Nos. 12-10492; 12-10493; 12-10559; 12-10560
(consolidated with Nos. 12-10500; 12-10514; 12-10558)

IN THE

United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

v.

HUI HSIUNG,

Defendant-Appellant-Cross-Appellee.

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

v.

HSUAN BIN CHEN,

Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of California, No. 3:09-cr-00110-SI
District Judge Susan Illston

BRIEF FOR DEFENDANTS-APPELLANTS HUI HSIUNG AND HSUAN BIN CHEN

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STATEMENT OF JURISDICTION

This case arises from a criminal prosecution in the U.S. District Court for the Northern District of California. The district court had jurisdiction under 18 U.S.C. § 3231. The district court entered final judgments of conviction on October 2, 2012. ER 206-210; ER 211-215. Defendants Hui Hsiung and Hsuan Bin Chen timely noticed their appeals that same day. ER 226-227; ER 202-205; *see* Fed. R. App. P. 4(b)(2). This Court has jurisdiction under 28 U.S.C. § 1291.

BAIL STATUS OF DEFENDANTS

After the district court sentenced Dr. Hsiung and Mr. Chen each to 36 months of imprisonment, it denied their motions for bail pending appeal. This Court recently affirmed the denial of bail. Ninth Circuit Dkt. 23. The district court has set a self-surrender date of February 12, 2013. With anticipated credit for good behavior, and subject to U.S. Bureau of Prisons policies, the expected release date for both Dr. Hsiung and Mr. Chen is approximately September 3, 2015.

INTRODUCTION

This case raises a foundational question about whether the Sherman Act can be extended beyond U.S. borders to criminalize foreign conduct under a *per se* theory of antitrust liability. The government alleged that several foreign corporations had conspired in a series of meetings in foreign countries to fix the prices of thin-film transistor liquid crystal display (TFT-LCD) panels. Those panels—all of which were manufactured abroad—were sold almost exclusively to foreign entities and shipped to foreign destinations, where they were incorporated into monitors and notebook computers. Because some of those finished products eventually made their way into the United States through the chain of commerce, the government contended that U.S. courts had authority to subject the foreign corporations and their executives to staggering fines and substantial terms of imprisonment on the ground that price fixing is *per se* illegal.

But the government was wrong. Given the complex dynamics of foreign markets and sensitive foreign-relations concerns, this Court has held that U.S. antitrust laws may not be extended to cover foreign conduct without examining whether the challenged restraint is unreasonable. This Court's rule is as plain as day: "[W]here a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation." *Metro Indus., Inc.* v. *Sammi Corp.*, 82 F.3d 839, 845 (1996). That rule applies "[e]ven if" the challenged restraint "would require application of the *per se* rule if [it] occurred in a domestic context." *Id.* at 844. And it further applies across-the-board to *any* type of antitrust offense based on foreign conduct; indeed, the Court singled out "price fixing in a foreign country" to illustrate that point. *Id.* at 845.

This case is just what *Metro Industries* had in mind: "price fixing in a foreign country." Yet the district court refused to follow the *Metro Industries* rule. The court forbade defendants from arguing that their foreign conduct was reasonable, even though defendants could have shown that the fledgling TFT-LCD industry faced unique business pressures that threatened its survival and risked substantial decreases in competition. Instead, the court instructed the jury that price fixing—even if it occurs in a foreign country—is illegal *per se*, no matter its

actual effects or justifications. The district court's baseless rejection of *Metro Industries* necessitates reversal of defendants' convictions.

And there's yet still more: The Sherman Act, with its domestic focus, cannot be stretched to criminalize defendants' foreign conduct at all. One of the longest standing and most venerable canons of statutory construction is the presumption that U.S. laws do not apply extraterritorially. To displace the presumption, Congress must provide a clear statutory statement extending the law beyond U.S. borders. The Sherman Act lacks the requisite clear statement, and so does not apply abroad. And that is especially true in this criminal case, where the presumption carries additional weight given the liberty interests that are at stake.

The district court dismissed defendants' extraterritoriality arguments on the erroneous theory that effects in the United States justify jurisdiction over foreign conduct—and then doubled down on the error by not even requiring the jury to find those domestic effects. Instead, the court instructed that the Sherman Act applies so long as a single overt act occurs in the United States. That breathtakingly broad view of jurisdiction conflicts not only with precedent, but also with international law and common sense. Because the jury undoubtedly convicted on this flawed legal theory, reversal is once again warranted.

Finally, the convictions cannot stand because the government—focused on foreign conduct—failed to prove that venue was appropriate in the Northern

District of California. Perhaps realizing the thinness of its venue evidence, the government waited to discuss venue until its rebuttal closing argument, at which point it stitched together a claim that conspirators had conducted negotiations for price-fixed panels in the district. But this evidence simply didn't exist. Nor could the government come up with any plausible alternative theory of venue when it scoured the transcripts post-trial. The government's failure to offer sufficient evidence of venue violated defendants' Article III and Sixth Amendment rights, and the prosecutor's prejudicial misstatement of the evidence violated due process.

In short, this criminal case was flawed in its inception and flawed in its prosecution. Defendants' convictions must be reversed.

STATEMENT OF ISSUES FOR REVIEW

1. Whether reversal is warranted because the district court erroneously permitted defendants to be convicted on a *per se* theory of antitrust liability, in violation of this Court's bright-line rule in *Metro Industries* that Sherman Act claims based on foreign conduct must be evaluated under the rule of reason.

Defendants repeatedly raised their *Metro Industries* argument, ER 1690; ER 1656; ER 1551; ER 1524-34; ER 554-581; ER 500-509, and the district court repeatedly denied it, ER 190; ER 146-147; ER 33; ER 7. "The selection of the proper mode of antitrust analysis"—whether *per se* or rule of reason—"is a

question of law, which [this Court] review[s] de novo." *California ex rel. Harris* v. *Safeway, Inc.*, 651 F.3d 1118, 1124 (9th Cir. 2011) (en banc).

2. Whether the Sherman Act lacks a clear statement of extraterritoriality and therefore may not be used to prosecute foreign conduct.

Defendants moved to dismiss the indictment for failing to adequately allege a Sherman Act violation based on foreign conduct, ER 1683-91; ER 1681-82, and the district court denied that motion, ER 186-196. In their post-trial motions, defendants also argued that the Sherman Act does not apply extraterritorially. ER 489-497; ER 528. This Court "review[s] *de novo* a challenge to the extraterritorial application of criminal statutes." *United States* v. *Chao Fan Xu*, __ F.3d __, 2013 WL 28392, at *3 (9th Cir. Jan. 3, 2013).

3. Whether defendants' convictions must be reversed because the district court erroneously instructed the jury that the Sherman Act applies to foreign conduct so long as a single overt act occurs in the United States.

Defendants objected to this jury instruction orally and in writing. ER 1216; ER 1241-46. The district court overruled these objections. ER 1250; ER 1246; ER 600. This Court reviews *de novo* whether a jury instruction accurately states the law. *United States* v. *Hopper*, 177 F.3d 824, 831 (9th Cir. 1999).

4. Whether the government failed to carry its burden to prove venue, in violation of Article III, the Sixth Amendment, and Federal Rule of Criminal Procedure 18.

Defendants moved for judgment of acquittal based on the government's failure to prove venue at the close of the government's case-in chief and at the close of all the evidence. ER 1300-02; ER 1251; ER 1161-62; ER 1157. The district court denied these motions. ER 1303; ER 1251. Defendants again challenged venue in their post-trial motions, ER 530-543; ER 509-516, and the district court again denied the claim, ER 3-5. "The existence of venue is a question of law [that this Court] review[s] *de novo*." *United States* v. *Angotti*, 105 F.3d 539, 541 (9th Cir. 1997). Where, as here, the district court "in substance" decides the venue issue as a matter of law, this Court asks whether "the evidence viewed rationally by a jury could *only* support a conclusion that venue existed." *United States* v. *Lukashov*, 694 F.3d 1107, 1120 (9th Cir. 2012) (emphasis added).

5. Whether the prosecutor's misconduct in misstating the venue evidence in rebuttal closing argument denied defendants due process.

Defendants contemporaneously objected to the prosecutor's misstatement of the evidence, and the district court overruled that objection. ER 1042. Defendants also moved for a mistrial on this basis, which the district court denied. ER 1038-40. This Court "review[s] whether closing argument constitutes [prosecutorial]

misconduct *de novo*." *United States* v. *Perlaza*, 439 F.3d 1149, 1169 n.22 (9th Cir. 2006).[1]

ADDENDUM

An addendum containing pertinent constitutional and statutory provisions appears at the end of this brief.

STATEMENT OF THE CASE

On June 10, 2010, Mr. Chen, Dr. Hsiung, AU Optronics Corporation (AUO), AU Optronics Corporation America (AUOA), and others were indicted on one count of violating Section One of the Sherman Act, 15 U.S.C. § 1. Defendants twice moved to dismiss the indictment for failure to adequately allege a Sherman Act offense based on foreign conduct. The district court denied those motions, and the case thereafter proceeded to trial.

The trial commenced on January 9, 2012, and lasted approximately nine weeks. On March 13, 2012, after deliberating for over one week, the jury voted to convict Mr. Chen, Dr. Hsiung, AUO, and AUOA. Defendants filed post-trial motions for judgments of acquittal or, in the alternative, a new trial. The district court denied those motions.

[1] Pursuant to Federal Rule of Appellate Procedure 28(i), Mr. Chen and Dr. Hsiung also adopt and incorporate by reference the arguments raised in the joint opening brief of co-defendants AUO and AUOA.

The court sentenced defendants on September 20, 2012, and entered final judgments of conviction on October 2, 2012. Defendants filed their notices of appeal that same day.

STATEMENT OF FACTS

The TFT-LCD Industry And Events Leading To This Criminal Prosecution. Mr. Chen, AUO's former President and CEO, and Dr. Hsiung, AUO's former Executive Vice President, are esteemed business professionals and pioneers of TFT-LCD technology. Under their leadership, AUO aggressively researched and developed TFT-LCD panels, which use thin-film transistor technology to improve the image quality on screens in a variety of electronic devices, including televisions and computers. In the words of the district court, Mr. Chen and Dr. Hsiung "have produced an extremely useful product, and it really has changed the world; how we live, and how we function, and how we process information, and how we live our lives, and how we conduct our government." ER 246-247.

Although TFT-LCD panels are now ubiquitous, the industry at its infancy faced "desperate times" that threatened its very survival. ER 1253. Prices plummeted during a sustained period of oversupply in 2001, just after TFT-LCD manufacturers had invested in expensive fabrication facilities. *Id.* The situation

was so dire that the TFT-LCD manufacturers were struggling to stay in business. ER 1415; ER 1319; ER 1253; ER 1255.

In the midst of this crisis, representatives from six Taiwanese and Korean TFT-LCD manufacturers began getting together in so-called "Crystal Meetings" in Taiwan to discuss market conditions and panel pricing. ER 1320. For five years, from 2001 until 2006, the Crystal Meeting participants met more than 60 times. ER 1314. Neither Mr. Chen nor Dr. Hsiung attended the first two Crystal Meetings; in fact, Mr. Chen attended only five meetings total, and Dr. Hsiung nine. ER 785; ER 774; ER 767; ER 765; ER 764; ER 757; ER 754; ER 752; ER 748; ER 745.

Pre-Trial Proceedings. On June 10, 2010, Mr. Chen, Dr. Hsiung, AUO, AUOA, and others were charged with one count of conspiring to fix prices in violation of Section One of the Sherman Act, 15 U.S.C. § 1. According to the indictment, "participants in the Crystal Meetings regularly exchanged production, shipping, supply, demand, and pricing information with each other at the meetings for the purpose of agreeing to fix the price of TFT-LCD." ER 1728. The TFT-LCD manufacturers then allegedly used these fixed prices to negotiate sales to customers around the world, including in the United States. ER 1730.

The indictment was notably silent on one important point: *mens rea*. That is because, as the government would later explain, the "defendant[s] [are] charged

with participating in a classic *per se* Section 1 price-fixing violation," rendering it unnecessary to show that they acted with "knowledge that proscribed [anticompetitive] effects would most likely follow." ER 1674 (internal quotation marks omitted). In the government's view, it "need only allege—as it did in the Superseding Indictment—that the defendant[s] knowingly joined and participated in the price-fixing conspiracy." *Id.*

Mr. Chen and Dr. Hsiung—both Taiwanese citizens living in Taiwan—voluntarily traveled to the United States to face the charges in the indictment. They initially moved to dismiss, arguing that actions they took in Taiwan could not be criminally prosecuted under a *per se* theory of liability. ER 1683-91; ER 1681-82. Defendants relied on this Court's decision in *Metro Industries*, which held that Sherman Act violations "based on conduct outside the United States" must always be evaluated under the rule of reason, rather than declared illegal *per se*. ER 1687-91. The district court, however, denied the motion to dismiss. ER 186-196. It refused to follow *Metro Industries*, concluding instead that the case was governed by the First Circuit's decision in *United States* v. *Nippon Paper Industries Company*, 109 F.3d 1 (1st Cir. 1997), which suggested that *per se* analysis could apply to foreign conduct if there was a substantial and intended effect in the United States. ER 189-191.

Defendants then moved to dismiss because the indictment did not even do that; it failed to allege any intended effect—substantial or otherwise—on U.S. commerce. ER 1648-63; ER 1646; ER 1647. The court denied that motion, too. It concluded that the case did not implicate extraterritoriality principles because the indictment actually "allege[d] a domestic conspiracy." ER 184.

Trial Proceedings. Shortly before trial began, the district court admonished defendants that they would not be allowed to argue "that reasonableness would get [them] out from under the Sherman Act in this price-fixing case." ER 146. To drive home the point, the court emphasized in preliminary jury instructions that the government need not prove that the conspiracy had detrimental effects on competition, ER 1471; indeed, the court told jurors that they were forbidden from considering the economic effects of the conspiracy "when deciding the guilt or innocence of the individual defendants." ER 1472.

