No. 14-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTOROLA MOBILITY LLC,

Plaintiff-Appellant,

v.

AU OPTRONICS CORP., et al.,

Defendants-Appellees

On Interlocutory Appeal from an Order of
the United States District Court
for the Northern District of Illinois, Case No. 09-cv-6610

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Cir. R. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it. No law firm has appeared, or is expected to appear, for amicus curiae in this matter.

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INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The American Antitrust Institute (AAI) is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws.[1]

This should have been an easy case. An American-owned manufacturer buys price-fixed components abroad, incorporates them into finished products that its parent imports into the United States, with the result that American consumers pay artificially inflated prices for the finished products. There is no dispute that the price fixing has a direct, substantial, and reasonably foreseeable effect on American consumers. Indeed, those are the *only* consumers who feel the effects of the price fixing of those components. There is no dispute that *Illinois Brick* and *Hanover Shoe* give the direct-purchaser manufacturer standing to recover the full amount of overcharge (and generally deny standing to American consumers as indirect purchasers) in order to promote deterrence and encourage vigorous private enforcement of the antitrust laws. Yet the panel denied recovery to direct purchasers here apparently because it believed that harm to American consumers from price fixing in global supply chains is so common that allowing relief would result in an explosion of litigation against international cartels, creating friction with many foreign coun-

[1] Individual views of members of the Board of Directors or the Advisory Board may differ from AAI's positions. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity—other than AAI or its counsel—has contributed money that was intended to fund the preparation or submission of this brief. Kenneth Adams, who is one of the attorneys representing appellant, is a member of AAI's Advisory Board, but he played no role in the Directors' deliberations or the drafting of the brief.

tries and resentment at the United States becoming the world's competition police officer.

The panel has it backwards. Protecting American consumers from harm caused by international cartels is a core purpose of both the Sherman Act and the Foreign Trade Antitrust Improvement Act (FTAIA). The more widely American consumers are at risk from international cartels, the *greater* is the need for private attorneys general to enforce the law. When American consumers are directly, substantially, and foreseeably harmed by foreign conduct, and the remedy redresses that harm, there is no comity concern.

The panel's references and quotes from *Empagran* are entirely inapposite. *Empagran* involved a situation where the foreign plaintiffs sought recovery for foreign harm that had *nothing* to do with the harm to American consumers. The panel selectively quotes this court's discussion of *Empagran* in *Minn-Chem*: "'U.S. antitrust laws are not to be used for injury to foreign customers.'" Slip op. 7 (quoting *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 858 (7th Cir. 2012)). But what this court actually said was:

> While [*Empagran*] holds that the U.S. antitrust laws are not to be used for injury to foreign customers, it goes on to reaffirm the well-established principle that the U.S. antitrust laws reach foreign conduct that harm U.S. commerce:
>
> > "[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused."

Minn-Chem, 683 F.3d at 858 (quoting *Empagran*, 542 U.S. at 165).

As the Court found in *Empagran*, allowing foreign plaintiffs to recover for foreign harm that has nothing to do with the domestic injury does not redress that injury. However, allowing a foreign manufacturer (whether owned by a U.S. corporation or not) to recover for a cartel's "foreign" harm that *proximately causes* domestic injury is fully in accord with prescriptive comity.

The panel quotes the question asked in *Empagran*: "'Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?'" Slip op. 16 (quoting 542 U.S. at 165). The answer in this case is that the ultimate customers are *U.S. consumers*. *See Minn-Chem,* 683 F.3d at 860 ("country whose consumers are hurt [is] the better enforcer").

The panel's decision is sweeping: its narrow view of the import commerce exclusion, crabbed reading of the "gives rise to" requirement, and refusal to recognize an exception to the *Illinois Brick* rule combine to immunize defendants from any liability for Sherman Act damages as to the price-fixed products at issue. Indeed, any international price-fixing cartel that concededly has a direct, substantial and reasonably foreseeable effect on American consumers would be able to avoid Sherman Act damages for products intended for the U.S. market as long as the cartel sells its price-fixed products abroad before the products are imported into the United States. Such an extreme result is contrary to the most natural reading of

the FTAIA, the intent of the statute, and a fair reading of *Empagran*. And it would seriously undermine already inadequate levels of deterrence of international cartels that harm American consumers.

