No. 25-1358

In the Supreme Court of the United States

NHK SPRING CO., LTD., ET AL.,
Petitioners,

v.

SEAGATE TECHNOLOGY LLC, ET AL.

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

BRIEF OF *AMICUS CURIAE* INTERNATIONAL CENTER FOR LAW & ECONOMICS SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the mere domestic negotiation of parts of contracts for foreign transactions between foreign companies performed in their entirety outside the United States is sufficient to bring all ensuing commerce from those negotiations within the Sherman Act when the alleged price-fixing injuries occurred outside the United States and the preceding negotiations had no intervening "effect * * * on trade or commerce which is not trade or commerce with foreign nations." 15 U.S.C. §6a(1)(A).

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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICUS CURIAE*[1]

Amicus International Center for Law & Economics ("ICLE") is a non-partisan nonprofit 501(c)(3) organization that is dedicated to educating the public, policy makers, and the courts by applying rigorous law and economics methodologies and economic learning to inform the important legal and policy decisions of the day. As an independent, privately funded research organization, ICLE does not accept government grants, is not attached to a university, and does not do "contract" research. *Amicus* has specific experience and expertise in antitrust law and economics and, moreover, a particular and longstanding interest in the precise question this case presents. More than a decade ago, Geoffrey Manne, ICLE's founder and President, joined eleven other professors of antitrust and international law as *amici curiae* in the district court proceedings in *Motorola Mobility, Inc.* v. *AU Optronics Corp.,* No. 09-CV-6610, 2014 WL 258154 (N.D. Ill. Jan. 23, 2014), *aff'd sub nom. Motorola Mobility LLC* v. *AU Optronics Corp.,* 775 F.3d 816 (7th Cir. 2015), the very decision from which the Ninth Circuit broke below.[2] That brief

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution toward the brief's preparation or submission. Counsel of record for all parties received timely notice of *amicus*' intent to file this brief.

[2] *Amicus Curiae* Brief of Twelve Law Professors in Support of Defendants' Motion for Reconsideration, *Motorola Mobility, Inc.* v. *AU Optronics Corp.*, 2014 WL 258154 (N.D. Ill. Jan. 23, 2014) (No. 09-cv-6610), ECF No. 124.

urged a single, unifying principle: that the geographic reach of the Sherman Act turns on the situs of a restraint's competitive *effects*, not on the territory in which the underlying *conduct*—the meetings, the negotiations, the gathering of competitive intelligence—happened to occur. *Amicus* now files this brief because the decision below repudiates that principle and, in doing so, threatens to unsettle a body of doctrine and a system of international enforcement cooperation that has taken seventy years to build.

Amicus agrees with Petitioners that the decision below conflicts with the Seventh Circuit's *Motorola* decision, that the decision below is wrong and harmful, and that this case presents a clean vehicle for resolving the split. Pet.15, 16, 21, 26-29. It writes separately to emphasize the importance of maintaining the international antitrust regime established following *Motorola* and the need for prompt correction of the Ninth Circuit's reversion to an approach the U.S. deliberately abandoned in the mid-twentieth century. Absent such correction, the predictability of antitrust enforcement will be undermined and the cooperative characteristic of international antitrust enforcement will be upended. The harmful economic consequences of the error will be immediate, substantial, and unavoidable.

By allowing the mere location of some parties to price negotiations in U.S. territory to trigger Sherman Act exposure for wholly foreign transactions having no domestic U.S. anticompetitive effects, the Ninth Circuit has adopted an ill-founded rule. And that rule generates perverse incentives to manipulate negotiations to both avoid and trigger U.S.

jurisdiction, with U.S. courts then forced to address wholly foreign disputes with ever more tenuous connections to U.S. competition and consumers. The need for a clear rule is even more urgent now than it was when the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. §6a, was enacted or when *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), was decided. Now that courts of appeal have reclassified the statute's requirements as substantive elements of a Sherman Act claim rather than jurisdictional limits, an indeterminate domestic-effects standard no longer screens foreign-injury claims at the threshold. Instead, the parties must wade through years of antitrust discovery before the question of the Sherman Act's reach is asked or answered. A clear legal boundary, enforceable early in litigation, yields its benefits *ex ante*, in the transactions that parties structure in reliance on it. Those benefits are forfeit every year the boundary remains uncertain.