In line with these instructions, the government's evidence at trial centered on the claim that the conspiracy existed and that defendants had joined it. The government called multiple witnesses who attended the Crystal Meetings in Taiwan and testified that participants agreed to fix prices at them. *See, e.g.*, ER 1344-45. The government also introduced reports prepared by Crystal Meeting participants that summarized the monthly discussions and pricing agreements. ER 806-1027.

In addition, the government called two witnesses who worked at companies that purchased TFT-LCD panels from AUO during the alleged conspiracy. These witnesses discussed the circuitous route by which some TFT-LCD panels made their way into the United States. Every last panel was manufactured abroad. *E.g.*, ER 1367-68. Those panels were then sold to foreign entities known as "systems integrators" (SIs), either directly or through intermediate sales to foreign "original equipment manufacturers." *E.g.*, ER 1461-63; ER 1440-42; ER 1326; ER 1311. Virtually all SIs operated their production facilities in Asia, and so the TFT-LCD suppliers would ship the panels to those foreign locations. *E.g.*, ER 1461; ER 1438-39; ER 1367-68; ER 1330-31. The SIs would then incorporate the panels into consumer products such as televisions, monitors, or notebook computers. *E.g.*, ER 1461. At that point, the SIs would sell the finished products to brand-name foreign and domestic electronics companies. *E.g.*, ER 1463-64. Finally, these corporations imported the electronics devices into countries around the world, including the United States. *E.g.*, ER 1442.

Although virtually all TFT-LCD panels were sold in the first instance to foreign entities and shipped to foreign nations, the government introduced evidence that AUO, through its U.S. subsidiary AUOA, engaged in price negotiations with U.S. companies during the conspiracy period. The government called former AUOA employee Michael Wong, who testified about his

negotiations with U.S. customers, the pricing directives he received from Taiwan, and the efforts he made to gather market information to make informed pricing recommendations. *E.g.*, ER 1411-14; ER 1370-71. Wong was adamant that he never agreed "with any of AUO's competitors or AUOA's competitors to fix prices on LCD panels," nor had he "agree[d] with anyone at AUO" or "anyone at AUO America to fix prices on LCD panels." ER 1381.

Finally, because it was seeking an alternative maximum fine against the corporations, the government called an economic expert who offered his conclusions regarding the gain reaped by the companies that attended the Crystal Meetings. The district court repeatedly instructed that this testimony was "admissible only against the corporate defendants"—not the individuals—and only for the "limited purpose" of establishing gain if jurors found the corporations guilty. ER 1309-10; ER 1308; ER 1153-54.

By the end of the trial, the district court acknowledged that the evidence had concerned predominantly foreign conduct; the court therefore instructed the jurors regarding the extraterritorial application of the Sherman Act. ER 600; *see* ER 101-102 (declining to give preliminary jury instructions on the Sherman Act's extraterritorial reach, but reserving the right to do so in the final instructions "[a]fter hearing the evidence of the conspiracy's domestic component"). The district court adhered to its pretrial ruling that the Sherman Act could be extended

to criminalize foreign conduct so long as "the conspiracy had a substantial and intended effect in the United States." ER 600. But the court further told the jurors that they could convict without finding *any* effect in the United States so long as they found "that at least one member of the conspiracy took at least one action in furtherance of the conspiracy in the United States." *Id.*

The government was so preoccupied with proving a conspiracy hatched half a world away that it neglected to show why venue was appropriate in the Northern District of California. Defendants therefore moved for acquittal. ER 1161-62. That prompted the district court to ask the government if it was "at all worried about [its] venue proof." ER 1162. Despite these warnings, the government never mentioned venue during its initial closing argument. Instead, its gambit was to wait until rebuttal, at which point the prosecutor insisted that venue was proper because:

> HP, which was a major victim of this crime, had a procurement office in Cupertino from the beginning of the charged conspiracy time [September 2001] until HP and Compaq merged in May of 2002. And negotiations for LCD panels were carried out there. Cupertino * * * is in the Northern District of California. The conspirators' negotiation of price-fixed panels with HP in Cupertino were acts in furtherance of this conspiracy.

ER 1041-42. Defense counsel immediately objected that the government had misstated the evidence. ER 1042. The prosecutor protested, "[i]t doesn't, Your Honor." *Id.* In front of the jury, the Court asked, "[i]s that in evidence?" *Id.* The

prosecutor responded, "[i]t is in evidence." *Id.* Relying on that representation, the court overruled the objection. The prosecutor then launched back into rebuttal: "The Government, in short, has established that this case is properly in this Court, and properly before this jury." *Id.*

The case was submitted to the jury shortly thereafter. After deliberating for over a week, the jury voted to convict Mr. Chen, Dr. Hsiung, AUO, and AUOA. The jury acquitted two other AUO employees, and could not reach a verdict on a third individual.

Post-Trial Proceedings. Defendants filed motions for judgment of acquittal or, in the alternative, for a new trial. They emphasized that the government's evidence at trial had overwhelmingly focused on foreign conduct: The testimony and exhibits predominantly concerned the actions of foreign defendants and foreign corporations meeting in a foreign country to allegedly fix prices all over the world for a foreign-made product sold to foreign-based entities and shipped from one foreign country to another. Because, by now, there was no doubt that the "Sherman Act claim [wa]s based on conduct outside the United States," defendants argued that the district court should have followed this Court's directive in *Metro Industries* to "apply rule of reason analysis to determine whether there is a Sherman Act violation." 82 F.3d at 845. Moreover, defendants contended that, in light of the strong presumption against extraterritoriality and the trial's focus on

foreign individuals and events, the Sherman Act could not reach beyond U.S. borders to criminalize foreign conduct. Finally, defendants argued that the prosecution had not only failed to prove venue, but had also engaged in misconduct by deliberately misstating the venue evidence in rebuttal closing argument, misleading the court and the jury.

The district court rejected all of these claims and denied defendants' post-trial motions.

Sentencing. On September 20, 2012, the district court sentenced Mr. Chen and Dr. Hsiung to each serve a 36-month term of imprisonment and to pay a $200,000 fine. At sentencing, the court acknowledged that this was no ordinary price-fixing case. Mr. Chen and Dr. Hsiung were responding to "a lot of business pressures" and "thought they were doing the right thing vis-à-vis their industry and their companies." ER 249. The court found that "the business logic of assisting a fledgling industry in another country and in another culture and acting in and for the benefit of [the] company and others in the industry are offsetting features of this crime" that "go a long way to explain it." ER 248-249. In sum, the court emphasized that the prosecution had involved different circumstances than the mine-run case because "there were reasons for committing these acts." ER 250.

This appeal followed.

SUMMARY OF ARGUMENT

I. The district court erroneously permitted the jury to convict on the theory that defendants' foreign conduct was *per se* illegal. That violated this Court's bright-line rule in *Metro Industries* that *all* foreign conduct—whether price fixing, bid rigging, a market division, or any other conduct "outside the United States"—must be evaluated under the rule of reason. 82 F.3d at 844-845. There is no doubt that this Court meant what it said in *Metro Industries*; indeed, it stated the bright-line rule some *five times* in the space of just a few pages. And there is also no doubt that this case—which involved foreign defendants who allegedly fixed prices for foreign-made components sold to foreign-based entities and shipped from one foreign nation to another—was "based on conduct outside the United States" and therefore triggered the *Metro Industries* rule. *Id.* at 845. By refusing to follow *Metro Industries*, the district court impermissibly precluded defendants from arguing to the jury what the court itself recognized at sentencing: that "there were reasons for committing these acts." ER 250. Because "Foreign Conduct Cannot Be Examined Under the Per Se Rule," *Metro Indus.*, 82 F.3d at 844, defendants' convictions cannot stand.

II. In fact, the Sherman Act cannot be stretched to criminalize defendants' foreign conduct at all. The Supreme Court recently confirmed that if "a statute gives no clear indication of an extraterritorial application, it has none." *Morrison*

v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010). That rule makes this an open-and-shut case: Because the Sherman Act contains no clear statement of extraterritorial effect, it doesn't have any. The district court erred by relying on an anachronistic view that the Sherman Act applies whenever there are substantial and intended effects in the United States. But *Morrison* unequivocally repudiated the "effects test" of extraterritorial jurisdiction. And in no event should the "effects test" be extended to the criminal sphere, where the presumption against extraterritoriality carries even more weight.

III. Embracing an even more imperialistic view of U.S. law—and risking yet greater infringement on foreign nations' prerogatives—the district court erroneously instructed the jury that the Sherman Act could apply if just one overt act occurred in the United States. *Morrison* says otherwise: "[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." 130 S. Ct. at 2885. Because the government cannot show that the jury did not convict on this legally defective theory, the judgment should be reversed.

IV. The government also failed to carry its burden under the Constitution to prove that venue was proper in the Northern District of California. Belatedly realizing its mistake, the government tried to conjure a venue finding through sheer

speculation that overt acts must have occurred in the district. But the wisps of evidence the government relied on cannot support the jury's verdict.

V. To salvage its flawed proof on venue, the government grossly misrepresented the venue evidence to the jury in rebuttal closing argument. That prosecutorial misconduct prejudiced defendants, who had no opportunity to correct the record in a close case. This due-process violation independently warrants reversal.

ARGUMENT

I. DEFENDANTS WERE IMPROPERLY CONVICTED UNDER A *PER SE* THEORY OF LIABILITY, IN VIOLATION OF THIS COURT'S DECISION IN *METRO INDUSTRIES*.

Nearly two decades ago, this Court adopted a bright-line rule for Sherman Act prosecutions involving foreign conduct:

> [W]here a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation.

Metro Indus., 82 F.3d at 845. Both the trigger for the rule (foreign conduct) and the result (rule-of-reason analysis) are clear. Yet the rule was ignored in this case. Although the government's proof at trial centered on acts committed abroad, the district court permitted the jury to condemn defendants' foreign conduct *per se*. That erroneous standard of liability prevented defendants from demonstrating that their foreign conduct was reasonable. And prove this they could: As the district

court itself recognized at sentencing, defendants faced substantial "business pressures" as they participated in "a fledgling industry in another country"—"offsetting features of th[e] crime" that went "a long way to explain it." ER 248-249. But the court prohibited defendants from making all of these arguments to the jury. That ruling, in square conflict with *Metro Industries*, is reason alone to reverse the convictions.

A. *Metro Industries* Applies Rule-of-Reason Analysis To All Cases Involving Foreign Conduct.

It has long been settled that Section 1 of the Sherman Act—which declares unlawful "[e]very contract, combination * * *, or conspiracy, in restraint of trade or commerce," 15 U.S.C. § 1—is "intended to prohibit only *unreasonable* restraints of trade." *Bus. Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (emphasis added). To determine whether a challenged trade practice falls within this statutory prohibition, the factfinder must consider "a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997). Known as the "rule of reason," this case-by-case approach "weighs legitimate justifications for a restraint against any anticompetitive effects." *Paladin Assocs., Inc.* v. *Montana Power Co.*, 328 F.3d 1145, 1156 (9th Cir 2003). As this Court recently observed, "[t]he rule of reason is

responsible for a sensible application of the antitrust laws that has guided courts for almost a century." *Harris*, 651 F.3d at 1133 n.10.

A narrow exception to the rule of reason exists for restraints that are "manifestly anticompetitive" and lack "any redeeming virtue." *Cont'l T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977). Those trade practices are condemned *per se*—that is, they are "conclusively presumed to be unreasonable and therefore illegal" without any inquiry into "the precise harm they have caused or the business excuse for their use." *N. Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). But *per se* treatment is permitted only after courts have developed "considerable experience with certain business relationships" and have confirmed that a restraint is never justified and never produces procompetitive benefits. *Broad. Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) (internal quotation marks omitted). Thus, the rule of reason remains the "default or presumptive" standard. *Harris*, 651 F.3d at 1133.

In *Metro Industries*, this Court clarified that the general rule-of-reason presumption functions as a bright-line rule when foreign conduct is at issue: In all cases "where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation." 82 F.3d at 845. In adopting that rule, the Court recognized that, even when conduct has been outlawed *per se* in the domestic sphere, courts lack

comparable institutional experience with foreign restraints implicating market dynamics and intricacies far beyond U.S. borders.

But the principal reason for *Metro Industries*' bright-line rule is that the usual assumptions about anticompetitive effects get lost in translation when applied to foreign conduct. As this Court emphasized, "the conventional assumptions that courts make in appraising restraints in domestic markets are not necessarily applicable in foreign markets." *Id.* (quoting 1 Phillip Areeda & Donald F. Turner, *Antitrust Law*, ¶ 237 (1978)). For example, "[a] foreign joint venture among competitors * * * might be more 'reasonable' than a comparable domestic transaction in several respects: the actual or potential harms touching American commerce may be more remote; the parties' necessities may be greater in view of foreign market circumstances; and the alternatives may be fewer, more burdensome, or less helpful." *Id.*

In short, the rationale undergirding the *per se* theory of liability—that the "conduct * * * in most of its manifestations, is potentially very dangerous with little or no redeeming virtue"—is (as this Court put it) wholly "inapplicable to foreign restraints that, in many instances, either pose very little danger to American commerce or have more persuasive justifications than are likely in similar restraints at home." *Metro Indus.*, 82 F.3d at 845 (quoting Areeda & Turner,

supra, ¶ 237). Hence the categorical rule of reason this Court embraced in *Metro Industries*.