ARGUMENT

I. THE PANEL ERRED BY RULING THAT THE IMPORT-COMMERCE EXCLUSION CANNOT APPLY WHEN PRICE-FIXED PRODUCTS ARE NOT PHYSICALLY IMPORTED BY THE DEFENDANTS

The panel held that the price-fixed LCD panels that Motorola's foreign subsidiaries purchased abroad and incorporated into cell phones imported into the United States did not involve import commerce because "[i]t was Motorola, rather than the defendants, that imported these panels into the United States." Slip op. 5. This is clear error, unsupported by any analysis. Any requirement that the "defendants function as the physical importers of goods" was rejected by the Third Circuit in *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F. 3d 462, 470 (3d Cir. 2011). Rather, the Third Circuit held that the "import [exclusion] is not limited to importers, but also applies if the defendants' conduct is directed at an import market." *Id.* at 471 n.11; *see also United States v. Hui Hsiung*, 758 F.3d 1074, 1091 (9th Cir. 2014) ("To suggest, as the defendants do, that AUO was not an 'importer' misses the point. The panels were sold into the United States, falling squarely within the scope of the Sherman Act."). As the government argued, "Anticompetitive conduct often can involve import commerce, even though the perpetrators are not themselves importers." U.S. Br. 8 (Sept. 5, 2014) (Doc. 89).

To the extent that foreign price fixers' products are imported into the United States (either as components or as raw materials), and the price fixers intend such a result, there is simply no basis in comity or policy to treat such conduct as *not* "involving" import commerce. *See* H.R. Rep. 97-686 (1982), at 10 ("[W]holly foreign transactions as well as export transactions are covered by the [FTAIA], but . . . import transactions are not.").[2] Of course, accepting that defendants' conduct involved import commerce does not necessarily mean that Motorola could recover for harm attributable to price-fixed products that were not imported into the United States, as the government suggested. U.S. Br. 10 (where foreign injury is unrelated to import commerce, antitrust standing and antitrust injury rules may bar claims).

II. THE PANEL ERRED BY FAILING TO RECOGNIZE THAT THE "GIVES RISE TO" REQUIREMENT CAN BE SATISFIED BY DIRECT PURCHASERS ABROAD WHEN THE HARM TO DOMESTIC COMMERCE DEPENDS ON FOREIGN INJURY

While recognizing that defendants' price fixing likely has a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce by raising the price of cell phones in the United States, the panel erroneously concluded that Motorola cannot satisfy the FTAIA's second requirement—that "such effect gives rise to a claim" under the Sherman Act. The panel offered no analysis to support its conclusion; it merely assumed that Motorola could not recover for the overcharges it paid on price-fixed components because the injury "occurred entirely in foreign

[2] In *Minn Chem*, this court vacated a panel decision that had suggested a strict construction of the import commerce *exclusion* was necessary in order to give meaning to the import commerce *exception*. The panel's reasoning was faulty because the exception applies to all forms of non-import commerce, including exports. So, for example, an export cartel would not involve import commerce, but would come within the exception if it created a worldwide shortage that raised the prices of U.S. imports. *Cf.* H.R. Rep. 97-686 at 13.

commerce." Slip op. 6, 13. Apparently, the panel accepted defendants' argument that *Empagran* requires a private plaintiff to show that the effect on U.S. commerce gives rise to "the plaintiff's claim" or "the claim at issue," rather than "a claim" as the text of the statute provides, and that the higher prices for cell phones in the United States did not give rise to Motorola's overcharge claims.

This argument entirely misreads *Empagran*. *Empagran* recognized that the "gives rise to" requirement was meant to ensure that the conduct "has an effect of a kind that antitrust law considers harmful." 542 U.S. at 162; *Minn-Chem*, 683 F.3d at 854 (effect "must give rise to a substantive claim under the Sherman Act"). As Motorola demonstrated, the panel's conclusion that the "gives rise to" requirement was intended to establish a separate rule of standing ("who may bring a suit," slip op. 4) is inconsistent with the legislative history and the obvious interpretative difficulty that the exact same "gives rise to" formulation was added to the FTC Act, which only the FTC may enforce. 15 U.S.C. § 45(a)(3). That Congress knew how to address "who may bring a suit" when it wanted to is evident in the last sentence of section 6a, which provides that insofar as anticompetitive conduct has an effect on the export trade of a domestic exporter, the Sherman Act applies, but "only for injury to export businesses in the United States." 15 U.S.C. § 6a.

