No. 14-1121

IN THE
Supreme Court of the United States

HUI HSIUNG, HSUAN BIN CHEN,
AU OPTRONICS CORPORATION, and
AU OPTRONICS CORPORATION AMERICA, INC.,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement included in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

The petitioners in this case were charged with meeting overseas to fix the prices of thin-film transistor liquid crystal display (TFT-LCD) panels, which they sold abroad to foreign products manufacturers. Petitioners were convicted in the Ninth Circuit and sentenced to half a billion dollars in fines and substantial prison terms. Members of the same conspiracy were also defendants in a civil antitrust suit in the Seventh Circuit. But the two circuits squarely disagreed about the meaning of U.S. antitrust law and how to apply it to this foreign agreement. Whereas the Ninth Circuit held that the agreement

involved import commerce, the Seventh Circuit held that it did not. And whereas the Ninth Circuit held that the effects of the agreement were direct and immediate, the Seventh Circuit held that they were too attenuated to give rise to a Sherman Act claim.

The Government nevertheless contends that there is no conflict warranting this Court's review. But the conflict could hardly be sharper: The same conduct gave rise to contrary holdings in different circuits. And while the Government attempts to obscure this split with a revisionist reading of the relevant opinions, the conflict is real and creates crippling uncertainty for U.S. and foreign participants in the global economy. *See* Br. of the Nat'l Ass'n of Mfrs. as *Amicus Curiae* in Support of Granting Cert. 2-3, *Motorola Mobility LLC* v. *AU Optronics*, No. 14-1122 (U.S. Apr. 16, 2015). It needs to be resolved now.

The Government also contends that this Court's review would not affect the outcome in this case. That is wrong, and in any event, this Court can ensure that the issues are properly presented simply by granting certiorari on the antitrust questions in both the Ninth and the Seventh Circuit cases. That is how this Court has addressed vehicle concerns in the past, and given that both cases involve the *same* alleged conspiracy, it should do so here. Granting the cases together would allow the Court to hear from all interested parties: industry participants, the Government, and those imprisoned as a result of the Ninth Circuit's misinterpretation of the law.

This Court should also agree to decide an additional question: whether foreign price-fixing agreements are *per se* unlawful. The rule of reason is the accepted standard under the Sherman Act, and the Gov-

ernment cannot justify the Ninth Circuit's departure from that standard here.

ARGUMENT

I. REVIEW IS WARRANTED TO DECIDE TWO QUESTIONS UNDER THE FTAIA

A. The Circuits Disagree About The Scope Of The Import-Commerce Exclusion

The Government contends (at 19) that there is "no conflict" among the circuits over the scope of the FTAIA's import-commerce exclusion. According to the Government (at 12-13), there is a "widely accepted understanding" that the exclusion "encompasses a foreign producer's sales of its products for shipment to purchasers in the United States."

But the question presented is not whether the import-commerce exclusion "*encompasses*" such sales. (Emphasis added). Of course it does. The question is whether it is *limited to* them. Pet. i. And on *that* question, there is no "widely accepted understanding." The circuits are sharply divided, and the Ninth Circuit's decision deepens that split.

1. On one side is the Third Circuit, which has rejected the view that the exclusion applies only to defendants acting as importers. As construed by the Third Circuit, the exclusion is far broader, extending to any conduct "*directed at* an import market." *Animal Sci. Prods., Inc.* v. *China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011) (emphasis added) (internal quotation marks omitted). Thus, as the Government acknowledges (at 18), "[f]unctioning as a physical importer * * * is not a necessary prerequisite" under Third Circuit precedent. *Animal Sci.*, 654 F.3d at 470.