Make no mistake: that rule was no casual aside or loose dictum. To the contrary, this Court reaffirmed the rule several times over. At the outset of the opinion: "Because conduct occurring outside the United States is only a violation of the Sherman Act if it has a sufficient negative impact on commerce in the United States, *per se* analysis is not appropriate." *Id.* at 843. And again, in the title of the section setting forth the bright-line rule: "Foreign Conduct Cannot Be Examined Under the Per Se Rule." *Id.* at 844. And yet again, in the first sentence of the section: "Even if Metro could prove that [a restraint] would require application of the *per se* rule if [it] occurred in a domestic context, application of the *per se* rule is not appropriate where the conduct in question occurred in another country." *Id.* at 844-845. And still once more, after describing the justifications for the rule: "[T]he potential illegality of actions occurring outside the United States requires an inquiry into the impact on commerce in the United States, regardless of the inherently suspect appearance of the foreign activities." *Id.* at 845. And one final time: "[W]here a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation." *Id.*

As the *Metro Industries* Court clarified again and again, the trigger for the rule is *foreign* conduct—not any particular *type* of conduct. Accordingly, the Court recognized that the rule would apply to a variety of factual situations. Indeed, the Court listed several examples covering a range of offenses—a "market division * * * occur[ing] in a foreign country," "[a] foreign joint venture," and, most notably, "*price fixing in a foreign country*." *Id.* at 843, 845 (emphasis added). These examples share only one common denominator: foreign conduct. *Id.* at 845. In other words, under this Court's bright-line rule, the relevant question is not *what kind* of agreement was formed, but rather *where* that agreement occurred: In every instance "where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation." *Id.*[2]

[2] *Metro Industries*' discomfort with applying the *per se* rule to foreign conduct reflects a wider trend in antitrust law away from the *per se* theory of liability. Indeed, over the last three decades the Supreme Court has repeatedly overruled precedents declaring various restraints *per se* illegal, holding that the rule of reason applies instead. *See, e.g.*, *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 882 (2007) (overruling a 1911 precedent that applied *per se* analysis to vertical minimum price fixing); *State Oil*, 522 U.S. at 7 (overturning a 1968 precedent holding that maximum resale price maintenance is *per se* illegal); *Cont'l T.V.*, 433 U.S. at 58-59 (overruling a 1967 decision applying *per se* analysis to an agreement to restrict the locations from which retailers could resell merchandise). These cases recognize that the *per se* test is too blunt an instrument in light of increasingly complicated market dynamics. *See, e.g.*, *Leegin*, 551 U.S. at 899. And the cases confirm the correctness of the *Metro Industries* rule. Indeed, if the *per se*/rule-of-reason divide is not well settled in the domestic sphere,

Metro Industries' rule and rationale was—until this prosecution—the guiding precedent in this circuit. Even the government for decades had recognized that different substantive antitrust rules should apply to foreign and domestic conduct. The Department of Justice's 1977 *Antitrust Guide for International Operations* stated outright that "[t]he rule of reason may have a somewhat broader application to international transactions where it is found that (1) experience with adverse effects on competition is much more limited than in the domestic market, or (2) there are some special justifications not normally found in the domestic market." U.S. Dep't of Justice, *Antitrust Guide for International Operations* 1 (1977 superseded) (citing Kingman Brewster, *Antitrust and American Business Abroad* 79-84 (1958)); *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 273b, at 333 (2006) (describing the government's prior view that *per se* rules are not necessarily transferable to foreign restraints). Having once recognized what is common sense—that the Sherman Act must apply differently to foreign and domestic conduct—the government is hard-pressed to explain why rule-of-reason analysis has no role to play in this foreign-conduct case. Of course, while the government may have the flexibility to ignore its prior practices, it may not ignore this Court's prior precedents. *Metro Industries*' bright-line rule categorically forecloses this *per se* prosecution.

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it certainly should not be extended to the international context, with all the additional market complexities existing there.

B. *Metro Industries*' Bright-Line Rule Governs This Case.

The foreign conduct in this case falls squarely within the *Metro Industries* rule. The conspiracy charge centered on pricing discussions at dozens of Crystal Meetings held over a five-year period—not one of which occurred in the United States. ER 1431; ER 1335; ER 1332-33. The government also focused on agreements allegedly negotiated during one-on-one meetings in the later years of the conspiracy—all of which were also held abroad. *E.g.*, ER 1304. Because the "essence of any violation of Section 1 [of the Sherman Act] is the illegal agreement itself," *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 330 (1991), and because there is no dispute that every pricing agreement at issue here was formed on foreign soil, this case is governed by *Metro Industries*.

Although these foreign agreements—the "essence" of the prosecution—are reason enough to apply *Metro Industries*, the record is rife with additional foreign elements. Each individual defendant, for example, was a foreign national and resident of Taiwan, and the six companies charged with price fixing at the Crystal Meetings were all incorporated and headquartered overseas. ER 616; ER 1724-25.[3] The TFT-LCD panels discussed at the Crystal Meetings were all

[3] Although the jury convicted AUO's small U.S. subsidiary, there was no evidence that AUOA directly participated in the Crystal Meetings or took any action independent of AUO in furtherance of the conspiracy. AUOA's participation was far overshadowed by AUO's conduct abroad; indeed, during the years of the alleged conspiracy AUO employed tens of thousands of individuals

manufactured abroad. *E.g.*, ER 1367-68. Those panels were then sold almost exclusively to foreign companies. *E.g.*, ER 1440-42; ER 1326; ER 1311. And nearly all the panels were then shipped to foreign locations to be integrated into monitors, notebooks, and televisions. *E.g.*, ER 1461; ER 1438-39; ER 1367-68; ER 1330-31. The prices discussed at Crystal Meetings in Taiwan applied globally, with no differentiation for various geographic markets. *E.g.*, ER 1337; ER 1318. Nor were the panels specifically designed for the U.S. market, but rather placed in products sold throughout the world. *E.g.*, ER 1442; ER 1336; ER 1329; ER 1328. Indeed, the overwhelming majority of panels never made it to the United States. *E.g.*, ER 1312-13.

A conspiracy allegedly hatched abroad, orchestrated abroad, involving companies incorporated abroad, and turning on products manufactured and sold abroad is indisputably foreign. Indeed, this case involves far more foreign conduct than *Metro Industries* itself. The dispute in *Metro Industries* centered on a Korean design registration system that allowed a Korean exporting company and two of its

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overseas, while AUOA never had more than a dozen employees on hand. *See* ER 615; ER 672.

In any event, *Metro Industries* settles this issue, too: It classified a Sherman Act violation as "foreign conduct" even though U.S. subsidiaries were joined as defendants and allegedly helped carry out an unlawful market allocation through predatory pricing in the United States. 82 F.3d at 841; *see also Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 775-777, 779 (1993) (characterizing a conspiracy in the insurance market as "foreign conduct" even though it involved both international and U.S. participants).

U.S. subsidiaries to engage in predatory pricing in the United States. 82 F.3d at 841. The U.S.-importer plaintiff contended that it had provided the Korean exporter with models of a stainless-steel steamer design, which the exporter then registered under the Korean system, vesting it with an exclusive right to export the design. *Id.* When the U.S. importer later attempted to order the steamers from another company, the Korean exporter blocked the sales by invoking its design right. *Id.* at 841-842. The case featured many domestic elements: a U.S. plaintiff alleged injury to U.S. commerce; that injury stemmed from cooperation between the U.S. plaintiff and the foreign defendant in designing a product specifically for the U.S. market; U.S. subsidiaries of the foreign exporter were joined as defendants and allegedly helped to implement a predatory pricing scheme in the United States; the foreign defendant had "a great deal of business in the United States," *id.* at 847; and "[t]he impact of the registration [wa]s felt more in the United States than in Korea because the registration system only limit[ed] the *export* of particular designs," *id*. Despite these domestic features, this Court classified the dispute as "foreign conduct," triggering the rule that "where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation." *Id.* at 845.

The same "foreign conduct" label applies here. And rightly so: No case better illustrates the wisdom of the *Metro Industries* rule than this one. Just as the

Metro Industries Court anticipated, defendants' foreign conduct was far "more 'reasonable' than a comparable domestic transaction in several respects." 82 F.3d at 845. The district court said so itself at sentencing: "[T]here were reasons for committing these acts." ER 250. As the court observed, "the business logic of assisting a fledgling industry in another country and in another culture and acting in and for the benefit of [the] company and others in the industry are offsetting features of this crime" that "go a long way to explain it." ER 248-249. The court recognized that "there were a lot of business pressures that [defendants] were responding to," and "the defendants thought they were doing the right thing vis-à-vis their industry and their companies." ER 249. Yet the court's refusal to apply *Metro Industries* prevented defendants from demonstrating to the jury that their "necessities [were] greater in view of foreign market circumstances," and that "the alternatives [were] fewer, more burdensome, or less helpful." *Metro Indus.*, 82 F.3d at 845. The district court's error, in short, violated not only the letter but also the spirit of *Metro Industries*.

C. The District Court Provided No Persuasive Reason To Ignore *Metro Industries*.

Because defendants argued before, during, and after the trial that *Metro Industries* governs this case, the district court had ample opportunity to consider that issue. Yet none of the court's evolving reasons for refusing to apply this Court's precedent withstand scrutiny.

In denying defendants' motion to dismiss for failure to allege a rule-of-reason violation, the district court deemed *Metro Industries* inapplicable because the Sherman Act charge at issue there—a market-division claim—was not the same Sherman Act charge at issue here—a price-fixing claim. ER 190. But *Metro Industries* announced a bright-line rule applicable across the board to *all* Sherman Act violations based on foreign conduct. As this Court has emphasized, a "broad rule" like the one announced in *Metro Industries* "must be applied in the many factually distinct situations that come before the lower courts." *Musladin* v. *Lamarque*, 555 F.3d 830, 839 (9th Cir. 2009) (internal quotation marks omitted). And that is all the more true given that *Metro Industries* specifically singled out "price fixing in a foreign country" as an example of the type of conduct to which the bright-line rule would apply. 82 F.3d at 845. In short, the district court's conclusion—that "*Metro Industries* did not address the * * * standard in a criminal antitrust price fixing prosecution involving foreign conduct," ER 190—cannot be harmonized with what this Court itself said in *Metro Industries*. Because a price-fixing prosecution involving foreign conduct is "based on conduct outside the United States," this Court "appl[ies] rule of reason analysis to determine whether there is a Sherman Act violation." *Metro Indus.*, 82 F.3d at 845.[4]

[4] Courts and treatises have acknowledged that *Metro Industries* adopts a bright-line rule that *all* foreign conduct—even price fixing—must be analyzed under the rule of reason. *See, e.g.*, *United States* v. *Nippon Paper Indus. Co.*, 62 F.

The district court sidestepped *Metro Industries* for another reason: *Metro Industries* had also justified the rule-of-reason test because the particular restraint at issue there was a "previously unexamined business practice." ER 190. To be sure, that was *one* rationale for adopting a rule-of-reason rubric. But this Court adopted a *second* rationale: that foreign conduct categorically resists *per se* analysis and must therefore be analyzed—always—under the rule of reason. *See Metro Indus.*, 84 F.3d at 844-845.

Contrary to what the district court seemed to think (and what the government argued below), the fact that *Metro Industries* adopted alternative holdings does not sap the decision's bright-line foreign-conduct rule of precedential force. This Court has emphasized that a rule announced in an appellate decision "continues to be binding precedent, even if characterized as an alternative holding." *United States* v. *Bajakajian*, 84 F.3d 334, 337 n.6 (9th Cir. 1996) (internal quotation marks omitted), *aff'd*, 524 U.S. 321 (1998). "Where an appellate court decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Operating Eng'rs Pension Trust* v. *Charles Minor Equip. Rental, Inc.*, 766 F.2d 1301, 1304 (9th Cir. 1985) (internal quotation marks

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Supp. 2d 173, 193 (D. Mass. 1999) (understanding *Metro Industries* to require that "an international price-fixing, unlike a domestic price-fixing, is subject to different rules in all cases—i.e., a rule of reason test"); Areeda & Hovenkamp, *supra*, at ¶ 273b, p. 331 ("[I]n *Metro Industries*, the Ninth Circuit concluded that a rule of reason inquiry is necessary in all cases involving restraints abroad.").

omitted). Thus, the first holding of *Metro Industries* (Part I.A) does nothing to undermine the decision's other holding (Part I.B) that all foreign conduct is subject to rule-of-reason analysis. In short, the district court erred in narrowly focusing on the holding in *Metro Industries* that does not apply here, rather than the holding that does.

After the trial, the court repeated these flawed justifications for ignoring *Metro Industries*, but also tacked on a curious new rationale: that defendants waived the claim. ER 7 n.4. This conclusory assertion of waiver ignored that defendants had been invoking, citing, quoting, and emphasizing *Metro Industries* since the indictment came down. They sought to dismiss the indictment on that precise ground mere months after they were charged. ER 1690 ("Under *Metro Industries*, all cases based on foreign conduct are rule of reason cases."). They flagged the *Metro Industries* issue in a second attack on the sufficiency of the indictment. ER 1656 ("[D]efendant[s] * * * continue to believe that *Metro Industries* * * * is controlling"). They raised the issue again when disputing pre-trial motions in limine. ER 1551 ("Defendants continue to maintain that under controlling Ninth Circuit law, this prosecution based on foreign conduct must be decided under a rule of reason analysis"). They submitted proposed jury instructions on the rule of reason before trial. ER 1524-34. And they raised *Metro Industries* yet again in their post-trial motions. ER 554-581; ER 500-509. Each

time, the district court refused to accept this Court's directive in *Metro Industries* that cases involving foreign conduct must be assessed under the rule of reason. ER 190; ER 146-147; ER 33; ER 7.

The district court nevertheless found waiver based on a single data point: at the end of the trial, the defendants stipulated to jury instructions that reflected a *per se* test. ER 7 n.4. But of course they did. By that point, the district court's earlier rulings had prevented them from presenting a rule-of-reason defense. Having repeatedly pressed and lost the point, defendants were forced to defend against the government's *per se* theory of liability—and jury instructions at the end of the case could do nothing to cure that error, which pervaded the entire trial. Moreover, "[w]here the trial court has left no possibility of a different ruling on a renewed objection, there is no requirement that a party engage in a futile and formalistic ritual to preserve the issue for appeal." *United States* v. *Varela-Rivera*, 279 F.3d 1174, 1177-78 (9th Cir. 2002). Thus, the district court's waiver finding—like its other arguments against *Metro Industries*—has no basis in the facts of the case or in this Court's precedent.

Because the district court erroneously permitted the jury to convict on a *per se* theory of liability in clear violation of *Metro Industries*, defendants' convictions must be reversed.

