No. 14-1122

IN THE

Supreme Court of the United States

MOTOROLA MOBILITY LLC,

Petitioner,

v.

AU OPTRONICS ET AL.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The ruling below radically limits the enforcement of U.S. antitrust law against international price-fixing cartels that cause serious harm to U.S. competition, U.S. commerce, and U.S. consumers. The Seventh Circuit held that the FTAIA immunizes from civil antitrust liability every import transaction that begins overseas – for example, whenever goods are delivered abroad then transshipped into this country. The court of appeals reasoned that under the statute's "direct effects exception," the "effect" on U.S. import commerce does not "give[] rise to" the plaintiff's injury because that effect arises only after the plaintiff was already injured in overseas commerce. Pet. App. 7a.

On that basis, the Seventh Circuit dismissed petitioner's claim arising from the billions of dollars in price-fixed goods that respondents sold to Motorola's subsidiaries (based on prices negotiated with Motorola in this country), knowing that those goods would be incorporated into finished cell phones for sale by Motorola directly into the United States. By contrast, the Ninth Circuit held in *Hsiung* that the same statute is no obstacle to Sherman Act liability for indistinguishable conduct in the same conspiracy.

The Court thus has before it irreconcilable rulings by two courts of appeals applying the same poorly worded but critically important statute to indistinguishable facts. As detailed in the previously filed Reply Brief of the *Hsiung* petitioners, the conflict is stark. It is also untenable: the cases were previously before the same district court, which held that the FTAIA did not bar petitioner's claim; multiple defendants in that case pleaded guilty to fixing the prices of panels sold to Motorola; and the lead

respondent here (AU Optronics) now urges this Court to grant review.[1] Whichever side is right on the merits, the Questions Presented are of indisputable importance, both for international antitrust enforcement and the domestic economy. The criteria for this Court's intervention are more than satisfied.

So that the Court may directly address the merits, petitioner withdraws its request that the Court decide the panel's power to adjudicate this case. The Court has the supervisory authority to address the procedure employed below, if appropriate. *E.g.*, *Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787, 809 (1987). In petitioner's view, the Court should be deeply concerned with the Seventh Circuit's practice, which permits motions panels to self-select cases whenever they want, not merely when (as in other circuits) they are already thoroughly immersed in the merits. *See* Pet. 33-39. As this case illustrates, particular judges have used that power to decide a disproportionate number of important questions of antitrust law and class action procedure, frequently without briefing and argument. *See, e.g.*, *Butler v. Sears Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), *vacated and remanded*, 133 S. Ct. 2768 (2013), *judgment reinstated*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

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[1] The Court has shown special solicitude towards resolving such disagreements. *See, e.g.*, *DirecTV v. Imburgia*, No. 14-462; *FTC v. Actavis*, No. 12-416; *Salazar v. Ramah Navajo Chapter*, No. 11-551.

I. The Importance Of The Question Presented And The Deeply Unsettled State Of The Law Necessitate This Court's Intervention.

These cases present the most important outstanding issue in international antitrust law. Although the FTAIA was enacted in 1982, and although it determines the Sherman Act's application to hundreds of billions of dollars in U.S. import commerce annually, this Court has construed it only once. In *Empagran*, the Court held that the FTAIA does not authorize a suit by foreign parties based on foreign cartel sales that were "independent" of any harm to U.S. commerce. *F. Hoffmann-La Roche v. Empagran S.A.*, 542 U.S. 155, 158 (2004). These petitions present the remaining, critical question: how does the FTAIA apply when the sales directly harm U.S. competition, U.S. commerce, and U.S. consumers?

A clear ruling of this Court, not muddied lower court opinions, should resolve a question with such substantial implications. Several foreign governments have participated as *amici*. In international cases presenting questions that arise less frequently, with less substantial consequences, this Court has described the importance of the legal question as a sufficient basis to grant review. *See, e.g.*, *BG Grp. v. Argentina*, 134 S. Ct. 1198, 1205 (2014).