The decision also inverts the comity principle at the heart of *Empagran*. The effects test is now the shared standard of the United States and its major trading partners. It sustains a workable, reciprocal allocation of enforcement authority, and it protects competition and consumers *in* the United States by applying U.S. law in U.S. markets. A rule that claims U.S. jurisdiction over foreign-to-foreign sales whenever a negotiation touches American soil unravels that equilibrium by inviting every other nation to do the same to American firms. And because American consumers are already being made whole in parallel class litigation involving different antitrust injuries from segregable transactions with related parties, the foreign-injury claims endorsed by the panel would create duplicative treble-damages recovery. That would be over-deterrence—not protection for Americans.

Finally, and as noted by Petitioners, the decision below is wrong. Pet.21-26. *Amicus* emphasizes further that it is wrong in a way that undermines the FTAIA's express purpose. From *American Banana Co.* v. *United Fruit Co.,* 213 U.S. 347 (1909), through *United States* v. *Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945), and continuing through the FTAIA's enactment in 1982, the antitrust laws have deliberately abandoned the location of anticompetitive conduct in favor of the location of its effects. The Ninth Circuit's negotiation-situs rule reinstates the conduct-situs inquiry that the statute was written to displace. Economics confirms the error: the cognizable "effect" is the supracompetitive overcharge paid in a market—defined as a product market and as a geographic market—and the only markets in which Respondents' affiliates paid that overcharge were in Thailand and Singapore. The arbitrary locations of the negotiators during either in-person or multi-location electronic negotiations is, in economic terms, irrelevant.

The conflict with *Motorola* is square, the error is consequential, and the question is recurring and important. The petition should be granted.

ADDITIONAL REASONS FOR GRANTING THE PETITION

I. The Panel's Standardless Rule Will Draw an Unmanageable Volume of Wholly Foreign Disputes into the Federal Courts.

A. Treble-damages make the United States a magnet for foreign-injury antitrust claims.

The incentive to litigate antitrust claims in the United States is unlike that found anywhere else. Section 4 of the Clayton Act awards a prevailing plaintiff three times its damages plus attorney's fees, 15 U.S.C. §15(a), deliberately enlisting private litigants as "private attorneys general" to supplement public enforcement. *Hawaii* v. *Standard Oil Co.,* 405 U.S. 251, 262 (1972) (citation omitted). That design has made private antitrust litigation one of the highest-stakes categories of federal civil litigation. No other jurisdiction offers a comparable lure and the automatic trebling of damages remains effectively unique to the United States.[3] The predictable consequence is that any standard for reaching foreign conduct that is not clear and readily administrable will draw foreign disputes—however tenuous their

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[3] Henry J. Hauser et al., *Antitrust Reformers Should Consider the Consequences of Mandatory Treble Damages: What the Admonition Against Putting New Wine in Old Wineskins Can Teach Us About Antitrust Reform*, 107 Minn. L. Rev. Headnotes 9, 14 (2022) ("[T]he United States—despite the global proliferation of antitrust laws over the last several decades—is the only antitrust jurisdiction in the world that requires judges to award treble damages.").

connection to American commerce—into U.S. courts in pursuit of that singular remedy.

Clarity in defining such a standard is not a drafting nicety. It is the difference between a workable boundary and an open invitation. And allowing the location of even part of negotiations for foreign contracts to suffice for triggering U.S. antitrust claims in U.S. courts is functionally no boundary at all. Virtually every transaction of a modern multinational enterprise has some American touchpoint—*e.g.*, a U.S.-based employee, affiliate, or representative on a call, text communication, or video conference, a term discussed during a domestic visit, an approval routed through a U.S. office. See also Pet.27 (discussing modern global trade negotiations). A standard keyed to the situs of mere parts of a negotiation hands plaintiffs a ready hook to attach almost any foreign dispute to a "domestic" effect, promising U.S. courts a steady diet of fact-intensive litigation over where a price was "really" set.

B. The negotiation-situs rule supplies no limiting principle, invites forum-shopping, and penalizes the United States as a venue for global commerce.