D. The District Court's Marked And Unforeseeable Departure From *Metro Industries* Violated Due Process.

In refusing to apply *Metro Industries*, the district court violated not only this Court's commands, but also due process. It is long settled that expanding criminal statutes by judicial fiat implicates the Due Process Clause's fair-notice principle. *See Bouie* v. *City of Columbia*, 378 U.S. 347 (1964); *see also Poland* v. *Stewart*, 117 F.3d 1094, 1099 (9th Cir. 1997) (emphasizing that the Due Process Clause prohibits "unforeseeable judicial enlargement[s]" of criminal statutes) (internal quotation marks omitted). A judicial construction is unconstitutionally expansive when it constitutes "a marked and unpredictable departure from prior precedent." *Rogers* v. *Tennessee*, 532 U.S. 451, 467 (2001); *see also Clark* v. *Brown*, 450 F.3d 898, 912, 916 (9th Cir. 2006) (finding that a court's interpretation violated due process because rather than writing on a "clean slate," the court deviated from its previous narrower interpretation).

This fair-notice principle is particularly important when interpreting the Sherman Act. Judicial constructions, after all, control the statute's scope because the Act, "unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes." *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978). Without clear statutory text to work from, judicial standards—like the bright-line rule in *Metro Industries* prohibiting *per se* analysis of foreign conduct—serve a particularly critical notice function. *See*

Marks v. *United States*, 430 U.S. 188, 195 (1977) (holding that "precisely because the [obscenity] statute is sweeping," its reach "necessarily ha[d] been confined" within judicial limits, and petitioners "had no fair warning that their products might be subjected to * * * new standards").

The district court's unforeseeable departure from *Metro Industries* substantively impacted the scope of defendants' criminal liability. Under the *per se* theory, the government was not required to prove that defendants knew that their conduct would likely cause anticompetitive effects in the United States; their foreign conduct was conclusively *presumed* to have that effect. Yet had rule-of-reason analysis applied, as defendants had every reason to expect under this Court's binding decision in *Metro Industries*, defendants would have argued that they did not possess the *mens rea* to support criminal liability and that their conduct produced sufficient procompetitive benefits to avoid liability. The unanticipated switch to *per se* liability radically altered the core elements of the alleged crime, the theory of the defense, and the government's evidentiary burden. *See Clark*, 450 F.3d at 911 (due process is violated when defendants are unfairly surprised "in a way that affect[s] [their] legal defense") (internal quotation marks omitted).

This Court has granted relief based on such a drastic alteration in violation of due process. For example, in *Rathert* v. *Galaza*, 203 F. App'x 97 (9th Cir.

2006), this Court reversed on fair-notice grounds after the California Supreme Court retroactively abrogated a specific-intent requirement that was set forth in a controlling intermediate appellate case. *Id.* at 99. *See also Lancaster* v. *Metrish*, 683 F.3d 740, 751-753 (6th Cir. 2012) (finding a fair-notice violation because Michigan Supreme Court's elimination of diminished-capacity defense was unforeseeable departure from intermediate appellate court decision upholding the defense), *cert. granted*, 2013 WL 203553 (No. 12-546) (Jan. 18, 2013). Just as in *Rathert*, the district court's unexpected departure from the bright-line rule in *Metro Industries* violates due process and so provides yet another reason why defendants' convictions must be reversed.

II. THE PROSECUTION WAS FATALLY FLAWED BECAUSE THE SHERMAN ACT DOES NOT APPLY EXTRATERRITORIALLY.

Although the *Metro Industries* error is reason enough to reverse, there is a deeper reason why the convictions should be overturned: The government cannot use a domestic law like the Sherman Act to punish foreign conduct taken half a world away.

The district court concluded otherwise, relying on an anachronistic "effects test" to determine whether and to what extent Congress intended U.S. law to apply extraterritorially. But the Supreme Court resoundingly rejected this "effects test" of extraterritoriality three years ago. *See Morrison*, 130 S. Ct. at 2877. In its place, the Court substituted a bright-line rule governing all extraterritoriality

inquiries: If "a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 2878.

The Sherman Act contains no language—none—indicating that it applies beyond U.S. borders. Hence it doesn't. That is especially true in this criminal prosecution, because the robust presumption against extraterritoriality has still greater force when criminal sanctions are on the line. Because the Sherman Act cannot be stretched to criminalize foreign conduct, defendants' convictions must be reversed.

A. The Sherman Act Does Not Apply Extraterritorially.

For more than two centuries, the Supreme Court has embraced a strong presumption that U.S. laws do not apply extraterritorially. *See, e.g.*, *Morrison*, 130 S. Ct. at 2877; *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*); *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (Story, J.); *Rose* v. *Himely*, 8 U.S. (4 Cranch.) 241, 279 (1808) (Marshall, C.J.). That presumption makes sense. It gives effect to the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith* v. *United States*, 507 U.S. 197, 204 n.5 (1993). And it "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248; *Am. Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909) (applying U.S. law to foreign conduct "not only would be unjust, but would be an interference with the

authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent"). Because the question is so fraught with sensitive foreign-relations concerns, Congress—not the Judiciary—must decide whether a law should reach across international borders: Congress, after all, is "able to calibrate its provisions in a way that [courts] cannot." *Aramco*, 499 U.S. at 259.

To enforce the presumption against extraterritoriality, the Supreme Court has long stated that a statute extends beyond U.S. borders only if Congress has "ma[de] a clear statement that [it] applies overseas." *Id.* at 258. The Court has repeated this point again and again: Congress's intent to apply a law extraterritorially must be "clearly expressed," *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); the text of the statute must "definitely disclose an intention to give [the statute] extraterritorial effect," *New York Cent. R.R.* v. *Chisholm*, 268 U.S. 29, 31 (1925); and "any lingering doubt" regarding a statute's coverage means the law applies "only within the territorial jurisdiction of the United States," *Smith*, 507 U.S. at 203-204.

Most recently, in *Morrison*, the Supreme Court adopted an even more muscular formulation: "When a statute gives no clear indication of an extraterritorial application, it has none." 130 S. Ct. at 2878. This test eliminates—by design—the fatal indeterminacy that plagued earlier judicial formulations. That

is significant because, as the test for extraterritoriality evolved, courts reached wildly inconsistent views on the scope of the Sherman Act. *See Dee-K Enters., Inc.* v. *Heveafil Sendirian Berhad*, 299 F.3d 281, 294 (4th Cir. 2002) (noting that the extraterritorial application of the Sherman Act "has historically been marked by change, and remains a subject of serious debate"). In an early interpretation of the Act, the Supreme Court recognized that the statute lacked the requisite clear statement of extraterritorial application. *Am. Banana Co.*, 213 U.S. at 355-357. The Court emphasized that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. * * * All legislation is prima facie territorial." *Id.* at 356-357 (internal quotation marks omitted). The Court therefore found it "rather startling" that foreign conduct might be punished under U.S. antitrust laws, and observed that "the improbability of the United States attempting to make acts done in [foreign countries] criminal is obvious." *Id.* at 355, 357. For these reasons, the Court thought it "entirely plain" that foreign conduct fell outside the Sherman Act's scope. *Id.* at 357.

But lower courts resisted that conclusion—so much so that the Second Circuit eventually ruled, contrary to *American Banana*, that the United States could impose Sherman Act liability based on foreign conduct that was "intended to affect imports and did affect them." *United States* v. *Aluminum Co. of Am.*, 148 F.2d

416, 444 (2d Cir. 1945) (*Alcoa*). Although this "effects test" of extraterritoriality sparked an outcry in the international community,[5] it gained widespread acceptance in the lower courts. The theory embraced by these courts was that, if only Congress had paused to consider the question, it would have wanted to protect U.S. consumers from all antitrust violations originating anywhere in the world. From this judicial hypothesis—not the text of the Sherman Act itself—courts extended the reach of U.S. antitrust law to the four corners of the globe.

Until *Morrison* radically clarified the test for extraterritoriality in 2010, it was thus generally assumed that the Sherman Act applied beyond U.S. borders. Even the Supreme Court indulged this assumption in a case decided nearly two

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[5] Several foreign nations enacted blocking statutes to frustrate U.S. efforts to apply domestic antitrust law to foreign conduct. *See, e.g.*, Leigh Robin Lamendola, *The Continuing Transformation of International Antitrust Law and Policy*, 22 Suffolk Transnat'l L. Rev. 663, 683-684 (1999) (summarizing the "widespread international criticism" of the "effects test"). Other nations expressed disapproval through diplomatic channels. *See, e.g.*, D.M. Jacobs, *Extraterritorial Application of Competition Laws: An English View*, 13 Int'l Law. 645, 648 (1979) (quoting a diplomatic note from the British government stating "there is no basis for the extension of one country's antitrust jurisdiction to activities outside of that country of foreign nationals"). Foreign courts also weighed in criticizing the "effects test." *See, e.g.*, *Midland Bank Plc.* v. *Laker Airways Ltd.*, 2 W.L.R. 707, 710 (C.A. 1986) (Dillon, L.J.) (observing that British courts should "insist on keeping the United States statutory provisions of the Sherman and Clayton Acts within the territorial jurisdiction of the United States in accordance with accepted standards of international law"). As a leading international law treatise has observed, "[t]he justification for * * * assertions of [extraterritorial] jurisdiction on the basis of an alleged 'effects' principle of jurisdiction has not been generally accepted" and is of "doubtful consistency * * * with international law." 1 *Oppenheim's International Law* 474-475 (9th ed. 1992).

decades before *Morrison*. In *Hartford Fire Insurance Company* v. *California*, 509 U.S. 764 (1993), a deeply fragmented decision regarding comity, the Court noted in passing—with no analysis of the statutory text or the presumption against extraterritoriality—that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id.* at 796.[6]

Then came *Morrison*. In an unequivocal repudiation of the "effects test," the Supreme Court held that U.S. securities laws do not apply extraterritorially even if effects are felt here. 130 S. Ct. at 2883. Notably, the first court to adopt an "effects test" in the securities context had expressly relied on Sherman Act precedent. *See Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968) (citing *Alcoa*). Thus, the Supreme Court in *Morrison* recognized that it was overturning a test that had prevailed in the lower courts "over many decades." 130 S.Ct. at 2878. And it further understood that the "effects test" stemmed from the belief that Congress would have wanted "to protect American investors." *Id.*

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[6] As former Dean of Stanford Law School Larry Kramer has chronicled, the Court was wrong to think it "well established" that the Sherman Act reached foreign conduct. An examination of the authorities cited in *Hartford Fire* reveals that "none of the citations actually supports the Court's assertion; there were, in fact, no Supreme Court cases applying the Sherman Act on facts like those in *Hartford*." Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case*, 89 Am. J. Int'l L. 750, 751 (1995). "Hence, the best understanding of the cases is that *Aramco* provided a rule to which *Hartford* is an exception based on (an erroneous reading of) pre-*Aramco* precedent." *Id.* at 754.

(internal quotation marks omitted). But no matter how laudable that aim, the Court held that "using congressional silence as a justification for judge-made rules violates the traditional principle that silence means no extraterritorial application." *Id.* at 2881. Rather than attempt to "divin[e] what Congress would have wanted if it had thought of the situation," the Court said it would "apply the presumption [against extraterritoriality] in all cases." *Id.* That approach yielded a straightforward rule, no part of which hinges on U.S. effects: "When a statute gives no clear indication of extraterritorial application, it has none"—period. *Id.* at 2878.

In light of *Morrison*, the extraterritoriality language in *Hartford Fire* is no longer good law. The Court clarified that "in all cases"—without exception—extraterritoriality must be based on a clear statement in the statutory text rather than on domestic effects. *Id.* at 2881. Nor is *Morrison*'s holding confined to the Securities Exchange Act. *See Pakootas* v. *Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1221 n.45 (9th Cir. 2011) ("*Morrison* shows the [Supreme] Court's interest in the extraterritorial application of statutes" more generally). The "effects test" repudiated in *Morrison* is exactly the same as the "effects test" employed in other contexts, including Sherman Act cases; indeed, the cases all cite to one another in echo-chamber fashion. *See, e.g.*, *Schoenbaum*, 405 F.2d at 208 (citing *Alcoa*); *Poulos* v. *Caesars World Inc.*, 379 F.3d 654, 663 (9th Cir. 2004) (citing antitrust and securities cases in a suit involving the Racketeer Influenced and Corrupt

Organizations Act (RICO)); *N.S. Finance Corp.* v. *Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996) ("[G]uidance [regarding the extraterritorial application of RICO] is furnished by precedents concerning * * * international securities transactions and antitrust matters."). And the "effects test" can be condemned in all cases for the same reason: It amounts to "judicial-speculation-made-law" for "divining what Congress would have wanted, complex in formulation and unpredictable in application." *Morrison*, 130 S. Ct. at 2878, 2881.

Morrison, in short, radically recalibrated how courts are to assess the extraterritorial reach of U.S. law. That is why, in the short time since *Morrison*, federal courts have been reconsidering the geographical scope of federal laws that were once assumed to apply abroad as a matter of course. For example, this Court as recently as 2004 held that RICO applied extraterritorially based on an "effects test." *See Poulos*, 379 F.3d at 663. Yet just weeks ago this Court held that, given the bright-line rule announced in *Morrison*, "RICO does not apply extraterritorially." *Chao Fan Xu*, __ F.3d __, 2013 WL 28392, at *3. Other courts have likewise recognized that *Morrison*'s "bright line" clear-statement rule abrogated prior precedent that had adopted an "effects test" to measure RICO's extraterritorial application. *Norex Petroleum Ltd.* v. *Access Indus., Inc.*, 631 F.3d 29, 32-33 (2d Cir. 2010).

The Supreme Court, too, has begun revisiting seemingly well-established extraterritorial applications of U.S. law in the wake of *Morrison*. Last fall, the Court heard argument on the question whether the Alien Tort Statute (ATS) applies extraterritorially. *See Kiobel* v. *Royal Dutch Petroleum*, No. 10-1491 (U.S.). The plaintiffs argued that the Court had "already rejected a categorical territorial limitation on ATS jurisdiction" in a pre-*Morrison* case, such that the Court would have to "abando[n]" its prior precedent to now hold that the statute does not apply beyond U.S. borders. Petitioners' Supplemental Opening Brief in *Kiobel*, No. 10-1491, at 7. But the Court indicated that *Morrison* may require exactly this result; that is why the Court ordered additional briefing and argument on the extraterritoriality issue even though the defendant had not raised it below and even though lower courts had uniformly held that the ATS reaches foreign conduct.