Further, the extraordinary *amicus* brief of the National Association of Manufacturers, which favors neither side, persuasively establishes that this Court's intervention is required because the unsettled state of the law causes substantial harm every day. As the

Seventh Circuit stressed – and *amici* professors and economists confirm – the question has great importance for the American economy, and its significance will grow as U.S. companies extend their global supply chains. Pet. App. 17a-18a. This suit by one victim of this one conspiracy involves roughly $5 billion in price-fixed sales and more than $1 billion in illegal overcharges.

Everything about these cases makes them representative of the frequently recurring circumstances that give rise to dispositive questions about the FTAIA's application. The petitions present all four of the scenarios in which the relevant legal issues can arise:

(a) the transshipment of price-fixed goods via an overseas destination to the United States;

(b) the direct importation of price-fixed goods into the United States;

(c) the shipment of price-fixed goods to an overseas affiliate of the domestic purchaser for incorporation into finished products delivered to the United States; and

(d) the shipment of price-fixed goods to an overseas affiliate of the domestic purchaser for incorporation into finished products delivered abroad.

The parties also raise every legal question that arises under the FTAIA from those factual scenarios. They dispute whether the sales were "import commerce," as well as whether those sales "give rise to a claim." Respondents also vigorously contest whether

the conspiracy had a "direct" effect on U.S. commerce. Indeed, the court of appeals drafted and published (but later withdrew) an opinion agreeing with respondents on that question, so that theory is unusually well developed too. *See* Pet. App. 27a-35a.

A thorough adversarial presentation of the issues is assured. The parties are the Government, a private civil plaintiff, private criminal defendants, and private civil defendants – each represented by experienced counsel. The academic and economic communities are engaged, as are several foreign governments. Indeed, these are surely the most closely watched international antitrust cases in years. *See, e.g.*, Editorial, *The Motorola Mobility Ruling and International Cartels*, N.Y. Times (June 15, 2014). By contrast, no one contends that there would be any benefit to deferring this Court's determination of the FTAIA's application to these recurring facts in order to permit the issue to percolate further in the lower courts.

Finally, the records in the two cases are ideal. The parties in this case completed extensive pre-trial proceedings, including full discovery, in multidistrict litigation. *Hsiung* was decided after a full criminal trial. By contrast, a later petition may be clouded by an undeveloped record and important disputes regarding the manner in which goods made their way to this country, whether that result was "foreseeable" or "substantial," and the nature of the conspiracy.

II. The Seventh Circuit's Dramatic Narrowing Of Federal Antitrust Law Cannot Be Reconciled With The FTAIA.

A. The ruling below conflicts with Congress's purposes in enacting the FTAIA.

The Seventh Circuit's ruling is in the teeth of Congress's express intent and the statutory text. As this Court has explicitly recognized, Congress enacted the FTAIA for a specific purpose: to "exempt from the Sherman Act [1] export transactions that [2] did not injure the United States economy." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (citing H.R. Rep. No. 97-686, 1-3, 9-10 (1982)). As this Court reiterated in *Empagran*: "The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements . . ., however anticompetitive, *as long as* those arrangements affect *only* foreign markets." 542 U.S. at 161 (emphasis added).

Respondents argue that Congress decided as a matter of comity to make overseas purchases like Motorola's the responsibility of the foreign jurisdictions in which those sales occurred. But when the comity inquiry accounts for the admitted harm that these very transactions caused this country, there is nothing objectionable about applying the Sherman Act. Again, *Empagran* is clear, in language that respondents and the Seventh Circuit ignore: This Court has "long held that application of our antitrust laws to foreign anticompetitive conduct is . . .

consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused." *Id*. at 165.[2]

By contrast, the Seventh Circuit's ruling finds no support in the FTAIA's purpose or history. There is no suggestion that Congress intended to provide that civil liability would turn on whether the underlying commercial transactions are consummated in this country or instead abroad – a fact that is irrelevant to whether the U.S. economy is harmed. Just as striking, there is no mention of intent to provide that the identical anticompetitive transactions would be subject to criminal prosecution but not civil suits. If Congress had thought it was adopting such an extraordinary rule for the first time in the history of U.S. antitrust law, someone would have mentioned it. Surely, at the least, such a change would have been requested by the Department of Justice, or at least acknowledged by it. But the government discovered the supposed bright-line distinction it now advocates for the first time in an *amicus* brief in this case, decades after the statute's enactment.