2. On the other side of the split is the Seventh Circuit. Under that circuit's precedent, the import-commerce exclusion applies only to importers. *See* Pet. 10-11 (discussing *Motorola Mobility LLC* v. *AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015), and *Minn-Chem, Inc.* v. *Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012) (en banc)). The Government denies this (at 17-18), but *Motorola* could hardly be clearer. There, the Seventh Circuit considered Motorola's so-called "Category Two" claims, involving "panels sold and delivered to Motorola's foreign subsidiaries and incorporated into cellphones bound for the United States." Br. in Opp. 17. The court held that those claims did not satisfy the exclusion because "[i]t was Motorola, rather than the defendants, that imported these panels into the United States, as components of the cellphones that its foreign subsidiaries manufactured abroad and sold and shipped to it." *Motorola*, 775 F.3d at 818. In other words, Motorola's Category Two claims did not satisfy the exclusion precisely because the defendants sold and delivered the panels to *Motorola's foreign subsidiaries*, not purchasers in the United States. The Seventh Circuit thus found dispositive the fact that the defendants were not importers—a fact that would *not* have been dispositive in the Third.

Moreover, the Government ignores the holding of *Minn-Chem, Inc.* v. *Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012) (en banc). Addressing the import-commerce exclusion, the Seventh Circuit concluded that "[t]hose transactions that are directly between the [domestic] plaintiff purchasers and the [foreign] defendant cartel members *are* the import commerce of the United States." *Id.* at 855. By contrast, all of the other alleged activities were "best understood as

sufficiently outside the arena of simple import transactions as to require application of the FTAIA." *Id.* The Seventh Circuit thus drew a line between "simple import transactions" and everything else, restricting the exclusion to the former. *Id.* *Motorola* and *Minn-Chem* simply cannot be reconciled with *Animal Science*.

3. The Ninth Circuit's decision deepens this split. When petitioners argued that they had not made any sales directly into the United States, the Ninth Circuit concluded that that was irrelevant: "To suggest, as the defendants do, that AUO was not an 'importer' misses the point." Pet. App. 33a. The Ninth Circuit held that conduct falls within the import-commerce exclusion so long as it is "consummated within" an import market, rejecting the Seventh Circuit's narrower view. *Id.* at 31a n.8.

The Government disputes this (at 14), pointing to a sentence in the Ninth Circuit's opinion stating that "import commerce" encompasses direct sales between "foreign defendant producers" and "purchasers located in the United States." Pet. App. 30a. But again, the question is not whether the exclusion *encompasses* direct sales; the question is whether it is *limited to* them.

The Government insists (at 13) that in applying the exclusion, the Ninth Circuit relied *only* on evidence of direct sales. Not true. The Ninth Circuit relied expressly on trial testimony that AUO sold as many as "one million price-fixed panels per month" to U.S. companies. Pet. App. 33a. The Government does not dispute that those panels were sold to the *foreign intermediaries* of those U.S. companies overseas, rather than directly to purchasers in the United

States. *See* Br. in Opp. 15. Those overseas sales were thus no different from the Category Two sales in *Motorola*. And yet, unlike the Seventh Circuit, the Ninth Circuit held that those very sales satisfied the import-commerce exclusion. Pet. App. 33a. In doing so, the Ninth Circuit necessarily rejected the Seventh Circuit's view that the exclusion applies only to importers.

To be sure, the Ninth Circuit found it unnecessary to "determine the outer bounds of import trade by considering whether commerce directed at, but not consummated within, an import market is also outside the scope of the FTAIA's import provisions." *Id.* at 31a n.8. But just because the Ninth Circuit has not gone as far as the Third does not mean it agrees with the Seventh. Indeed, the Ninth Circuit made clear that it rejected the Seventh Circuit's view by holding that the exclusion extends to commerce "consummated within" an import market, *id.*; by deeming the fact "that AUO was not an 'importer' [beside] the point," *id.* at 33a; and by relying on evidence regarding panels sold overseas to the foreign intermediaries of U.S.-based companies, *id.*

The Ninth Circuit's decision therefore exacerbates the split over the import-commerce exclusion. Certiorari should be granted to resolve it.

B. The Circuits Disagree About The Scope Of The Effects Exception

The Government does not deny that the circuits reached opposing results when they applied the FTAIA's effects exception to the same conspiracy: The Ninth Circuit held that the exception was satisfied, whereas the Seventh Circuit held that it was not. Pet. 15-16. The Government insists (at 20, 23-

24), however, that the Ninth Circuit addressed "only one aspect" of the effects inquiry—whether the effects of the conspiracy were "direct"—while the Seventh Circuit addressed a different aspect—whether the effects "give[] rise to" a Sherman Act claim.