Because *Morrison* abrogated *Hartford Fire*'s "effects test," this Court must now consider whether the Sherman Act contains the necessary extraterritoriality language. That is an easy task: It clearly does not. *See Mannington Mills* v. *Congoleum Corp.*, 595 F.2d 1287, 1291 (3d Cir. 1979) (observing that "the [Sherman] Act [does not] give[] any clear indication of the scope of the extraterritorial jurisdiction conferred"). Section 1 of the Act lacks any express statement regarding extraterritoriality, providing only that "[e]very contract,

combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.[7] That text is the beginning and end of the matter: Because Congress gave "no clear indication of an extraterritorial application," the Sherman Act "has none." *Morrison*, 130 S. Ct. at 2878.[8]

To be sure, the Sherman Act refers to "commerce * * * with foreign nations." But *Morrison* squarely held that boilerplate commerce phrases like this do not provide the necessary clear statement of extraterritoriality. The Court

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[7] This text contrasts with numerous other statutes where Congress has taken care to provide for extraterritorial application. *See, e.g.*, Money Laundering Control Act of 1986, 18 U.S.C. § 1956(f) ("There is extraterritorial jurisdiction over the conduct prohibited by this section if * * * the conduct is by a United States citizen or * * * the conduct occurs in part in the United States."); Maritime Drug Law Enforcement Act, 21 U.S.C. § 959(c) ("This section is intended to reach acts of manufacture or distribution [with intent to import] committed outside the territorial jurisdiction of the United States."). The absence of similar language in the Sherman Act is striking.

[8] Although the text is conclusive, the legislative history of the Sherman Act confirms that Congress did not intend to extend the law to foreign conduct. In discussing a predecessor bill, Senator George observed that "if the agreement or combination, which is the crime, be made outside of the jurisdiction of the United States it is also without the terms of the law and can not be punished in the United States. * * * Then if these conspirators are foreigners and remain at home, or, being citizens, shall cross our borders and enter into any foreign territory and there make the combination or agreement they escape the criminal part of this law." 21 Cong. Rec. 1766 (1890). Senator Sherman agreed: "It is true that if a crime is committed outside the United States it can not be punished in the United States. * * * Either a foreigner or a native may escape 'the criminal part of the law,' as [Senator George] says, by staying out of our jurisdiction." 21 Cong. Rec. 2461 (1890).

emphasized that it had "repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply abroad." 130 S. Ct. at 2882 (quoting *Aramco*, 499 U.S. at 251); *see also Chisholm*, 268 U.S. at 31 (statute premising liability on involvement in commerce between "any of the States or territories and any foreign nation or nations," 45 U.S.C. § 51, contains "no words which definitely disclose an intention to give it extraterritorial effect").

The government argued below that the Foreign Trade Antitrust Improvements Act (FTAIA) shows that the Sherman Act extends beyond U.S. borders. But that statute says nothing of the sort. It merely provides that the Sherman Act does *not* apply to conduct involving foreign trade or commerce, other than import commerce, unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce. *See* 15 U.S.C. § 6a(1)(A). Notably, even those courts that have stated that the Sherman Act applies extraterritorially have declined to rest that conclusion on the FTAIA. *See Hartford Fire*, 509 U.S. at 796 & n.23 (finding it "unclear how [the FTAIA] might apply"); *Nippon Paper*, 109 F.3d at 4 ("The FTAIA is inelegantly phrased and the court in *Hartford Fire* declined to place any weight on it. * * * We emulate this example and do not rest our ultimate conclusion about Section One's scope upon the FTAIA.").

More telling still, *Morrison* itself squarely held that a statutory provision similar to the FTAIA does not provide a clear statement of extraterritorial effect. The Securities Exchange Act at issue in *Morrison* included a provision stating that the Act did not apply to individuals "transact[ing] a business in securities without the jurisdiction of the United States" unless the action violated regulations promulgated to prevent evasion of the securities laws. *Morrison*, 130 S. Ct. at 2882 (quoting 15 U.S.C. § 78dd(b)). The Solicitor General "argue[d] that [this] exemption would have no function if the Act did not apply in the first instance to securities transactions that occurred abroad." *Id.* But the Court was "not convinced": "[I]t would be odd for Congress to indicate the extraterritorial application of the whole Exchange Act by means of a provision imposing a condition precedent to its application abroad. * * * At most, the Solicitor General's proposed inference is possible; but possible interpretations of statutory language do not override the presumption against extraterritoriality." *Id.* at 2882-83.

Because the Sherman Act contains no clear statement of extraterritoriality, this Court should hold that the Act does not reach the foreign conduct in this case. Accordingly, defendants' convictions must be reversed.

B. At The Very Least, The Sherman Act's Criminal Prohibitions Do Not Apply Extraterritorially.

Although *Morrison* abrogates *Hartford Fire*, this Court can avoid deciding that issue because in no event should *Hartford Fire*—a civil case—be extended to

the criminal sphere. Thus, even if *Hartford Fire* remains good law for civil matters, it does not answer the question posed by this criminal prosecution where individual freedoms hang in the balance. *See U.S. Gypsum Co.*, 438 U.S. at 435 (rejecting government's attempt, in a criminal Sherman Act case, to "re[ly] primarily on * * * *a civil case* to support its position") (emphasis added).

The Supreme Court has held that criminal laws do not apply extraterritorially absent an express statement from Congress: "If [criminal] punishment is to be extended [extraterritorially], it is natural for Congress to say so in the statute, and *failure to do so will negative the purpose of Congress in this regard*." *United States* v. *Bowman*, 260 U.S. 94, 98 (1922) (emphasis added). This clear-statement rule parallels the analysis in civil cases, but the presumption against extraterritoriality assumes even greater force with criminal laws. *See United States* v. *Flores*, 289 U.S. 137, 155 (1933) ("[T]he criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extraterritorial effect."); *Chua Han Mow* v. *United States*, 730 F.2d 1308, 1311 (9th Cir. 1984) ("[C]ourts have been reluctant to give extraterritorial effect to penal statutes").

This is because "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.), and

the "law of nations" singles out and specifically disapproves extraterritorial enforcement of criminal prohibitions. *See* Restatement (Third) of Foreign Relations Law § 403, Reporters' Note 8 (1986) (Restatement); *see also United States* v. *Neil*, 312 F.3d 419, 421 (9th Cir. 2002) (recognizing that extraterritorial application of penal laws must "compor[t] with principles of international law"). It is not hard to understand why the law of nations disfavors extraterritorial criminal jurisdiction. "[T]he exercise of criminal (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive." Restatement § 403, Reporters' Note 8. And so international law embraces the "generally accepted" view that "criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity." *Id.*; *see also Nippon Paper*, 109 F.3d at 11-12 (Lynch, J., concurring) ("[T]here are special concerns associated with the imposition of criminal sanctions on foreign conduct. * * * Indeed, most people recognize a distinction between civil and criminal liability; that the law of nations should do so as well is not surprising."); *Neely* v. *Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 185 n.17 (3d Cir. 1995) (stating that civil, as opposed to criminal, suits "represent a lesser potential intrusion on the prescriptive jurisdiction of other sovereigns").

Moreover, the risk of intrusion is heightened when a state imposes criminal sanctions through a regulatory statute. As summarized by the Restatement:

> The principles governing [extraterritoriality] apply to criminal as well as civil litigation. *However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities law, the presence of substantial foreign elements will ordinarily weigh against application of criminal law.* In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.

Restatement § 403, cmt. f (emphasis added). Rather than target economic acts, criminal "[p]rosecutions for activities committed in a foreign state have generally been limited to serious and universally condemned offenses, such as treason or traffic in narcotics, and to offenses by or against military forces." Restatement § 403, Reporters' Note 8. "In such cases the state in whose territory the act occurs is not likely to object to regulation by the state concerned." *Id.* But the Restatement found a striking absence of authority for extraterritorial "criminal prosecution[s] * * * for an economic offense." *Id.*

The potential for conflict is particularly acute when U.S. courts use the Sherman Act to impose criminal sanctions on foreign conduct. Many foreign nations have chosen not to criminalize antitrust violations and the United States is the only country that regularly imprisons individuals for antitrust offenses. John M. Connor, *Problems with Prison in International Cartel Cases*, 56 Antitrust Bull.

311, 314 (2011); Terry Calvani & Torello H. Calvani, *Cartel Sanctions and Deterrence*, 56 Antitrust Bull. 185, 188 Tbl. 1 (2011); *cf. F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 167 (2004) (observing that "even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies"). These differences in foreign antitrust law demonstrate that "[e]nforcement of criminal laws against foreign nationals for conduct on foreign soil may affect this country's relationship with the foreign country in somewhat different ways than would a civil action"—justifying an even more robust presumption against extraterritoriality. *Nippon Paper*, 109 F.3d at 12 n.10 (Lynch, J., concurring).[9]

It therefore comes as no surprise that only one Court of Appeals has ever analyzed and approved an extraterritorial Sherman Act criminal prosecution. *See Nippon Paper*, 109 F.3d at 4. That court offered just one reason for its result: the Sherman Act's civil and criminal prohibitions spring from the same statutory text. *Id.* But there is much wrong with that lone justification. To begin with, the

[9] The intrusion on state sovereignty through application of criminal sanctions is particularly pronounced in this case. Taiwan does not prohibit all forms of price fixing, and the Taiwan Fair Trade Commission has declared that "[c]riminal punishment * * * should be a measure of last resort" pursued only after administrative sanctions. Taiwan Fair Trade Comm'n, *Explanatory Material Relevant to the Revised Articles of the Fair Trade Act*, § 3.1 (1999), *available at* http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=647&docid=1565 (last visited Jan. 7, 2013). Rather than heed this approach by bringing civil charges, the U.S. government here seeks to impose a substantial term of imprisonment on the individual defendants.

Sherman Act is no ordinary statute. To the contrary, "it has been construed to have a generality and adaptability comparable to that found to be desirable in constitutional provisions." *U.S. Gypsum Co.*, 438 U.S. at 438-439 (internal quotation marks omitted). Because the Sherman Act invites "courts to give shape to the statute's broad mandate by drawing on common-law tradition," *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 688 (1978), nothing in the statutory text prohibits courts from restricting the extraterritorial reach of the Act's criminal prohibitions, even if the civil provisions have longer arms. Indeed, the Act's sponsor assumed it would be interpreted in exactly this fashion. In discussing a predecessor bill, Senator Sherman stated that the statute's civil sanction "would be construed liberally with a view to promote its object" while the criminal prohibition "would be construed strictly." 21 Cong. Rec. 2456 (1890).

And that is exactly how the Supreme Court interpreted the Act in *U.S. Gypsum Co.* There, the Court adopted completely different constructions of Section One in civil and criminal cases with respect to *mens rea*. The Court acknowledged that "[b]oth civil remedies and criminal sanctions are authorized with regard to the same generalized definitions of conduct proscribed," 438 U.S. at 438-439—the point *Nippon Paper* thought conclusively resolved the criminal extraterritoriality question. But the Supreme Court recognized that the same statutory text could yield different requirements based on the enforcement context.

Thus, the Court interpreted the statute's criminal aspect, but not its civil aspect, as incorporating a *mens rea* requirement—despite the fact that the very same language is at issue in both. *Id.*; *see also* Areeda & Hovenkamp, *supra*, ¶ 303c, at 42 ("The courts should and do vary definitions of an antitrust offense" depending on whether the case is criminal or civil).

Nor does *U.S. Gypsum Co.* stand alone in interpreting the civil and criminal components of a statute differently. The D.C. Circuit, for example, refused to give the term "willful" the same meaning in the civil and criminal provisions of the Fair Labor Standards Act: "We do not agree that the criminal construction is to be imparted into the civil provision simply because both provisions are part of the same statute." *Laffey* v. *Nw. Airlines, Inc.*, 567 F.2d 429, 461-462 n.230 (D.C. Cir. 1976), *see also Domanus* v. *United States*, 961 F.2d 1323, 1326 (7th Cir. 1992) ("The special definition of 'willfully' for criminal tax statutes is not required in applying civil tax statutes."). In short, "[i]t is by no means new in our law to hold that statutes of a double aspect (penal and remedial) may be given a liberal construction in the civil courts when applied remedially, and yet be strictly construed in the criminal courts." *McKenzie* v. *Peoples Baking Co.*, 31 S.E.2d 154, 155 (S.C. 1944); *see also* 3 Sutherland, *Statutory Construction* § 60:04 (5th ed. 1995) (citing dozens of additional cases for this point). As all of these cases—*U.S. Gypsum Co.* front and center—demonstrate, interpretations of the Sherman

Act in civil suits cannot be reflexively applied to criminal cases. Thus, a court may not ignore the strong presumption against extraterritorial application of criminal laws simply because *Hartford Fire* suggested the Act had a broader reach in a civil case.

That is particularly true given the rule of lenity. That rule mandates that, where ambiguities lurk in a statute, courts "resolve any doubt in favor of the defendant." *Ratzlaf* v. *United States*, 510 U.S. 135, 148 (1994). It would be inappropriate to mechanically extend a civil interpretation of a statute to a criminal case if lenity would otherwise compel a different interpretation. *See U.S. Gypsum Co.*, 438 U.S. at 437 (referring to lenity when distinguishing between criminal and civil applications of the Sherman Act). Any ambiguity over whether the Sherman Act covers defendants' foreign conduct must therefore be resolved against the government.

Because the Sherman Act cannot be read to criminalize the foreign conduct at issue here, defendants' convictions must be reversed.

III. THE JUDGMENT MUST BE REVERSED BECAUSE THE DISTRICT COURT ERRONEOUSLY INSTRUCTED THE JURY THAT A SINGLE ACT IN THE UNITED STATES IS ENOUGH TO VIOLATE THE SHERMAN ACT.