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[2] Respondents' attempt to suggest that the FTAIA was intended to narrow the longstanding *Alcoa* standard, BIO 2-3, is obviously wrong. The FTAIA explicitly *imposes* the *Alcoa* standard by requiring that the effect on U.S. commerce be "direct, substantial, and reasonably foreseeable." 15 U.S.C. § 6a(1).

B. The ruling below cannot be squared with the statutory text and structure.

The Seventh Circuit's ruling makes no sense in light of the structure of the antitrust laws. The court of appeals reasoned that the requirement that the effect on U.S. commerce be direct, substantial, and reasonably foreseeable "establishes that there is an antitrust violation," whereas the requirement that the effect "gives rise to a claim" is a standing provision that "determines who may bring a suit based on it." Pet. App. 5a. But if Congress wanted to achieve that end, it would have amended the Clayton Act, which is the statute that specifies which private parties may sue under U.S. antitrust law.

For the reasons that follow, the ruling below also cannot be reconciled with the obvious meaning of either the import exclusion or the direct effects exception.

1. The Seventh Circuit's interpretation of the import exclusion is insupportable.

Respondents sold price-fixed LCD panels to petitioner's overseas subsidiaries, knowing that those panels would be incorporated into phones sold to U.S. consumers. At all times, the sales were destined for U.S. import commerce. The Seventh Circuit thus accepted the sales had a "direct, substantial, and foreseeable effect" on that commerce, Pet. App. 6a-7a, but held that they did not "involv[e] import commerce," *id.* 5a. Its entire reasoning was that Motorola and its subsidiaries, not respondents, were the "importers."

Id. To support that legal rule, the court cited nothing at all.

That is because the ruling below is a *non sequitur*. Whichever party was the "importer," the conduct is exempt from the FTAIA because it "*involve[d]*" import commerce. Take two hypothetical transactions: (1) A sells a product to B overseas, for importation into this country; and (2) A sells the same product to B, but for delivery by A in the United States. Which transaction "involv[es] import commerce"? Obviously, *both of them*. That conclusion is substantially reinforced by the fact that the Seventh Circuit's ruling does not advance Congress's goal of protecting U.S. consumers and contradicts its insistence that the commerce exempted by the FTAIA not cause anticompetitive harm in this country.

2. The Seventh Circuit's reading of the direct effects exception is wildly implausible.

The Seventh Circuit likewise erred in its reading of the direct effects exception, and in particular the requirement that the effect on U.S. commerce "give[] rise to a claim." This Court unambiguously recognized in *Empagran* that the statutory language means that the conduct must harm competition in U.S. markets: the direct effects exception applies to conduct that "has an effect of a kind that antitrust law considers harmful, *i.e.*, the 'effect' must 'giv[e] rise to a [Sherman Act] claim.'" 542 U.S. at 162.

That interpretation makes perfect sense of the text. Foreign conduct that has a "direct, substantial, and reasonably foreseeable effect" is subject to the

Sherman Act – and thus "give[] rise to a claim" – only if it satisfies one further requirement: the effect must diminish competition in U.S. commerce. As described by Areeda & Hovenkamp, under the direct effects exception, "the domestic injury must be an injury to competition." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 212i (May 2015 ed.).