To be sure, *Empagran* offered that, in the circumstances, it "makes linguistic sense to read the words 'a claim' *as if* they refer to the 'plaintiff's claim' or 'the claim at issue.'" 542 U.S. at 174 (emphasis added). But the Court could not have been clearer that it based its reading on the assumption that respondents sought recov-

ery for *independent* foreign harm. *Id.* at 158 ("We here focus upon anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury."). Indeed, the Court referred to "independent" foreign harm more than 20 times in the opinion. As a matter of comity and history, the Court could find no justification for reading the FTAIA to extend to claims by foreign plaintiffs based on independent foreign harm. Accordingly, although the statute uses the words "*a* claim," and "respondents' reading [may be] the more natural reading of the statutory language,"[3] *id.* at 174, the Court rejected it where the foreign harm for which respondents sought recovery was not linked to any domestic effects. On those facts, the Court held that "respondents' reading is not consistent with the FTAIA's basic intent," and respondents had failed to show "we *must* accept [it]." *Id.*[4]

However, the "more natural" reading *should* be adopted where, as here, there is a close link between the foreign and domestic harm, and the basic purpose of the FTAIA and the Sherman Act—protecting U.S. consumers—would be undermined by adopting *Empagran*'s linguistic gloss applicable to cases of independent harm. Here, the foreign conduct proximately caused domestic harm *by virtue* of foreign injury; there is no logical reason or statutory purpose for treating this situation differently from cases of domestic harm proximately causing foreign injury. If any-

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[3] It is not just that the statute says "*a* claim," but "a claim *under the provisions of sections 1 to 7 if this title, other than this section*." 15 U.S.C. § 6a (emphasis added).

[4] Indeed, reading the statute to mean "gives rise to plaintiff's claim" was not necessary to the result because the Court simply could have held that foreign plaintiffs lacked antitrust standing in cases of independent harm, as the Solicitor General had suggested. U.S. Amicus Br. at 25, *Empagran*, 542 U.S. 155 (No. 03-724).

thing, the case for allowing relief is stronger when causation runs in this direction because relief redresses harm to the domestic economy. *Empagran* itself recognized that the Sherman Act may apply where "the domestic harm depended in part upon the foreign injury." *Id.* at 172 (distinguishing *Dominicus Americana Bohio v. Gulf & Western Indus.,* 473 F. Supp. 680 (S.D.N.Y. 1979)); *see also Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998) (foreign rival's exclusion by monopolist abroad satisfied requirements of FTAIA where exclusion caused higher domestic prices for U.S. customers).

Ordinarily, the meaning of statutory language does not vary when applied in different circumstances. *See, e.g., United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (extraterritorial effect of Sherman Act is same for purposes of civil or criminal offense). But this canon of statutory construction does not always apply. *See, e.g., United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 & n.13 (1978) (intent is element of criminal, but not civil, Sherman Act offense); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (identical language in Section 1 of Sherman Act may have different meaning than in Section 3). *Empagran* acknowledged that "[l]inguistically speaking, a statute can apply and not apply to the same conduct, depending upon other circumstances." 542 U.S. at 174. And the canon is particularly inapt where, as here, there already is no "unitary" meaning of the statutory language (because the "gives rise to" language has a dif-

ferent meaning when the government is the plaintiff, *see id.* at 170-71),[5] and the interpretation adopted for one circumstance (independent foreign harm) is countertextual and chosen for purposive reasons that do not apply in other circumstances.

III. THE PANEL'S DECISION CREATES A SIGNIFICANT LOOPHOLE IN THE SHERMAN ACT WHICH UNDERMINES ALREADY INADEQUATE DETERRENCE OF INTERNATIONAL CARTELS THAT HARM U.S. CONSUMERS

The panel's decision exempts foreign cartels from Sherman Act damages on price-fixed products intended for the U.S. market, as long as those products are initially sold abroad before they are imported into the United States (either as raw materials or components of finished products). Not only are direct purchasers like Motorola's foreign subsidiaries barred from recovery under the FTAIA, but the panel was emphatic that the *Illinois Brick* rule would prevent U.S. indirect purchasers (Motorola or American consumers of cell phones) from recovery as well. Slip op. 9, 11, 12. This result makes no sense because it cannot be the case that the most efficient enforcer of the U.S. antitrust laws is "no one."

"Typically, the final consumer is the one most seriously injured by cartel or monopoly prices, while retailers and other intermediaries have relatively minor injuries caused by lost volume of sales." Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 307 (2005). Nonetheless, the Supreme Court reasoned that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers," *Illinois Brick Co. v.*

[5] When the government is the plaintiff it makes no sense to read "gives rise to a claim" to mean "gives rise to plaintiff's claim" under sections 1 to 7 of the Sherman Act, because injury or damages are not elements of a government case.