The errors in the district court's understanding of the Sherman Act's extraterritorial reach run deeper still, for the court did not even require the government to establish that defendants "meant to produce and did in fact produce

some substantial effect in the United States." *Hartford Fire*, 509 U.S. at 796. Instead, over defendants' objection, the court instructed the jury that the Sherman Act applies *either* if there are substantial and intended domestic effects *or* if "at least one member of the conspiracy took at least one action in furtherance of the conspiracy within the United States." ER 600. That breathtaking one-overt-act theory of jurisdiction contravenes precedent and international law—not to mention common sense. The judgment should be reversed because the government cannot show that the jury did not convict on this improper basis.

It is worth pausing for a moment on the sweep of the district court's one-overt-act jury instruction. The court told the jury that a single act in the United States renders the Sherman Act applicable, no matter whether a conspiracy is foreign in every other respect. Under the court's instruction, the conspiracy need not produce any domestic effect, let alone a substantial one. Nor must the overt act be significant or material to the scheme; *any* act in *any* context suffices. That would mean that the Sherman Act applies to a foreign conspiracy among foreign defendants affecting only foreign markets and involving exclusively foreign conduct, save one phone call in furtherance of the conspiracy made from a U.S. airport on a layover between foreign destinations. It would also mean that if foreign conspirators fix the price of widgets in a foreign country, but sell just one widget for one dollar to a customer in the United States, then that single sale would

extend U.S. jurisdiction over each and every foreign conspirator. If this were the law, it is hard to imagine a set of circumstances in this global economy that the Sherman Act *couldn't* reach.

But this is not the law. That much is clear from *Hartford Fire* itself. Although foreign conduct dominated the conspiracy in *Hartford Fire*, domestic insurance companies were joined as defendants and some overt acts occurred in the United States, including a key meeting among domestic and foreign defendants in New York City. *See In re Ins. Antitrust Litig.*, 938 F.2d 919, 929 (9th Cir. 1991), *rev'd on other grounds sub nom. Hartford Fire*, 509 U.S. 764. Yet the Supreme Court required a substantial and intended effect on U.S. commerce notwithstanding this domestic conduct. *Hartford Fire*, 509 U.S. at 796. If all that were necessary was "one action in furtherance of the conspiracy within the United States," as the district court here instructed the jury, ER 600, the *Hartford Fire* Court would have had no need to consider effects in the United States at all.[10]

Consistent with *Hartford Fire*, courts have held that any case "involv[ing] primarily foreign conduct" counts as extraterritorial, no matter whether there is one (or even several) overt acts in the United States. *Dee-K Enters.*, 299 F.3d at 283;

[10] As noted, defendants maintain that the Sherman Act cannot be extended extraterritorially based on domestic effects alone, without a clear statement in the statutory text. But even if this Court rejects that argument, *Hartford Fire* demonstrates that substantial and intended effects in the United States are required and one domestic overt act will not suffice.

see also id. at 287 (characterizing "a largely foreign conspiracy with some domestic elements" as extraterritorial even though overt acts involving "routine communications" had occurred in the United States). The Supreme Court drove the point home in *Morrison*: "[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." 130 S. Ct. at 2884.

Indeed, the district court's instruction that the Sherman Act applies based on one domestic overt act violates not only precedent, it also conflicts with the law of nations. A country "has jurisdiction to prescribe law with respect to conduct that, *wholly or in substantial part*, takes place within its territory." Restatement § 402(1)(a) (emphasis added). One *de minimis* overt act, if it is a "mere dro[p] in the sea of conduct that occurred [abroad]," *Dee-K Enters.*, 299 F.3d at 295, does not qualify as a valid basis for jurisdiction. Extending the Sherman Act to cover such an act when no substantial and intended effects are felt in the United States would be an "unreasonable" exercise of jurisdiction under international law. Restatement § 403(1); *see also id.* § 403(2)(a); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies."). The district

court's instruction on the Sherman Act's application thus runs afoul of the rule that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118; *see also In re Korean Air Lines Co. Antitrust Litig.*, 642 F.3d 685, 696 (9th Cir. 2011) (same).

Against all this, the district court justified its one-overt-act jury instruction based on a stray sentence in *United States* v. *Endicott*, 803 F.2d 506, 514 (9th Cir. 1986)—that "[a]ny conspiratorial act occurring outside the United States is within United States jurisdiction if an overt act in furtherance of the conspiracy occurs in this country." But *Endicott*, in context, did not approve jurisdiction without intended effects in the United States. The sentence directly preceding that quote, after all, stated: "United States jurisdiction extends to acts occurring outside its territory *if those acts are intended to produce detrimental effects in the United States*." *Id.* (emphasis added). And the authorities *Endicott* cites for the overt-act point likewise require intended effects in the United States. *See Chua Han Mow*, 730 F.2d at 1312 (approving extraterritorial jurisdiction when conspiracy "*had for its object* crime in the United States *and* overt acts were committed in the United States by co-conspirators") (emphasis added); *United States* v. *Davis*, 608 F.2d 555, 556-557 (5th Cir. 1979) (per curiam) ("The jurisdiction of the United States extends to conspiratorial acts occurring outside the country *intended to have effects*

in the United States, at least where an overt act in the United states in furtherance of the conspiracy can be proved.) (emphasis added); *United States* v. *Brown*, 549 F.2d 954, 956 (4th Cir. 1977) (permitting jurisdiction over foreign conduct because "the aim of the conspiracy" was a crime that would produce detrimental effects in the United States).[11] The district court in this case thus appears to be the first tribunal to ever apply the Sherman Act to a foreign conspiracy based on a single overt act in the United States without requiring an effect—substantial or otherwise—on U.S. commerce.

That unprecedented extension of the Sherman Act constitutes reversible error. There is every reason to think the jury convicted on this one-overt-act basis. After all, defendants never contested that *some* overt acts occurred in the United States; their argument instead was that the foreign elements of this case far overwhelmed any domestic connection. Yet the jury was permitted to find that the Sherman Act reached this foreign conduct based on just one minor act in the United States. Because defendants were substantially prejudiced by this erroneous instruction, their convictions must be reversed.

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[11] Even if these cases could be warped into supporting a one-overt-act jury instruction, none involved the Sherman Act and all preceded *Hartford Fire*. They therefore would conflict with the Supreme Court's instruction that the Sherman Act applies to foreign conduct, if at all, only if there are substantial and intended effects in the United States. *Hartford Fire*, 509 U.S. at 796.

IV. THE JUDGMENT MUST BE REVERSED BECAUSE THE GOVERNMENT FAILED TO PROVE THAT THE NORTHERN DISTRICT OF CALIFORNIA WAS AN APPROPRIATE VENUE.

A bedrock of our constitutional system is the right to be tried in the district where the crime was committed. Indeed, this venue right is so important the Constitution guarantees it twice over: Article III mandates that a trial "shall be held in the State where the said Crimes shall have been committed," U.S. Const. art. III, § 2, cl. 3, and the Sixth Amendment repeats that criminal prosecutions shall be held in "the State and district wherein the crime shall have been committed," U.S. Const. amend. VI; *see also United States* v. *Johnson*, 323 U.S. 273, 275 (1944) (the Framers reiterated Article III's venue requirement in the Bill of Rights "[a]s though to underscore the importance of this safeguard"). Federal Rule of Criminal Procedure 18 further reinforces these constitutional commands by providing that "the government must prosecute an offense in a district where the offense was committed."

These provisions collectively give rise to the government's burden to prove proper venue. *United States* v. *Corona*, 34 F.3d 876, 879 (9th Cir. 1994). And they serve a crucial purpose. The Framers imposed these venue restrictions to prevent abuses of governmental power and to protect defendants, like Taiwanese residents Mr. Chen and Dr. Hsiung, from "the unfairness and hardship involved

when an accused is prosecuted in a remote place." *United States* v. *Cores*, 356 U.S. 405, 407 (1958).[12]

The government utterly failed to carry its burden to prove venue in this case. Although defendants put the government on notice that they intended to challenge its venue proof, the government stuck its head in the sand by failing to argue any theory of venue in its initial closing argument. ER 1068-1152. Then, in rebuttal—knowing that defendants would have no opportunity to respond—the government for the first time contended that venue existed based on supposed price negotiations occurring in the district in the early stages of the conspiracy. ER 1042. By saving this argument for rebuttal, the government deprived defendants of any opportunity to point out holes in the government's theory. And holes abounded: The government offered no proof that negotiations occurred in the district; that co-conspirators participated in any such negotiations; that

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[12] Shortly before the Revolutionary War, Parliament in Great Britain revived an ancient statute that allowed colonists accused of treason to be taken to England for trial. As then-Judge Alito has chronicled, this despised practice was "one of the precipitating factors of the American Revolution." *United States* v. *Palma Ruedas*, 121 F.3d 841, 861 (3d Cir. 1997) (Alito, J., dissenting), *rev'd by United States* v. *Rodriquez-Moreno*, 526 U.S. 275 (1999). Indeed, Thomas Jefferson specifically condemned the practice in the Declaration of Independence, criticizing King George III "[f]or transporting us beyond Seas to be tried for pretended offenses." The Declaration of Independence, ¶ 20 (U.S. 1776). Against this historical backdrop, it is clear that "'[q]uestions of venue in criminal cases * * * are not merely matters of formal legal procedure. They raise deep issues of public policy.'" *United States* v. *Barnard*, 490 F.2d 907, 910 (9th Cir. 1973) (quoting *Johnson*, 323 U.S. at 276).

negotiations, if they occurred, involved fixed prices; or that any negotiations happened within the statute of limitations.

That is why the government changed course post-trial and attempted to defend the jury verdict by offering a scattershot of new venue theories. But those theories, too, lack any basis in the record. Defendants' convictions should be reversed.

A. Standard Of Review

The government bears the burden to prove venue and "[i]n a jury trial, it is for the jury, not the court, to determine that venue exists." *Lukashov*, 694 F.3d at 1120 (internal quotation marks omitted). In assessing a claim of insufficient venue evidence, this Court ordinarily asks whether a "rational finder of fact could have found" that venue was proper. *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). That standard was not met here.

To make matters worse for the government, an even more searching inquiry is required in this case, since the district court "in substance" decided the venue issue as a matter of law. *See Lukashov*, 694 F.3d at 1120. In such circumstances, a venue ruling survives only if "a rational jury *could not fail to conclude* that * * * the evidence establishes venue." *Id.* (emphasis added). That is, the government must show that "the evidence viewed rationally by a jury could *only* support a conclusion that venue existed." *Id.* (emphasis added).

That standard applies here. The government waited until its rebuttal closing argument to present its theory of venue to the jury—that HP and AUO conducted negotiations of price-fixed panels in the Northern District between September 2001 and May 2002. Because this statement had no evidentiary basis, *see infra* at 66-73, defendants immediately objected that the government had misstated the record. ER 1042. Rather than instruct the jurors that their recollection of the evidence controlled (as the court had done before, *e.g.*, ER 1045-46; ER 1044), the district court compounded the error by asking the prosecutor "[i]s that in evidence?" and permitting him to aver, in front of the jury, "[i]t is in evidence, Your Honor." ER 1042. Endorsing that statement, the court then overruled the objection—with the jury present to hear every word. The court's actions signaled agreement with the government's next comment that "[t]he Government, in short, has established that this case is properly in this Court, and properly before this jury." *Id.*

By endorsing the government's venue theory, the district court effectively stripped defendants of their right to have the jury determine venue. *See Powell* v. *Galaza*, 328 F.3d 558, 564 (9th Cir. 2003) (reversing conviction because trial court's statement during mid-trial jury instruction "in effect instructed the jury" that element of crime "had been satisfied"); *see also Quercia* v. *United States*, 289 U.S. 466, 470 (1933) (noting that "[t]he influence of the trial judge on the jury is necessarily and properly of great weight") (internal quotation marks omitted).

Because the court "in substance" decided the venue issue, *Lukashov* applies: This court must reverse defendants' convictions unless the evidence "could only support a conclusion that venue existed." 694 F.3d at 1120.

B. The Trial Record Is Devoid Of Evidence Supporting Venue.

For venue to lie in the Northern District, the government had to show that the conspiracy was formed there or that a co-conspirator committed an overt act in furtherance of the conspiracy in the district. *Corona*, 34 F.3d at 879. The sole theory of venue the government presented to the jury—that co-conspirators negotiated the sale of price-fixed panels to HP in the Northern District between September 2001 and May 2002—is a product entirely of the prosecutor's imagination. No evidence—no testimony, no e-mails, no records—comes close to proving that those negotiations occurred. Nor does any circumstantial evidence in the record prove venue. *See United States* v. *Kurt*, 986 F.2d 309, 312 (9th Cir. 1993) (inferences must be reasonable; "[m]ere suspicion or speculation * * * is insufficient").

The government realized that. So it unfurled new theories in its post-trial filing, alleging that venue could be based on supposed price negotiations with Apple or on various e-mails involving two AUOA employees, Michael Wong and Evan Huang. But these late-breaking theories will not do. One of the blackest of black-letter laws is that a criminal conviction cannot be affirmed on a basis not

presented to the jury. *See, e.g.*, *Chiarella* v. *United States*, 445 U.S. 222, 236 (1980). And in any event, these new theories find as little record support as the old one. Because the government may not rely on speculative evidence and "pil[e] inference upon inference" to establish venue, *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711 (1943), defendants' convictions must be reversed.

1. The Government's Price-Negotiation Theories Are Unsupported By The Record

To prove venue based on price negotiations, the government needed to establish four independent things: (1) that price negotiations occurred in the district; (2) that a co-conspirator present in the venue participated in those negotiations; (3) that the negotiations were based on prices fixed in Taiwan and so were acts in furtherance of the conspiracy; and (4) that the negotiations occurred within the statute of limitations. The evidence falls short for each of these claims.

a. Price Negotiations

The government proffered no evidence that price negotiations occurred in the district. The record established only that AUO's small U.S. subsidiary, AUOA, maintained an office with a handful of employees in Cupertino, California beginning in September 2001, ER 1420, and that HP's procurement group was primarily located in Cupertino before May 2002, ER 1466-67. The government accordingly sought to prove venue based on geographic proximity: that by having

an office in the Northern District of California, AUOA must be presumed to have engaged in overt acts in furtherance of an unlawful scheme there.