A rule keyed to the location of conduct invites the very types of manipulation and burdens on exports or wholly foreign commerce that the effects test was adopted to end. The effects test makes the meeting place—the instant location of the various cartelists—irrelevant because the antitrust laws exist to protect competition and the consumers harmed in a relevant domestic market, not to police the incidental geography of where a deal is discussed. To make out a prima facie case, the plaintiff must "prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Ohio* v. *American Express Co.*, 585 U.S. 529, 541 (2018) (citations omitted). Under the FTAIA, the "relevant market" for such harms is domestic, not foreign. Harms to foreign consumers from foreign transactions that do not themselves injure U.S. consumers or exporters are left to the laws in such foreign markets.

The decision below reintroduces the overreach and burdens the FTAIA sought to preclude. It hands plaintiffs and their firms a hook with which to pull wholly foreign transactions into American courts where some participants in negotiations merely touched U.S. soil, even where the relevant goods never did. That is the very burdensome arbitrariness the move from *American Banana* to *Alcoa* was meant to end. And it would seemingly sweep in one of the core areas of commerce the FTAIA was expressly designed to protect—export commerce from a U.S. company to a foreign buyer—which quite likely would have some aspect of the negotiations conducted by persons in the U.S.

Furthermore, a rule that gives multinational firms with offices in the United States a concrete reason to move meetings, personnel, and deal-making offshore distorts the choice of where to situate commerce for reasons untethered to any productive business interest. Congress enacted the FTAIA to reassure firms "doing business abroad" that anticompetitive arrangements affecting "only foreign markets" would not expose them to Sherman Act liability. *Empagran*, 542 U.S. at 161. The decision below tells those firms the opposite, making the safe harbor conditional on situating negotiations abroad. That betrayal of the statutory assurance is the heart of the problem. The rule below defeats the very certainty the FTAIA was enacted to provide, and it yields no countervailing benefit to U.S. competition or U.S. consumers.

II. The Recent Reclassification of the FTAIA's Limits as Substantive Rather than Jurisdictional Requirements Magnifies the Cost of an Indeterminate Standard and Increases the Urgency of a Clear Rule.

For most of the statute's history, courts treated the FTAIA's domestic effects requirements as going to jurisdiction, so that a foreign-injury claim lacking the requisite domestic effect could be tested at the threshold. *United Phosphorus, Ltd.* v. *Angus Chem. Co.*, 322 F.3d 942, 951-952 (7th Cir. 2003) (en banc), *overruled by Minn-Chem, Inc.* v. *Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012) (en banc). A subject matter jurisdictional defect may be raised under Federal Rule of Civil Procedure 12(b)(1) and resolved—even where a factual dispute exists—on limited, targeted jurisdictional discovery. See *United Phosphorous*, 322 F.3d at 946. That allows tenuous foreign-injury claims to be disposed of quickly and before the parties (or the courts) incur the staggering expense of full antitrust merits discovery.

But that changed following this Court's decision in *Arbaugh* v. *Y&H Corp.*, which directs that a statutory limitation be treated as non-jurisdictional unless Congress has clearly identified it as such. 546 U.S. 500, 515-516 (2006). Accordingly, courts analyzing the FTAIA now treat its domestic effects requirements as substantive elements of a Sherman Act claim, not as a limit on subject-matter jurisdiction. See, *e.g.*, *Minn-Chem, Inc.*, 683 F.3d at 848, 851-853 (holding that FTAIA limits go to the merits, not to subject matter jurisdiction), *overruling United Phosphorus*, 322 F.3d 942; *Lotes Co.* v. *Hon Hai Precision Indus. Co.,* 753 F.3d 395, 398 (2d Cir. 2014) (same).

As naturally as that reclassification may follow from *Arbaugh*, so too do the litigation consequences of treating the FTAIA as a substantive issue rather than a jurisdictional limit. A substantive element ordinarily cannot be resolved at the pleading threshold. It is litigated under Rule 12(b)(6) and, far more often, only after full merits discovery. Indeed, outside of the jurisdictional context, courts are wary of limiting discovery to specific defenses or elements lest they invite a wasteful second bite at the discovery apple should the targeted ground prove non-dispositive. See, *e.g.*, *Lakeland Reg'l Med. Ctr., Inc.* v. *Astellas US, LLC*, No. 8:10-CV-2008-T-33TGW, 2011 WL 486123, at *2 (M.D. Fla. Feb. 7, 2011) (denying phased discovery of class certification issues in an antitrust case because it "will lead to duplicative and delayed discovery").