Respondents ignore this Court's unambiguous interpretation of "gives rise to a claim" and point to other language in *Empagran* that is irrelevant here. The plaintiffs in that case argued that the phrase "a claim" meant *any* plaintiff's claim. 542 U.S. at 173-74. On that reading, the FTAIA would have been satisfied if the effect of the defendants' conduct in U.S. commerce injured *any* party. Thus, in *Empagran*, the plaintiffs were foreign entities that purchased price-fixed goods in foreign commerce that was independent of any effect in this country. *E.g.*, *id.* at 173. This Court rejected that argument in the language that respondents misread:

> The alleged conduct here did have domestic effects, and those effects were harmful enough to give rise to "a" claim. Respondents concede that this claim is not their own; it was someone else's claim. But, linguistically speaking, they say, that is beside the point. . . .
>
> Linguistically speaking, a statute can apply and not apply to the same conduct, depending on other circumstances; and those circumstances may include the nature of the lawsuit (or of the related underlying harm). It also makes linguistic sense to read the words

> "a claim" as if they refer to the "plaintiff's claim" or "the claim at issue."
>
> At most, respondents' linguistic arguments might show that respondents' reading is the more natural reading of the statute. But those arguments do not show that we *must* accept that reading. And that is the critical point.

Id. at 174.

That discussion in *Empagran* does not in any way call petitioner's suit into question. This Court merely recognized that one plausible reading of "a claim" was "the plaintiff's claim"; it did not *adopt* that reading. *Empagran* instead explicitly read the phrase to require that the defendant's conduct have anticompetitive consequences in this country. Unlike the *Empagran* plaintiffs, Motorola is not relying on the "claim" of some other entity that was injured in U.S. commerce. Respondents fixed prices in this country and injured Motorola in U.S. import commerce.

The Seventh Circuit's conclusion that "a claim" means "the plaintiff's claim" simply does not comport with the text. The statute imposes no such limitation; if Congress had intended it, it easily could have said so. But in fact Congress did the opposite: it revised the FTAIA *precisely to reject the interpretation adopted by the Seventh Circuit in this case*. *See* Pet. 27. The original bill provided that the plaintiff's claim must be based on the effect on U.S. commerce. Recognizing that this language could be misinterpreted just as the Seventh Circuit did in this case, it adopted the broader "gives rise to a claim" formulation instead. *Id.*

The Seventh Circuit's reading also makes a hash of the direct effects exception as a whole. Most obviously, the Seventh Circuit rendered the provision meaningless, or at least wildly confused. It held that in every case governed by direct effects exception (*i.e.*, every case involving overseas transactions), a private plaintiff can *never* satisfy it, because the effect on U.S. commerce never "gives rise to [the plaintiff's] claim." Pet. App. 7a-8a. Instead, the plaintiff is injured overseas, so that it must proceed under foreign antitrust law. *Id*. 9a. Conversely, in such cases, the "gives rise to a claim" clause *always* permits a federal prosecution, because the government never has to show individualized injury. *Id.* 20a-21a.[3]

That cannot be what the provision means. Even accepting the premise that the FTAIA asks whether the effect on U.S. commerce "gives rise to [the plaintiff's] claim," surely the statute contemplates that

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[3] Respondents are obviously wrong to suggest that the Seventh Circuit left open whether Motorola could assert a claim based on higher prices it paid to its subsidiaries and whether individual consumers could file suit. The court repeatedly said those exact claims were barred. Pet. App. 4a, 7a, 11a. The entire point of the great bulk of the ruling below is that only the direct victim of the price-fixed sales may file an antitrust suit, and that the FTAIA bars a suit when that first transaction occurs abroad. The Seventh Circuit did erroneously assert that Motorola had waived the sub-sub-claim that it was injured when it paid its subsidiaries higher prices for finished cell phones. But that was only an alternative – set forth "[i]n any event" – to the Court's legal holding that no claim could be asserted by Motorola or anyone else based on any overseas purchase. *Id.* 16a.

the provision will play some role. In cases subject to the exception, *some* plaintiff would have a "claim" and *sometimes* the government would not. Otherwise, why did Congress write the exception to ask the question? But the Seventh Circuit says no: every civil case fails and every criminal prosecution proceeds. It is wildly implausible that Congress would have written the exception in such a tortured way to produce that result, when it could have imposed such a rule clearly and directly.

CONCLUSION

For the foregoing reasons and those set forth in the Petition and the *amicus* briefs, the petitions in this case and *Hsiung* should be granted.

Respectfully submitted,

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