Here's the problem: This Court squarely rejected that theory in *United States* v. *Pace*, 314 F.3d 344, 350-351 (9th Cir. 2002). There, this Court concluded that maintaining business headquarters in Tucson, Arizona did not establish that the defendant had orchestrated a wire-fraud scheme there. *Id.* The record in *Pace* included evidence that the defendant routinely received letters and faxes at his Tucson business address; that one individual had sent a letter to Tucson requesting instructions regarding a fraudulent wire transfer; that the defendant authorized his secretary in Tucson to provide those instructions; and that the individual sent another letter to Tucson confirming the fraudulent transfer. *Id.* at 350. Nonetheless, this Court refused to infer that this circumstantial evidence made it more likely than not that the defendant orchestrated the wire transfer from Arizona. *Id.* at 350-351.

The case for venue is even weaker here. The government offered no testimony or other evidence that price negotiations occurred in the district between September 2001 and May 2002, the only period when both AUOA and HP had offices there. Zero. The government did not call any witness who worked at HP while it was located in Cupertino, nor did it elicit any testimony about where HP conducted its price negotiations. The only AUOA employee who testified at trial,

government witness Michael Wong, never indicated that he or any other AUOA employee negotiated sales of panels to HP in the district during the nine-month window on which the government relies. Wong's testimony, moreover, squares with the government's decision not to charge AUOA with becoming a co-conspirator until 2003—meaning the government did not think AUOA employees had conspired to negotiate sales using fixed prices before that time. And the government did not offer any evidence establishing that AUO products intended for HP were ever shipped into, or were purchased from, the Northern District.

Realizing that its evidence concerning HP was insufficient, the government in its post-trial brief urged the district court to take judicial notice that Apple is headquartered in Cupertino. ER 419-420 n.6. The court rightly declined to do so: "For a court * * * to take judicial notice of an adjudicative fact after a jury's discharge in a criminal case would cast the court in the role of a fact-finder and violate defendant's Sixth Amendment right to trial by jury." *United States* v. *Dior*, 671 F.2d 351, 358 n.11 (9th Cir. 1982). In any event, the government offered no evidence suggesting that price negotiations occurred at Apple's procurement office. The government did not call an Apple employee to testify, and it offered no business records showing that AUO negotiated with Apple in the Northern District.

Under *Pace*, the government's venue "proof" was not enough. Even if the proximity of AUOA's and HP's (or even Apple's) offices for a limited number of

months could give rise to the speculative possibility that a co-conspirator took some action in furtherance of the conspiracy there, that speculation does not support a reasonable inference. After all, "a 'reasonable inference' is one that is supported by a chain of logic, rather than * * * mere speculation dressed up in the guise of evidence." *Juan H.* v. *Allen*, 408 F.3d 1262, 1277 (9th Cir. 2005). But that speculation is all the government offered below. Accordingly, the government has not established that price negotiations occurred in the Northern District and its venue proof fails at the first step.

b. Co-Conspirators

Even if it were reasonable to infer that price negotiations occurred in the district, the government did not establish that a co-conspirator in the Northern District participated in those negotiations. *See Corona*, 34 F.3d at 879 (venue is proper only in those districts where a co-conspirator committed an overt act). A party becomes a co-conspirator only when he voluntarily and intentionally joins a conspiracy, knowing of its goal and intending to help accomplish it. *United States* v. *Wise*, 370 U.S. 405, 416 (1962). Although the government asserted in its post-trial brief that AUOA employees Michael Wong and Evan Huang were co-conspirators, it presented no evidence at trial to support that contention and called no witnesses to testify that Wong and Huang were part of the conspiracy.

No reasonable jury could have found that Wong was a co-conspirator. Wong appeared as the government's witness at trial pursuant to an immunity agreement that removed any motive to lie and that required him to testify truthfully. He stated that he never agreed "with any of AUO's competitors or AUOA's competitors to fix prices on LCD panels," nor did he "agree with anyone at AUO [or] AUO America to fix prices on LCD panels." ER 1381. Wong never attended a Crystal Meeting; he did not know whether AUO personnel in Taiwan were meeting with competitors in Taiwan to fix prices; and no one at AUO told him he had to follow the prices discussed at those meetings. ER 1365-66; ER 1355-56. No testimony or evidence contradicted any of Wong's statements. The government therefore did not establish that Wong voluntarily and intentionally joined the alleged conspiracy.

As for Huang, the government made no showing that he knew the conspiracy existed—much less that he knowingly participated in it. Huang did not attend any Crystal Meetings, he was not copied on Crystal Meeting reports, and the government offered no evidence that he purposefully agreed to further any price-fixing agreements from those meetings. While the government introduced all of two e-mails showing that Huang made efforts to gather competitor data relevant to informed pricing decisions, that behavior is not illegal. *See, e.g.*, *U.S. Gypsum Co.*, 438 U.S. at 441 n.16 ("The exchange of price data and other information among

competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."). The government offered no evidence that Huang was aware of any price-fixing activities or that he intended to further those activities when he exchanged information with competitors. Thus, the government cannot now contend that Huang knowingly joined a conspiracy to fix prices.[13]

c. Acts In Furtherance Of The Conspiracy

Even had the government shown that a co-conspirator in the district engaged in price negotiations there, it failed to demonstrate that those negotiations involved the prices fixed back in Taiwan that were the subject of the indictment. Accordingly, the government has not carried its burden to prove that an overt act was committed in the district *in furtherance* of the conspiracy. *See Angotti*, 105 F.3d at 545.

It was undisputed at trial that the Crystal Meeting participants did not discuss every size, type, and model of panel each month. Indeed, nearly half of all panels sold by AUO between 2001 and 2006 had no Crystal Meeting price during the month of sale. ER 1290-92. Any negotiations concerning these panels could

[13] The district court's pre-trial ruling that certain documents were admissible under the co-conspirator exception to the hearsay rule does not alter this conclusion. When the court deemed these documents admissible, it made no specific finding that Wong and Huang were co-conspirators. ER 1421-23. Moreover, the court's ruling pre-dated Wong's testimony at trial and hinged on inadmissible evidence, including facts alleged in the indictment. *Id.*

not have furthered the conspiracy because no fixed price existed. Nor did sales of panels that were discussed at Crystal Meetings automatically advance the conspiracy; to the contrary, the evidence showed that AUO charged its customers prices consistently below those agreed to at the meetings. *E.g.*, ER 1289 (Oct. 2001); ER 1286 (Nov. 2001); ER 1285 (Jan. 2002). Wong testified about the mechanisms that AUO employed to hide its low prices from its competitors, including the ruses of rebates and price masking to give the appearance that customers had paid a much higher price. ER 1358-59; ER 1361. Because the government did not demonstrate that any co-conspirators in the district attempted to negotiate prices that matched Crystal Meeting prices, its proof of venue is insufficient in yet a third way.

d. Limitations Period

Finally, the government's attempt to establish venue based on supposed price negotiations in Cupertino between 2001 and 2002 does not square with the Superseding Indictment's representation that the conspiracy "was carried out * * * in the Northern District of California *within the five years preceding the filing of this indictment*"—that is, between June 2005 and June 2010. ER 1732 (emphasis added). It makes sense to require that venue-creating acts occur within the statute of limitations; just as a time-barred act in furtherance of a conspiracy cannot establish a crime, it cannot establish venue. *See United States* v. *Luros*, 243 F.

Supp. 160, 168 (N.D. Iowa 1965) ("The indictment must allege * * * that the conspiracy was in existence and that at least one overt act was committed by one of the conspirators in this district during the period of limitations.").

For good reason, then, defendants prepared and executed their defense based on the indictment's 2005-to-2010 venue timeframe. By relying on a wholly different time period in arguing venue to the jury, the government constructively amended the indictment. *See United States* v. *Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984). At the very least, the government's venue argument depended on a timeframe that was "materially different from [that] alleged in the indictment"—indeed, fatally so. *United States* v. *King*, 200 F.3d 1207, 1217 n.3 (9th Cir. 1999); *United States* v. *Durades*, 607 F.2d 818, 820 (9th Cir. 1979) (reversing conviction where "variance between the indictment and the proof infringed one of [defendant's] substantial rights, Viz. his interest in being tried only in a district where venue properly lay"); *Angotti*, 105 F.3d at 545 ("possibility for prejudicial surprise" exists when defendant is not "fully apprised of the factual allegations supporting venue"). The government's decision to wait until its rebuttal closing argument to announce that its venue proof hinged on pre-2005 conduct cemented the prejudicial effect. Defendants were left with no opportunity to explain to the jury why the government's venue contention lacked any evidentiary basis. For this reason, too, defendants' convictions cannot stand.

2. The Government's E-Mail Theory Is Unsupported By The Record

With no evidentiary basis to support its price-negotiation theory, the government changed tactics after the trial was over, and asserted for the first time that venue was proper based on approximately 40 e-mails involving Wong and two e-mails involving Huang in the record. But to establish venue on this basis, the government would need to show (1) that an e-mail was sent from or received in the Northern District; (2) by a co-conspirator; (3) in furtherance of the conspiracy; (4) within the limitations period. *See United States* v. *Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003). Once again, the government's proof fails across the board.

For starters, the government cannot rely on e-mails from or to Wong and Huang because, as detailed above, it did not demonstrate that either was a co-conspirator or that all such e-mails furthered the conspiracy. Moreover, most of these e-mails were sent outside the limitations period and so cannot establish venue.

Even putting those flaws aside, the government made no effort to demonstrate that any of the e-mails it introduced at trial had a connection to the Northern District of California. It did not attempt to establish Wong's location when he sent or read particular e-mails, or otherwise elicit information about where he was working on the relevant dates. Even less is known about Huang, who did not testify at trial; there is no evidence concerning his location when he sent the

two e-mails on which the government relies. Nor did the government offer records of IP addresses to link the e-mails to a physical location, as it has done in other cases to prove venue based on e-mail or Internet activity. *See, e.g.*, *United States* v. *Powers*, 364 F. App'x 979, 984 (6th Cir. 2010) (rejecting venue challenge because government offered evidence related to IP address that established that pictures were uploaded and viewed from district). These evidentiary gaps are significant because an e-mail (just like the electronic filing of this brief) can be sent or received anywhere in the world—and the government has offered nothing to show that these particular e-mails happen to have made their way into the Northern District. *See United States* v. *Thompson*, 2012 WL 122564, at *4 (W.D. Ky. Jan. 17, 2012) (dismissing charges on venue grounds because "none of the chat texts, emails, or financial records supporting [the charge] have been shown to have taken place in the [district]").

The government's only response is to note that Wong and Huang at times worked from AUOA's Cupertino office. But that says nothing about whether the specific e-mails at issue were sent from or received in Cupertino. The Government certainly offered no evidence that Wong and Huang abstained from travel outside the Northern District of California. In fact, starting in 2003, Wong began working primarily in Texas after AUOA moved its headquarters there. ER 1419-20; *see also* ER 1420 (testimony from Wong that after he became a branch manager his

"sales function location[n]" entailed "traveling * * * [m]ainly between Austin and Houston"). Yet most of the e-mails on which the government relies were sent after AUOA relocated its headquarters to Houston. And to the extent the e-mails themselves feature any clues about location, they suggest that AUOA employees were *outside* the district. *See, e.g.*, ER 805 (e-mail from Wong stating he "[t]alked to AM LCD in Austin last night"); ER 804 (e-mail from Wong discussing negotiations "here in Austin"); ER 802-803 (e-mail from Wong discussing monthly pricing "which is due this Friday here in Austin"); ER 800 (e-mail from Wong describing anticipated HP business announcement to be made "tomorrow afternoon Houston time").

Critically, even if it were reasonable to infer that Wong or Huang sometimes communicated by e-mail from the Northern District, the government offers nothing but impermissible speculation that the *particular* e-mails on which it relies were sent from or received there. Two cases illustrate the point. First, in *Durades*, the government introduced evidence that the defendant in Los Angeles had in the past obtained narcotics from Mexicali, Mexico, but it did not offer any evidence concerning the origin of the particular drug shipment supporting the charges in the case; this Court observed that "[i]f the government had proved the *particular kilo* of heroin * * * originated in Mexicali and came to Los Angeles by the most direct route, transit through the district could have been inferred." 607 F.2d at 820 n.1

(emphasis added). But because the government failed to produce any evidence regarding the source of that particular kilo, the "trier of fact had no basis for inferring that [the defendant] passed through the Southern District of California on his way to Los Angeles." *Id.*

Similarly, in *United States* v. *Greene*, 995 F.2d 793, 801 (8th Cir. 1993), the only evidence supporting venue in the Southern District of Iowa was the testimony of a DEA agent that the defendant's seven marijuana fields were represented by pinholes on a map. But the map in question had 19 pinholes, several in the district and several outside it. The court concluded that because the holes were "distributed both inside and outside" the district, "a conclusion that at least one of the seven marijuana fields was in the Southern District of Iowa could have been reached only by speculation." *Id.*

The government's e-mail theory suffers from the same problem: Even if the government could show that Wong and Huang were sometimes in the district, there was no basis for the jury to infer that they were located there when they sent or received the particular e-mails the government introduced at trial. And as just noted, the few geographic references in the e-mails suggest the opposite conclusion. Thus, "only by speculation" could jurors conclude that any particular e-mail had a connection to the district. *Greene*, 995 F.2d at 801; *see also United States* v. *Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010) (en banc) ("[E]vidence is

insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case").

* * *

The government, in short, must stack inference upon inference to argue that venue was proper in the Northern District. First, the government must contend that the mere presence of an AUOA office in the district renders it reasonable to infer that price negotiations occurred there or that particular e-mails were sent from or received there. Then, the government must heap atop that its claim that a co-conspirator in the district participated in those hypothetical price negotiations or sent or received those e-mails. And then the government must further argue that when the co-conspirators in the Northern District (if they existed) participated in the negotiations in the venue (if such negotiations occurred) or sent or received those e-mails (if the co-conspirators happened to be in the venue at the time), they used these communications to further the conspiracy. Finally, the government must maintain that all of this happened at the tail end of the conspiracy, within the limitations period.