Because FTAIA domestic-effects issues can no longer be screened at the jurisdictional stage, more claims of domestic effects are likely to get past the motion-to-dismiss stage under an indeterminate test than under a clearer one. Whereas before it was still possible to discern the lack of any remotely plausible domestic effect from wholly foreign transactions, the Ninth Circuit's approach forces parties to probe the most tenuous of connections through a varied and potentially wide-spread set of negotiations requiring considerably more, and likely non-bifurcated, discovery. Antitrust discovery being among the most burdensome in all civil litigation, it could likely take years before the threshold question of the Sherman Act's reach can even be answered. The indeterminate rule below thus would impose tremendous, unnecessary, and statutorily inappropriate costs on both the parties and the courts.

This case itself illustrates the problem: the indeterminacy of the Ninth Circuit's standard generated such uncertainty in the district court that it certified an interlocutory appeal under 28 U.S.C. §1292(b). App.12a; Pet.12 n.3. Adding to that burden on the courts and the parties, the decision on appeal compounded the burden of resolving the remanded issue by inviting extensive proceedings and discovery on nearly *all* issues before the court can finally resolve the FTAIA issue under the Ninth Circuit's standard. The burden the panel's rule imposes (including the burden of an extended delay) is thus markedly greater today than it was when the FTAIA was enacted in 1982 or when *Empagran* was decided in 2004. Claims that arise solely from the foreign effects and harms of conduct, wherever that conduct occurred, are more easily amenable to FTAIA disposal at the pleadings stage. A rule allowing claims and recovery for harms that occur entirely abroad based on the hook of incidental and irrelevant "effects" from the situs of negotiation virtually ensures protracted discovery and litigation at great cost and risk.

The burdens imposed by the Ninth Circuit's rule are the predictable economic consequences of an unclear boundary. The central virtue of a clear rule is that parties can order their affairs around it predictably, at relatively low cost. When the boundary of a legal entitlement is uncertain, parties instead dissipate resources contesting the boundary and maneuvering around it. *Cf.* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 19 (1960), https://tinyurl.com/fdr5564d.

The FTAIA sought to provide a clear boundary (whether once viewed as jurisdictional or now viewed as substantive): it told every participant in a global supply chain which sovereign's competition law governs a transaction based on the effects of that transaction, not the competitively irrelevant and commonly miscellaneous locus of some discussions and negotiations. An effects-based line is cheap to administer because the situs of the parties to and performance of a sale of goods—and of the overcharge it imposes on the purchaser—are ordinarily undisputed. A negotiation-situs line, by contrast, is neither clear nor cheap to determine. It makes the governing law turn on a manipulable, potentially complex, and often contested fact. Such indeterminacy will almost inevitably defer resolution of the boundary question until after years of discovery and litigation.

The panel's premise—that domestic negotiations can, as a matter of law, supply the statute's domestic effect—is outcome-determinative of Respondents' foreign-purchase claims. There is no plausible suggestion that there are some other domestic effects that actually gave rise to Respondents' claims or caused them injury and hence could sustain the claim at issue here. Pet.22-26. The fact pattern of this case—multinational firms negotiating in the United States for components their foreign affiliates buy abroad—is ubiquitous, so the rule reaches an enormous and growing volume of global-supply-chain transactions.

That the conduct affected by this rule is common, however, does not mean the question will often reach this Court so cleanly. Few cases present it as squarely as this one, where the negotiation-situs premise is outcome-determinative and where no other domestic effect is even alleged. That makes the present petition an unusually apt vehicle. To delay correction of the Ninth Circuit's indeterminate and arbitrary rule would only serve to multiply the transactions structured under that rule, as well as the number of cases litigated under it, at ruinous expense, in the meantime.