Illinois, 431 U.S. 720, 735 (1977), because wrongdoers would be less likely to "retain the fruits of their illegality" for want of an economically motivated challenger to bring suit. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968). It would turn *Illinois Brick* upside down, and significantly undermine deterrence, to deny recovery to *both* indirect and direct purchasers when price-fixed imported products are first sold abroad.

Moreover, while foreign jurisdictions are moving slowly towards permitting private damages remedies for antitrust violations, those jurisdictions generally allow a pass-on defense.[6] Perversely, then, under the law in those jurisdictions, the more that direct purchasers abroad pass on to American indirect purchasers, the less cartelists will be deterred. And if they pass on the full 100% of the overcharge to American indirect purchasers, the panel's decision means cartels would escape all liability for damages in the United States or abroad for products imported into the United States by direct purchasers.

American consumers will be the losers. International cartels are a scourge of American commerce. The Justice Department "has prosecuted international cartels affecting billions of dollars in U.S. commerce" in numerous sectors of the world economy, cartels "cost[ing] U.S. businesses and consumers billions of dollars annually." Scott D. Hammond, Recent Developments, Trends, and Milestones in the

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[6] *See, e.g.*, European Union, Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union ¶ 39 (Oct. 24, 2014). While the EU directive also requires Member States to adopt laws allowing indirect purchasers to sue, it is hard to imagine U.S. consumers taking advantage of such relief, particularly since collective redress mechanisms (class actions) are neither required, *see id.* ¶ 13, nor generally available.

Antitrust Division's Criminal Enforcement Program 17 (March 26, 2008). The U.S. antitrust laws, including the FTAIA, were specifically designed to deter this kind of injury to the American economy. H.R. Rep. 97-686 at 13 ("Any major activities of an international cartel would likely have the requisite impact on United States commerce.").

Plainly, government enforcement alone cannot provide adequate deterrence. *See* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. Rev. 315, 317 ("quantitative analysis of the facts demonstrates that private antitrust enforcement probably deters more anticompetitive conduct than the DOJ's anti-cartel program"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators."); *cf. POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2239 (2014) ("Allowing [private] Lanham Act suits takes advantage of synergies among multiple methods of regulation.").

Effective deterrence requires penalties that exceed ill-gotten profits, adjusted for the likelihood of getting caught. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev 427, 429 (2012). An exhaustive survey of cartel detection literature shows that, conservatively, detection rates are at most 25-30%, meaning price-fixing cartelists have about a 75% chance of getting away with their crimes. *Id.* at 462-65. Accordingly, the ratio of a cartel's

total economic penalties for getting caught relative to the amount of monopoly profits it can extract from American consumers (the "penalty-to-harm ratio") must exceed 400% to adequately deter international cartels that would otherwise prey on Americans. *See* John M. Connor, *Private Recoveries in International Cartel Cases Worldwide: What do the Data Show?* 16 (Am. Antitrust Inst., Working Paper No. 12-03, Oct. 15, 2012).

The collective efforts of the Justice Department and private attorneys general have not come close to achieving this level of deterrence. Combining fines and payments resulting from both government and private cases, the penalty-to-harm ratio for international cartels affecting the United States on average does not even reach 100%. *Id.* at 15. In other words, typically it is *net profitable* for international cartels to illicitly appropriate wealth from U.S. consumers, even if they are caught. The situation has been getting worse, not better. From 2000-2010, as compared to 1990-1999, the penalty-to-harm ratio for international cartels has significantly *declined*. *Id*. Predictably, international cartels are proliferating. Over the last 15 years, 113 of the 120 cases yielding DOJ corporate fines of $10 million or more involved international cartels, the bulk of which produced intermediate goods incorporated into other goods. *See* U.S. Dep't of Justice, Antitrust Division, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More (Nov. 12, 2014).

The panel recognized that "[n]othing is more common nowadays than for products imported to the United States to include components that the producers

bought from foreign manufacturers," and that as a result of weak foreign antitrust enforcement, "the prices of many products exported to the United States doubtless are elevated to some extent by price fixing or other anticompetitive acts." Slip op. 14-15. But this harm to American businesses and consumers calls for full application of Sherman Act treble damages liability rather than creating a blanket exception for imports that are first sold abroad.

CONCLUSION

For the foregoing reasons, the court should grant Motorola's petition for en banc rehearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as it contains 3491 words, excluding the parts of the brief exempted by the rule. It complies with the type-face requirements as it has been prepared in a proportionally spaced typeface using Microsoft Word in 12-point Century Schoolbook type style.

/s Richard M. Brunell

December 17, 2014

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

s/ Richard M. Brunell