Because the government's venue theories require "piling inference on inference," each of which is based on nothing more than "speculation and conjecture," *United States* v. *Irvin*, 682 F.3d 1254, 1274 (10th Cir. 2012), no rational finder of fact could find that venue was proper in the Northern District of

California—let alone that "the evidence viewed rationally by a jury could *only* support a conclusion that venue existed." *Lukashov*, 694 F.3d at 1120 (emphasis added). Accordingly, the government failed to carry its burden to prove venue.

C. Defendants' Convictions Must Be Reversed For The Additional Reason That The Jury Did Not Find Proof Of Venue Beyond A Reasonable Doubt.

Because the government failed to produce sufficient evidence of venue, the judgment should be reversed and the Court need go no further. But reversal is warranted for the additional reason that the district court erroneously instructed the jurors that they could convict so long as they found venue proper by a preponderance of the evidence. ER 598-599. That was reversible error because, like any fact which is essential to a conviction and maximum punishment, venue must be proved beyond a reasonable doubt. *See, e.g.*, *United States* v. *Gaudin*, 515 U.S. 506, 509-510 (1995); *In re Winship*, 397 U.S. 358, 364 (1970); *Sullivan* v. *Louisiana*, 508 U.S. 275, 277-278 (1993); *Ring* v. *Arizona*, 536 U.S. 584, 588-589 (2002).[14]

[14] Because defendants did not object to the jury instruction, this claim is reviewed for plain error. The district court's application of an erroneous burden of proof satisfies that standard. The constitutional error is plain in light of Supreme Court precedent clearly establishing that all elements of an offense must be proved to a jury beyond a reasonable doubt. The Court has further indicated that errors of this type qualify as structural. *See, e.g.*, *Sullivan*, 508 U.S. at 281-282; *Gaudin*, 515 U.S. at 523 (Rehnquist, C.J., concurring) (observing that case arose in plain-error posture). In any event, permitting the jury to convict on a lesser standard of proof prejudiced defendants in view of the paucity of evidence introduced on

Venue is an "essential element of the government's proof at trial" because it must be established if the defendant is to be found guilty. *United States* v. *Snipes*, 611 F.3d 855, 865 (11th Cir. 2008); *see also Harris* v. *United States*, 536 U.S. 545, 561 (2002) (defining "elements" as "fact[s] * * * legally essential to the punishment to be inflicted") (internal quotation marks omitted); *Hill* v. *United States*, 284 F.2d 754, 755 (9th Cir. 1960) ("[P]roof of venue in a criminal prosecution is essential."). Nor can venue be characterized as a mere procedural formality; as already noted, the Constitution twice guarantees the venue right to serve substantive ends, including a defendant's ability to access evidence and witnesses to support a claim of innocence. Because venue is a constitutionally required element of every offense, the government must prove it beyond a reasonable doubt to obtain a criminal conviction. *See Ring*, 536 U.S. at 606-607 (emphasizing that when "Constitution * * * require[s] the addition of an element or elements to the definition of a criminal offense," the beyond-a-reasonable-doubt standard applies); *see also United States* v. *Strain*, 407 F.3d 379, 380 (5th Cir. 2005) ("[V]enue is * * * a constitutionally-imposed element of every crime").

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venue. *See supra* at 65-79. And the error "'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings,'" *United States* v. *Olano*, 507 U.S. 725, 736 (1993), because proper proof of venue "touch[es] closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests," *Johnson*, 323 U.S. at 275-276.

This Court has nevertheless noted in passing that the government need only prove venue by a preponderance of the evidence. *See, e.g.*, *Pace*, 314 F.3d at 349; *United States* v. *Powell*, 498 F.2d 890, 891 (9th Cir. 1974). All of the Court's decisions on this issue trace back to *Hill* v. *United States*, which stated, without any analysis, that venue "need not be proved beyond a reasonable doubt." 284 F.2d at 755. *Hill*, in turn, cited the Eighth Circuit's decision in *Dean* v. *United States*, 246 F.2d 335, 338 (8th Cir. 1957), which made the conclusory observation that "[v]enue is not an integral part of a criminal offense" and "need not be proven beyond a reasonable doubt." And *Dean* cited *Blair* v. *United States*, 32 F.2d 130, 132 (8th Cir. 1929), which noted in *dictum* that there was authority for the proposition that venue does not require proof beyond a reasonable doubt based on a legal encyclopedia that counted eleven states rejecting that standard of proof and two states embracing it.[15] Thus, the foundation for the burden of proof for venue in this circuit is based on *dictum* from the Eighth Circuit referencing a handful of state cases. *Cf. Williams* v. *Jones*, 571 F.3d 1086, 1107 & 1108 n.7 (10th Cir. 2009) (Gorsuch, J., dissenting) (criticizing reliance on "lines of cases" that, upon

[15] Today, the states are nearly evenly split on whether venue must be proved beyond a reasonable doubt. *See Comment note—Necessity of proving venue or territorial jurisdiction of criminal offense beyond a reasonable doubt*, 67 A.L.R. 3d 988 (counting 19 states requiring proof of venue beyond a reasonable doubt and 22 states using a preponderance standard). The American Law Institute's Model Penal Code advises that venue is an element of a criminal offense necessitating proof beyond a reasonable doubt. ALI, Model Penal Code (Official Draft) §§ 1.12(1), 1.13(9)(e), at 16, 18 (1985).

inspection, "appear to amount to the repetition of what started as *ipse dixit*"; "opinions without reasons do not persuade").

Because no party appears to have previously challenged the burden of proof for venue head-on in this circuit and this Court has never seriously examined the issue, this Court is free to hold that venue requires proof beyond a reasonable doubt. *See V.S. ex rel. A.O.* v. *Los Gatos-Saratoga Joint Union High Sch. Dist.*, 484 F.3d 1230, 1233 n.1 (9th Cir. 2007) (this Court is "not bound by a holding 'made casually and without analysis, * * * uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention'") (citation omitted); *Estate of Magnin* v. *C.I.R.*, 184 F.3d 1074, 1077 (9th Cir. 1999) (when a case "assume[s] the rule" but "d[oes] not elaborate upon the rule or evaluate its merit, * * * the case does not bind future panels"). And indeed, this Court *must* so hold in light of foundational principles of criminal law: Because venue is a constitutionally mandated fact necessary for conviction, it is an integral element of each and every criminal offense that must be proved beyond a reasonable doubt. Because the district court permitted conviction on a lesser standard of proof, defendants' convictions must be reversed.

V. THE PROSECUTOR'S MISCONDUCT IN MISSTATING THE VENUE EVIDENCE DENIED DEFENDANTS DUE PROCESS.

The government's venue tactics violated not only defendants' Article III and Sixth Amendment rights, but also due process: The prosecutor grossly misled the jury about the venue evidence in closing rebuttal argument. That prejudicial misconduct requires reversal.

"In determining whether a comment rendered a trial constitutionally unfair, factors [this Court] consider[s] are [1] whether the comment misstated the evidence, [2] whether the judge admonished the jury to disregard the comment, [3] whether the comment was invited by defense counsel in its summation, [4] whether defense counsel had an adequate opportunity to rebut the comment, [5] the prominence of the comment in the context of the entire trial and [6] the weight of the evidence." *Hein* v. *Sullivan*, 601 F.3d 897, 912-913 (9th Cir. 2010), cert. denied, 131 S. Ct. 2093 (2011). Here, all six *Hein* factors indicate that, absent the prosecutor's misconduct, "there was a 'reasonable probability' of a different result"—namely, acquittal based on insufficient proof of venue. *Id.* at 914-915.

To briefly recap the relevant facts: The prosecutor saved any mention of venue for rebuttal closing argument, when he contended that "[t]he conspirators' negotiation of price-fixed panels with HP in Cupertino were acts in furtherance of this conspiracy." ER 1042. When defense counsel immediately objected that this remark misstated the evidence, the court asked the prosecutor point-blank: "Is that

in evidence?" *Id*. The prosecutor reassured the court—and the jury—that "[i]t is in evidence." *Id.* The court then overruled the objection, providing the perfect segue for the prosecutor to conclude: "The Government, in short, has established that this case is properly in this Court, and properly before this jury." *Id.*

But the record contained not a wisp of evidence that conspirators negotiated price-fixed panels with HP in the district. *See supra* at 66-73. That is why the government retreated from the theory during post-trial briefing and debuted a hodgepodge of new theories. The government's own actions confirm that the prosecutor "misstated the evidence" to the jury. The first *Hein* factor therefore supports a finding of prejudice.

Nor did "the judge admonish[] the jury to disregard the comment." *Hein*, 601 F.3d at 912. Quite the opposite: By specifically asking the government "[i]s that in evidence?" and then crediting the government's affirmative answer by overruling defendants' objection, the district court amplified the misstatement's harmful effect. *See United States* v. *Weatherspoon*, 410 F.3d 1142, 1151 (9th Cir. 2005) (emphasizing that district court's erroneous decision to overrule objections to prosecutor's misstatement made "the trial * * * doubly flawed"). As the Supreme Court has observed, "[t]he influence of the trial judge on the jury is necessarily and properly of great weight and h[er] lightest word or intimation is received with deference, and may prove controlling." *Quercia*, 289 U.S. at 470

(internal quotation marks omitted). Here, the judge's actions signaled to the jury that not only the government, but the court itself, believed that the evidence supported a finding of proper venue.

The third *Hein* factor, too, demonstrates prejudice because defendants' summation did not invite the government's misstatement. Defendants put the government on notice that they intended to challenge the venue proof by moving for a judgment of acquittal on this ground at the close of the evidence. RT4695-96. Nevertheless, the government chose not to address this challenge in its initial closing argument, making no mention of venue whatsoever. Not surprisingly, defendants pointed out the gaps in the government's venue proof in their summation, but this did not grant the government *carte blanche* to refer to facts not in evidence to salvage its case. By "direct[ing] the jury's attention to * * * loopholes in the government's case" that the government would "have been expected to negate previously," defense counsel does not invite the prosecutor to refer to new facts on rebuttal that "it could have, but did not, introduce at trial." *United States* v. *Rubinson*, 543 F.2d 951, 966 (2d Cir. 1976).

And that gets to the fourth *Hein* factor. By sandbagging the defense with a glaring misstatement during rebuttal, the government deprived defendants of "an adequate opportunity to rebut the comment." *Hein*, 601 F.3d at 913. This Court has recognized that the risk of prejudice surges when "[t]he prosecutor's improper

comments occur[] during his rebuttal argument and therefore [a]re the last words from an attorney that [a]re heard by the jury before deliberations." *United States* v. *Sanchez*, 659 F.3d 1252, 1259 (9th Cir. 2011) (internal quotation marks omitted). And that is particularly true where, as here, "the court d[oes] not intervene." *Id.* Because the government ensured that its misstatement was "the last argument the jury heard" on venue "before going to the jury room to deliberate," the "timing increased the risk that the [misstatement] would improperly influence the jurors." *Id.* at 1261.

Finally, the "prominence of the comment" and "the weight of the evidence" further confirm the prejudicial impact. *Hein*, 601 F.3d at 913. The government's mischaracterization did not hide behind a phalanx of other evidentiary theories for venue. It was instead the *sole* theory presented to the jury. And after the district court effectively endorsed that theory by accepting the prosecutor's assurances before the jury, the misstatement received prominent top-billing. Nor can it be said that "the case [for venue] [wa]s particularly strong"; to the contrary, it was unreasonable for the jury to find that the government had proved venue, confirming this Court's observation that "as the case becomes progressively weaker, the possibility of prejudicial effect [from prosecutorial misconduct] grows correspondingly." *Sanchez*, 659 F.3d at 1260 (internal quotation marks omitted).

Because all six *Hein* factors point toward "a 'reasonable probability' of a different result" on venue, 601 F.3d at 915, the prosecutor's misstatement of the evidence denied defendants due process.

CONCLUSION

For the foregoing reasons, defendants' convictions must be reversed.

Respectfully submitted,

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February 4, 2013

NINTH CIRCUIT RULE 28-2.6 STATEMENT

Pursuant to Ninth Circuit Rule 28-2.6, counsel for Hui Hsiung and Hsuan Bin Chen identify the following related cases:

- *United States* v. *AU Optronics Corp.*, Nos. 12-10500; 12-10558. This appeal and cross-appeal, which have been consolidated with this case, arise out of the same case in the district court, raise the same or closely related issues, and involve the same events.
- *United States* v. *AU Optronics Corp. America*, No. 12-10514. This appeal, which has been consolidated with this case, arises out of the same case in the district court, raises the same or closely related issues, and involves the same events.

In addition, a related case is currently pending in the Northern District of California. That case, *United States* v. *Leung*, No. 09-cr-110-SI, involves the re-trial of co-defendant Steven Leung. It arises out of the same case in the district court, raises the same or closely related issues, and involves the same events. Mr. Leung is currently awaiting sentencing in the case.

/s/ Christopher T. Handman
Christopher T. Handman

CERTIFICATE OF COMPLIANCE

This Brief is accompanied by a motion for leave to file an oversize brief pursuant to Ninth Circuit Rule 32-2. I hereby certify that the attached Brief is proportionally spaced, has a typeface of 14 point, and contains 20,914 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Christopher T. Handman
Christopher T. Handman

ADDENDUM

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CONSTITUTIONAL PROVISIONS:

STATUTES:

U.S. Const. art. III, § 2, cl. 3

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 6a

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

CERTIFICATE OF SERVICE

I certify that the foregoing Brief was filed with the Clerk using the appellate CM/ECF system on February 4, 2013. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

Dr. Hsiung and Mr. Chen are filing joint Excerpts of Record with AUO and AUOA. Counsel for AUO and AUOA filed the Excerpts of Record with the Clerk using the appellate CM/ECF system on February 4, 2013. All counsel of record are registered CM/ECF users, and service of the Excerpts of Record will be accomplished by the CM/ECF system.

/s/ Christopher T. Handman
Christopher T. Handman