The conflict cannot be so easily dismissed. Contrary to the Government's suggestion, the Ninth Circuit addressed *both* the "direct" *and* the "gives rise to" prongs. Pet. App. 38a-39a. Both prongs concern the same issue: the strength of the causal connection between the defendants' activities and effects in the United States. Under Ninth Circuit precedent, the "direct" prong asks whether those effects flowed "immediate[ly]" from the defendants' activities, while the "gives rise to" prong asks whether they flowed "proximate[ly]" from them. *Id.* (internal quotation marks omitted). As the Ninth Circuit noted, "immediate" is a "stricter standard" than "proximate." *Id.* at 38a n.9. By holding that the effects in this case were "immediate," the Ninth Circuit necessarily concluded that both prongs were satisfied. *Id.* at 39a. That holding conflicts with the Seventh Circuit's holding on the "gives rise to" prong, and warrants this Court's review. *See United States* v. *Williams*, 504 U.S. 36, 41 (1992) (holding that the Court may review "an issue not pressed so long as it has been passed upon").

The Government nevertheless contends (at 24) that the two circuits' decisions can be reconciled, because one dealt with a criminal prosecution, while the other dealt with a civil suit. Neither decision, however, rested on the nature of the lawsuit. Each turned instead on the immediacy of the effects of the alleged conspiracy: Whereas the Ninth Circuit con-

cluded that they were "direct" and "immediate," Pet. App. 38a, the Seventh Circuit concluded that they were "indirect" and "derivative." *Motorola*, 775 F.3d at 820, 821.

The Government's attempt to reconcile the two circuits' decisions fails. Review should be granted to resolve this conflict.

C. This Case Is The Ideal Vehicle For Resolving These Splits

The Government further asserts that certiorari should be denied because this Court's review would not be outcome-determinative. It claims (at 19) that "petitioners' convictions can be affirmed" even if this Court were to reverse the Ninth Circuit on both FTAIA questions. The Government is wrong.

1. As an initial matter, this Court can eliminate any vehicle concerns simply by granting certiorari on the antitrust questions in both this case and *Motorola*. The Solicitor General has recommended just such a course in the past. When, for example, the Solicitor General sought review of the Ninth Circuit's interpretation of a federal statute a few Terms ago, he noted a potential vehicle problem with one of the two questions presented, and asked this Court to grant a "concurrently" filed petition presenting the same questions "to ensure that both [were] properly presented to this Court." Pet. for Cert. 21 n.4, *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011 (2012) (No. 10-1542), 2011 WL 2533820. The Court granted both petitions, *see* 132 S. Ct. 71, and decided the questions on the merits, *see* 132 S. Ct. 2011.

If the Court has similar concerns here, it should do the same. *Motorola*, after all, presents the same questions about the FTAIA as this case. Pet. for

Cert. 13-21, *Motorola*, No. 14-1122 (U.S. Mar. 16, 2015). And there can be no doubt that the Seventh Circuit's judgment turned on them. Granting the antitrust questions in both petitions would thus "ensure that [they] were properly presented to this Court." And doing so would be particularly appropriate, given that both cases involve the same alleged conspiracy.

2. Even if this case were considered on its own, this Court's review would be outcome-determinative.

a. Although the Government focuses (at 19) only on whether "petitioners' *convictions* can be affirmed" (emphasis added), reversal on both FTAIA questions would require vacating petitioners' *sentences*. Pet. 20-21.

AUO's gargantuan half-billion-dollar fine rested on the jury's finding regarding the "gross gain" from the offense. 18 U.S.C. § 3571(d). The jury was instructed that in making that finding, it "should total the gross gains * * * from affected sales of (1) TFT-LCD panels that were manufactured abroad and sold in the United States; or (2) TFT-LCD panels incorporated into finished products such as notebook computers and desktop monitors that were sold in the United States or for delivery to the United States." Pet. App. 43a-44a. Reversal on the two FTAIA questions would mean that the jury should have been permitted to consider only the panels described in part (1) of the instruction. None of the panels described in part (2) of the instruction—which made their way into the United States through foreign intermediaries—should have counted.