The judicial and economic burdens imposed by the holding below thus are all the more reason for this Court to grant prompt review and to supply a clear, administrable rule that is consistent with the FTAIA and the purpose of our nation's antitrust laws. Leaving the lower courts to adjudicate the Sherman Act's extraterritorial reach case by case, after extensive proceedings and discovery, would impose tremendous judicial cost and private expense, but without benefit to domestic competition or American consumers.

III. The Decision Inverts the Comity Principle of *Empagran* and Threatens the Developing Architecture of International Competition Enforcement.

A. The effects test is the shared standard of the United States and its trading partners, and reciprocity sustains a workable allocation of enforcement authority.

The effects-based approach that prevailed prior to the decision below is central to the FTAIA, but it is not uniquely American. Rather, it is a shared standard in the evolving global antitrust environment. Over the past several decades the European Union, the United Kingdom, Canada, Japan, China, and other major jurisdictions have converged on the principle that a nation's competition law reaches conduct—wherever undertaken—whose effects are felt within its markets. See *Amicus Brief* of Twelve Law Professors, *Motorola Mobility*, *supra* note 2, at 8-9. That convergence is what makes international antitrust enforcement workable and efficient: each sovereign polices the harms visited on its own markets, and the United States, through bilateral cooperation agreements, coordinates rather than collides with its counterparts. U.S. Dep't of Just. & Fed. Trade Comm'n, *Antitrust Guidelines for International Enforcement and Cooperation* 2-3 (2017), https://tinyurl.com/mm7mja4y ["*Antitrust Guidelines*"]. Critically, it ensures that domestic competition and consumers are protected by U.S. law. *Id*. at 16.

That equilibrium depends on reciprocity. If the United States's courts assert authority here over the foreign sale with wholly foreign antitrust effects, the U.S. forfeits any principled basis to object when a foreign sovereign asserts authority over U.S. sales affecting only U.S. markets if some element of the price negotiations occurred abroad. Competition and redundancy, rather than cooperation are the likely result. Often enough, the negotiation-situs rule would support claims that multiple locations have antitrust authority over a given transaction, independent of the locus of that transaction's competitive effects. Beyond the costs of uncertainty and undue litigation, the rule likely would be turned against American firms facing duplicative suits competing for redundant damages. Adopted by this country's largest circuit, the rule below would affect numerous transactions and trading partner nations, undermine cooperative enforcement, generate competing and conflicting claims, and make the global antitrust regime more complicated and less efficient.

B. An expansive U.S. forum would also interfere with private-enforcement systems abroad that strike a different antitrust balance accounting for each country's own policies and circumstances.

The harm reaches beyond friction with foreign sovereigns to the development of competition enforcement itself. When *Empagran* was decided, this Court credited the concerns of foreign governments that aggressive U.S. private litigation would interfere with their authority to regulate their own markets.

542 U.S. at 165, 167, 171. And it cautioned that private plaintiffs are far less likely than the Government to exercise restraint toward the different policies and antitrust sensibilities of foreign governments as respects their own markets. *Ibid.* Those concerns are even more acute today than in 2004.

A number of jurisdictions have relatively recently begun to build balanced private-redress mechanisms for competition harm, and those systems are still evolving.[4] If foreign claimants may route their foreign injuries into American courts to capture treble damages, they will have scant incentive to use—or to help develop—the differently balanced regimes their own legislatures are constructing. An overbroad domestic-effects exception thus risks retarding the growth of the foreign private-enforcement systems on which a healthy global competition order increasingly depends.

Just as Congress has declined to impose foreign competition policies on U.S. markets, so too not all nations can or want to operate under the often-punitive regime created by the Sherman Act's treble damages remedy. They should be allowed to choose their own path for transactions affecting their own economies, and to enlist private litigation to help with their own policies, should they choose, without the Ninth Circuit rule drawing away private litigants to

[4] Anu Bradford et al., *The Chicago School's Limited Influence on International Antitrust*, 87 U. Chi. L. Rev. 297, 300 (2020) (from 1979 through 2010, the number of countries that "had adopted an antitrust regime" grew from 41 to 127).

impose its own choices on such foreign-effects transactions.

