seventh Circuit's panel assignment procedures. Specifically, it complains that the Seventh Circuit's internal operating procedures permit a motions panel that has devoted significant attention to the merits of a case, with the permission of the chief judge of the circuit, to decide the case on the merits. Motorola apparently contends that once a motions panel rules on a motion, a court of appeals *must*

reassign the case to a separate panel for resolution on the merits.

Motorola identifies no authority imposing such a requirement, and the practice it challenges is an appropriate exercise of the discretion conferred on the courts of appeals to set their own procedures.

Contrary to Motorola's assertion, the Seventh Circuit is far from "alone among the courts of appeals," Pet. 38-39, in permitting a motions panel to decide a case on the merits. In the First Circuit, for example, "the panel that determines whether to issue a complementary [certificate of appealability] also will be the panel that adjudicates the appeal on the merits." C.A.1 Int. Op. Proc. VII(D). The Second Circuit, presented with a petition for leave to appeal, has invoked Federal Rule of Appellate Procedure 2 in granting the petition and then "elect[ing] to decide the merits," *Estate of Pew v. Cardarelli*, 527 F.3d 25, 29 (2d Cir. 2008), as has the Fifth Circuit, *Wallace v. La. Citizens Prop. Ins. Corp.*, 444 F.3d 697, 701 n.5 (5th Cir. 2006). And the Ninth Circuit has articulated a practice under which "the panel to which a motion to stay or to expedite an appeal from a preliminary injunction is referred may retain jurisdiction over the merits of the appeal itself." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 699 n.5 (9th Cir. 1997).

Motorola concedes the "efficiency" of a motions panel's retaining a case when it "must decide merits issues as part of" a preliminary decision. Pet. 38. Although Motorola seeks to limit this principle to stay applications, the same reasoning applies to petitions for interlocutory appeal, which require courts of appeals to consider the merits of an appeal

in order to determine whether there is "substantial ground for difference of opinion" on the merits of the question presented. 28 U.S.C. § 1292(b).

Motorola's overheated assertion that the "real and perceived impartiality of the appellate process in the Seventh Circuit" has been "dramatically undermine[d]" is incorrect. Pet. 33. Permitting duly constituted three-judge panels to decide the merits of an appeal after resolving a related motion is no more problematic than permitting a district court judge who decided a motion to dismiss to preside over a related trial. Even Motorola's characterization of a "non-random assignment process," *id.*, is mistaken—there is no indication that the Seventh Circuit motions panel here was not randomly composed and assigned. Moreover, in the Seventh Circuit, a motion panel's ability to decide an appeal on the merits is subject to oversight both by the chief judge of the circuit and by the en banc court. *See* C.A.7 Int. Op. Proc. 6(d) ("When a motion panel decides that a motion or petition should be set for oral argument or the appeal expedited, it may recommend to the chief judge that the matter be assigned for argument and decision to the same panel."); Fed. R. App. P. 35 (authorizing en banc review).

Even if there were merit to Motorola's criticism of Seventh Circuit procedures, this Court's review would not be warranted. Motorola points to only three instances in the last 60 years in which it believes the Court has taken up comparable issues, and each involved far more fundamental matters than are presented here: whether a court of appeals can effectively nullify the en banc process, *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 261

(1953); whether a court may appoint an interested attorney to prosecute a criminal contempt that could send someone to jail, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808-09 (1987); and whether a non-Article III judge may sit on a panel of a court of appeals, *Nguyen v. United States*, 539 U.S. 69, 79 (2003).

This case pales in comparison. Whether a court of appeals should allow a randomly-composed motions panel to decide the merits of a case to which it has already devoted significant attention is a mundane question of docket management, not a fundamental test of judicial power. The Court should therefore decline Motorola's invitation to engage in supervisory review of the Seventh Circuit's panel assignment procedures.

CONCLUSION

The petition for a writ of certiorari should be denied.

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