Thus, this Court's review would affect the amount of AUO's fine. And given that the District Court also

considered the panels described in part (2) in sentencing the other petitioners, they would be entitled to resentencing, too.

b. Moreover, the Government is wrong to suggest that review would be irrelevant to petitioners' convictions.

Reversal on the second FTAIA question alone would require vacating the jury's general verdict. Pet. 19-20. If "fixing the price of TFT-LCD panels that were incorporated into finished products" did not have an effect that was "direct" or "gives rise to" a Sherman Act claim, Pet. App. 26a, then one of the theories submitted to the jury was "legally inadequate." *Griffin* v. *United States*, 502 U.S. 46, 59 (1991). The Government argues (at 28) that the error would be merely "factual, not legal." But the error would have nothing to do with whether the evidence showed that petitioners fixed prices. The error would go to whether petitioners' conduct, *taking the facts as given*, nevertheless "fails to come within the statutory definition of the crime." *Griffin*, 502 U.S. at 59; *see also Skilling* v. *United States*, 561 U.S. 358, 413-414 (2010). That is a quintessentially *legal* error, which would require setting aside the entire verdict. *Griffin*, 502 U.S. at 59.*

* The Government contends (at 28) that even if the error were legal in nature, it would be harmless. The Ninth Circuit, however, did not conduct a harmless-error analysis. If any such analysis were appropriate, the time for it would be on remand, following this Court's decision on the merits. Speculation about the outcome of a harmless-error analysis, which no court has conducted, should not prevent review of these important questions.

Even if the error were factual, reversal on *both* FTAIA questions would require the same result, because there would be no evidentiary basis to convict. The Government contends (at 14-16) that the evidence was sufficient to satisfy even the narrowest interpretation of the import-commerce exclusion. But the Government never established that petitioners *themselves* sold any panels directly to U.S. purchasers; indeed, the Government admitted that "the evidence did not identify those panels imported by AUO in particular." C.A. E.R. 439. And even if there was evidence that some *other* participants imported panels, the Government never established that petitioners entered into an agreement "intending to help" the other participants do so. Pet. App. 26a. In other words, the Government never established that direct sales were part of the scope of the conspiracy at all. Because the Government's import-commerce and effects theories were both inadequate, petitioners' convictions cannot stand.

In short, this Court's review would affect petitioners' convictions *and* sentences. And if there is any doubt on that score, it can be easily resolved by granting review of the antitrust questions in this case and *Motorola*.

II. REVIEW IS WARRANTED TO DECIDE WHETHER FOREIGN PRICE-FIXING AGREEMENTS ARE *PER SE* UNLAWFUL

The Government does not dispute that this case involves a *foreign* price-fixing agreement. It claims (at 30) that applying the rule of reason to such an agreement would require "reconsidering [this Court's] settled precedents." The Government fails, however, to point to a single decision of this Court

involving a *foreign* price-fixing agreement. Thus, the burden is not on petitioners to justify departing from this Court's precedents; the burden is on the Government to justify departing from the rule of reason—"the accepted standard for testing whether a practice restrains trade in violation of § 1" of the Sherman Act. *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007).

The Government cannot meet that burden. The most the Government can say (at 30) is that a foreign price-fixing agreement "can still" have an anticompetitive effect in the United States. That is not enough. Under this Court's precedents, "the *per se* rule is appropriate * * * only if courts can predict with confidence that [the type of restraint at issue] would be invalidated in *all or almost all* instances under the rule of reason." *Leegin*, 551 U.S. at 886-887 (emphasis added). The Government's assurance that a foreign price-fixing agreement *can* be anticompetitive does not inspire that confidence.

Finally, the Government protests (at 32) that this case would be a "poor vehicle" for considering whether foreign price-fixing agreements should be *per se* condemned. Its only argument is that the particular agreement here might have had an anticompetitive effect in the United States. That might be relevant to whether the agreement would pass muster under the rule of reason. But the Government did not argue the rule of reason below, and it is too late to do so now. Pet. 27-29. Because the question presented is outcome-determinative, this case is the ideal vehicle for deciding whether a *per se* rule should govern foreign price-fixing agreements.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition should be granted.

Respectfully submitted,

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