C. The panel's view that "comity may be cast aside" for the benefit of Americans is backwards and ill-conceived.

The panel announced that "[i]nternational comity may have to be cast aside when foreign misconduct harms Americans." App.29a. *Empagran* holds the opposite. In *Empagran,* this Court construed the FTAIA narrowly *because* of comity, to "avoid unreasonable interference with the sovereign authority of other nations," 542 U.S. at 164-165, and it identified private damages actions as the setting in which restraint matters most, *id.* at 171.

The panel discounted that teaching by imagining some further penalties might deter wrongdoing and indirectly confer benefits on American competition and consumers. App.28a-29a & n.6. But any domestic harm from the conspiracy claimed here was already addressable under U.S. law and already being addressed under the Sherman Act via parallel multidistrict litigation by U.S. resellers and end-users arising from the same conduct. Pet.10, 14.[5] And the Government has already obtained NHK Spring's guilty plea in its Sherman Act case. The deterrent signal thus is already being delivered by the Government, and by those who actually bore the domestic overcharge, with remedies being assessed

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[5] See *In re Hard Disk Drive Suspension Assemblies Antitrust Litig.*, No. 19-md-2918 (N.D. Cal.) (certified classes of U.S. resellers and end-users); see also Pet.10, 19 & n.6 (cataloguing parallel proceedings in Japan, Canada, and Israel).

accordingly. It needs no assistance from foreign plaintiffs claiming wholly foreign losses from foreign transactions.

Piling on with treble recovery for such foreign effects was never intended by Congress, and the FTAIA sought to remove such foreign concerns from the thrice burdensome penalties of U.S. law. As the Seventh Circuit observed of the materially identical claims in *Motorola Mobility LLC* v. *AU Optronics Corp.*, the immediate victims of foreign component price-fixing are the foreign buyers, and "U.S. antitrust laws are not to be used for injury to foreign customers." 775 F.3d 816, 820 (7th Cir. 2015) (quoting *Minn-Chem*, 683 F.3d at 858).

Expanding treble damages remedies for conduct not affecting domestic markets and differently regulated by the countries actually affected only generates over-deterrence, not protection for Americans. And it creates thorny problems of the apportionment of damages and recovery that the indirect-purchaser rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), exists to avoid.[6]

[6] In *Illinois Brick*, this Court rejected efforts by indirect purchasers to recover antitrust damages for overcharges that were "passed on" to them by the direct purchasers. 431 U.S. at 730-731, 736. It continued to limit recovery to direct purchasers of goods as a means of avoiding duplicative recoveries for the same overcharge or the thorny apportionment problems that would arise from trying to ascertain which downstream purchasers had absorbed what portion of any overcharges. *Id.* at 741-745.

IV. The Decision Below is Wrong and Undermines the Express Purpose of the FTAIA.

The decision below is wrong twice over: it revives the conduct-situs test that seventy years of doctrine—and the FTAIA's express design—abandoned, and it misconceives the economics of the statute it construes.

The FTAIA was expressly described and enacted to clarify how Sherman Act coverage turned on the location of antitrust effects and injuries rather than the situs of conduct. The rule adopted below contradicts the original public understanding of the statutory language and design and perversely returns to a regime Congress and this Court had long abandoned.

A. From *American Banana* to *Alcoa* to the FTAIA, the law abandoned the location of conduct in favor of the location of effects.

The rule articulated in the earliest Sherman Act cases was territorial in the most literal sense. For example, in *American Banana Co.* v. *United Fruit Co.*, Justice Holmes held that the Sherman Act did not reach conduct undertaken abroad, reasoning that "the acts causing the damage were done * * * outside the jurisdiction of the United States," and that the Act should be "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." 213 U.S. 347, 355, 357 (1909), *overruled by Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

That rule did not survive the rise of a global economy. In *United States* v. *Aluminum Co. of America* (*Alcoa*), 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand recast the inquiry: a State may impose liability "for conduct outside its borders that has consequences within its borders." *Id.* at 443. The decisive question was no longer the location of the agreement but the location of its consequences. This Court embraced that turn, crediting *Alcoa*'s effects test and disapproving *American Banana*'s territorial one. See *Continental Ore*, 370 U.S. at 704-705 & n.13; see also *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 795-796 (1993) (collecting cases).

When Congress enacted the FTAIA in 1982, it both ratified and disciplined the effects test. The statute removes "conduct involving [non-import] trade or commerce * * * with foreign nations" from the Sherman Act's reach unless that conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce, or on United States exporters, and that effect "gives rise to" the plaintiff's claim. 15 U.S.C. §§6a(1)-(2).

Congress's stated and publicly understood purpose was "to promote certainty in assessing the applicability of American antitrust law to international business transactions," and to make "clear that wholly foreign transactions as well as export transactions" fall outside the Act. H.R. Rep. No. 97-686, at 9-10 (1982). The FTAIA was designed "to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce." *Empagran*, 542 U.S. at 169. Leading commentators agreed that the statute codified *Alcoa*'s effects-based approach with limiting and clarifying refinements in its formulation. See, *e.g.*, *Amicus Brief* of Twelve Law Professors, *Motorola Mobility*, *supra* note 2, at 7-8 (Prof. Hovenkamp among the *amici*) (citing 1B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 278-279 (¶272c) (2006)); Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 Hou. L. Rev. 285, 313-314 (2007).

That limiting purpose is underscored by the statutory vehicle Congress chose. The FTAIA was enacted as Title IV of the Export Trading Company Act of 1982, Pub. L. No. 97-290, §§401-403, 96 Stat. 1233, 1246—legislation designed to encourage American firms to compete abroad and to assure them that the Sherman Act would not penalize arrangements affecting only foreign markets. Congress paired that assurance with the Commerce Department's export certificate-of-review program, creating a clear boundary around purely foreign commercial activity isolated from the reach of the U.S. antitrust laws. The premise of the entire scheme was that conduct whose competitive consequences land abroad belongs to foreign law. *Empagran*, 542 U.S. at 161, 165-168. A rule that pulls wholly foreign sales into the Sherman Act whenever a price is negotiated on American soil is irreconcilable with that design.

The throughline of that seventy-year arc is unmistakable: the geographic reach of U.S. antitrust law follows the situs of a restraint's anticompetitive and economic effects, never the situs of the mere conduct—or elements of the conduct—that produced such effects elsewhere. The location where parties meet, bargain, or sign is not, and has not been since *Alcoa*, a touchstone of Sherman Act coverage.

The decision below turns that long-settled principle on its head. The panel held that Respondents' foreign affiliates could invoke the Sherman Act for purchases made, paid for, and delivered in Thailand and Singapore because the prices for those purchases were set through "the master Product Supply Agreement and the quarterly RFQs—all negotiated in the United States." App.23a-24a. And they could potentially recover treble damages for economic injuries suffered abroad by foreign purchasers. The fulcrum of the panel's analysis is thus the geographic situs of the negotiations rather than the situs of the antitrust injuries. That is precisely the inquiry this Court abandoned in *Alcoa. And* it is precisely the inquiry that Congress barred in the FTAIA.

The point reflects a simple symmetry. The effects test was adopted because the place where a restraint is hatched often has nothing to do with the place its anticompetitive consequences are felt. A cartel formed abroad can injure American competition and American consumers, and American law should reach it. The same logic drove Congress to forbid the inverse, where the injury for which recovery is claimed is foreign rather than domestic. A negotiation conducted in the United States that fixes the price of goods sold into Asia injures buyers in Asia. The situs of the talk—or of one or more negotiants—does not convert a foreign injury into a domestic one. To make the location of negotiation dispositive—whether to *expand* jurisdiction (as the panel did) or to *contract* it—is to resurrect *American Banana*, only in reverse.

B. Treating the conduct of negotiations as the qualifying "domestic effect" collapses the statute's two independent requirements.

The panel's analysis also does textual violence to the FTAIA's structure. The statute draws a deliberate line between "conduct" and "effect." See 15 U.S.C. §§6a(1), (2). "Conduct" is the agreement or combination in restraint of trade—here, the price coordination, the bid rigging, and the negotiations that implemented them. The "effect" is something downstream and different: the competitive harm, the supracompetitive price actually paid in a market. The qualifying effect must be "of a kind that antitrust law considers harmful," *Empagran*, 542 U.S. at 162 (citing 15 U.S.C. §§6a(1), (2))—the "*domestic* antitrust injury" the conduct causes, *id.* at 165.

The negotiations on which the panel relied are not effects at all. They are part of the conduct. Indeed, the Department of Justice and the Federal Trade Commission treat domestic negotiations as *evidence* that a later domestic effect was foreseeable—a position that makes sense only if the negotiations are conduct capable of causing an effect, not the effect itself. See *Antitrust Guidelines, supra*, at 22-24. By recharacterizing the conduct (negotiation) as a domestic effect, the panel merged the two prongs that Congress had kept separate. Under the panel's approach, anticompetitive conduct that physically occurs in the United States automatically supplies its own "domestic effect," no matter where the resulting injury lands. That reading would have nullified the FTAIA in *Empagran* itself, where "some of the anticompetitive price-fixing conduct" had "t[aken] place in *America*" yet could not support the foreign plaintiffs' claims. 542 U.S. at 165-166.[7]

C. The cognizable "effect" is the supracompetitive overcharge paid in a market, and Respondents' affiliates paid it abroad.

Stripped of labels, an antitrust injury is an overcharge above the otherwise competitive price. The FTAIA's effects requirement is, in economic terms, a requirement that this overcharge be borne in American commerce. That is why this Court, in *Empagran,* insisted that the foreign plaintiffs' "higher foreign prices" were "not the consequence of any domestic anticompetitive conduct *that Congress sought to forbid*," but rather "Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm" and the claim arises from that harm rather than from any domestic harm. 542 U.S. at 165-166. Here the claim is based on foreign, rather

[7] The error can also be seen in one of the panel's quotes from *Empagran* for the proposition that the FTAIA's "gives rise to a claim" requirement carries no geographic limitation. App.28a (quoting *Empagran*, 542 U.S. at 174). But the quoted language merely recites the respondents' argument, which the Court then *rejected* in the passage that immediately follows. *Empagran,* 542 U.S. at 174 ("Despite their linguistic logic, these arguments are not convincing.").

than domestic harm—the overcharge plaintiffs paid by foreign entities and was paid abroad.

Respondents' affiliates are in the identical position. Seagate Thailand and Seagate Singapore paid any anticompetitive overcharge in Asia, for delivery of goods in Asia, from a foreign supplier. Whatever effect that had on Thai and Singaporean commerce, it is an effect on non-import "trade or commerce with foreign nations"—the very commerce the FTAIA places outside the Sherman Act. 15 U.S.C. §6a(1). That the price was negotiated in dollars or in California does not change the market in which the overcharge was incurred any more than pricing a barrel of oil in dollars or discussing that price during a layover at LAX or SFO makes a sale in Singapore a domestic American sale.

D. The panel's rule severs Sherman Act coverage from the locus of competitive harm and rewards economically arbitrary conduct.

A sound rule allocating antitrust legal authority assigns a transaction to the legal regime of the market its competitive effects distort. That is, the jurisdiction in which competitive harms are caused is the one with the most legitimate interest and greatest incentive to accurately identify and assess such harms, and to adequately and efficiently remediate them. The effects test does exactly that, which is why it has proven administrable and durable. The panel's negotiation-situs rule does the opposite: it assigns jurisdiction based on a feature of the transaction—where the bargaining happened—that bears no necessary relationship to where competition was harmed. The same overcharge, paid by the same Asian buyer to the same Japanese seller for the same goods delivered to the same Asian port, would be inside the Sherman Act if the parties met in San Jose and outside it if they met in Singapore. Nothing about the competitive harm differs between those two worlds. A rule that makes liability turn on an economically irrelevant variable is not a limiting principle. It is an invitation to manipulate that variable.

That invitation is only magnified by the way modern negotiations are now conducted. Advances in telecommunications have rendered the situs of a negotiation increasingly ephemeral. Participants in a single real-time negotiation may be dispersed across several countries, joining by telephone or video from wherever they happen to sit. The physical location of any one participant can be masked, routed, or misrepresented at will. A test keyed to where bargaining "occurred" thus rests not merely on an economically irrelevant variable, but on one that is frequently indeterminate and readily manipulated.

CONCLUSION

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

Respectfully submitted,

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