No.

# In the Supreme Court of the United States

AGRIUM INCORPORATED, *ET AL.*,
*Petitioners,*

v.

MINN-CHEM, INCORPORATED, *ET AL.*,
*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

The Foreign Trade Antitrust Improvements Act ("FTAIA") provides that the U.S. antitrust laws do not govern "conduct involving" foreign commerce unless that conduct either "involv[es] * * * import trade or import commerce" or otherwise has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. 15 U.S.C. § 6a.

The questions presented are:

1. Whether a "direct effect" on U.S. commerce within the meaning of the FTAIA is an effect that has only "a reasonably proximate causal nexus" with that commerce (as held by the Seventh Circuit below) or, instead, is one that "follows as an immediate consequence of the defendant's activities" (as held by the Ninth Circuit).

2. Whether the FTAIA's "import-commerce" exclusion applies whenever a defendant sells its product in the United States (as held by the Seventh Circuit below) or, instead, only when a defendant engages in allegedly anticompetitive conduct as part of its efforts to sell its product in the United States (as held by the Second and Third Circuits and argued below by the United States).

## PARTIES TO THE PROCEEDINGS BELOW

Defendants-appellants before the court of appeals were Agrium Inc.; Agrium U.S. Inc.; BPC Chicago, LLC; JSC Belarusian Potash Company; JSC Silvinit; JSC International Potash Company; JSC Uralkali; The Mosaic Company; Mosaic Crop Nutrition, LLC; Potash Corporation of Saskatchewan Inc.; and PCS Sales (USA), Inc. An additional defendant in the district court, RUE PA Belaruskali, was dismissed from the action prior to the appeal.

The plaintiffs-appellees before the court of appeals and respondents before this Court are Minn-Chem, Inc.; Gage's Fertilizer & Grain, Inc.; Kraft Chemical Company; Shannon D. Flinn; Westside Forestry Services d/b/a Signature Lawn Care; Thomasville Feed & Seed, Inc.; Kevin Gillespie; Feyh Farms Company; William H. Coaker, Jr.; and David Baier. An additional plaintiff, Gordon Tillman, was dismissed from the action after the appeal but before this petition was filed.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Agrium U.S. Inc. is wholly owned by 3631591 Canada Ltd., which is wholly owned by petitioner Agrium Inc., which has no parent company. No publicly held company owns 10% or more of Agrium Inc. Petitioner Mosaic Crop Nutrition, LLC is wholly owned by petitioner The Mosaic Company, which has no parent. No publicly held company owns 10% or more of The Mosaic Company. Petitioner Potash Corporation of Saskatchewan Inc. has no parent company. No publicly held company owns 10% or more of Potash Corporation of Saskatchewan. Petitioner PCS Sales (USA), Inc. is a subsidiary of Potash Holding Company, 609430 Saskatchewan Limited, and Potash Corporation of Saskatchewan Inc.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Agrium Inc.; Agrium U.S. Inc.; The Mosaic Company; Mosaic Crop Nutrition, LLC; Potash Corporation of Saskatchewan Inc.; and PCS Sales (USA), Inc., respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The court of appeals' en banc opinion (App., *infra*, 1a-29a) is reported at 683 F.3d 845. The court of appeals' original panel opinion (App., *infra*, 30a-54a) is reported at 657 F.3d 650. The district court's order denying petitioners' motion to dismiss (App., *infra*, 55a-131a) is reported at 667 F. Supp. 2d 907.

## JURISDICTION

The en banc judgment of the court of appeals was entered on June 27, 2012. On September 14, 2012, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including November 24, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, provides:

> Sections 1 to 7 of [the Sherman Act] 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.

**STATEMENT**

This case presents recurring and important questions about the rules that govern application of the U.S. antitrust laws to foreign commerce. In the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, Congress provided that the Sherman Act does not apply to commerce with foreign nations unless (1) the challenged conduct involves "import" commerce or (2) the allegedly anticompetitive conduct had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. In the decision below, the en banc Seventh Circuit—setting aside a prior panel decision—held that the FTAIA import-commerce exclusion applies whenever a defendant imports its product into the United States, even if the challenged anticompetitive conduct occurs overseas; and that a "direct" effect on U.S. commerce is one that has a "reasonably proximate causal nexus" with that commerce. Applying these standards, the court held that the FTAIA does not bar U.S. Sherman Act claims that petitioners' joint exports from Canada to overseas purchasers had a spillover effect on pricing in the United States.

This holding should not stand. It expressly rejects the holding of one court of appeals and cannot be reconciled with the decisions of several others; departs from the text of the FTAIA, adopting a vague and novel standard that will leave significant uncertainty in the application of the statute; exposes virtually all multinational companies to U.S. antitrust liability for overseas activities based on distinctly *in*direct effects on U.S. consumers; and encourages baseless litigation that will force costly changes in business practices not intended by Congress. It also is sure to foment tension with major U.S. trading partners, one of which—Canada—has authorized petitioners to engage in the very joint overseas export activity that is challenged in this suit.

This Court has twice expressly reserved the question whether the FTAIA "amends existing law or merely codifies it," declaring the answer to that question "unclear." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 n.23 (1993). See *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 169 (2004) (FTAIA "perhaps" designed "to limit * * * the Sherman Act's scope as applied to foreign commerce"). Because this case squarely presents, and the outcome here turns on the answer to, that question, further review is warranted.

**A. Legal background**

The FTAIA governs the extraterritorial reach of U.S. antitrust law. Insofar as relevant here, the statute provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless * * * such conduct has a direct, substantial, and reasonably foreseeable effect" on commerce in the United States. 15 U.S.C. § 6a. This lan-

guage "initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach." *Empagran*, 542 U.S. at 162. "It then brings such conduct back within the Sherman Act's reach" (*ibid.*) if that conduct "has a direct, substantial, and reasonably foreseeable effect" on U.S. commerce (15 U.S.C. § 6a). As for the "import commerce" excluded from the FTAIA's restrictive scope, it remains subject to the pre-FTAIA test governing application of the Sherman Act to commerce with foreign nations, which requires a showing that the foreign conduct 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*") (L. Hand, J.). See *Hartford Fire*, 509 U.S. at 796.

As this Court recognized in *Empagran*, "the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, and perhaps to limit, but certainly not to *expand* in any significant way, the Sherman Act's scope as applied to foreign commerce." 542 U.S. at 169. But clarification was not Congress's only goal in enacting the FTAIA. The statute was passed during a time "when antitrust tensions between America and its trading allies were high." Jonathan T. Schmidt, *Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, 31 Yale J. Int'l L. 211, 222 (2006). Thus, Congress also intended the law to alleviate "foreign animosity toward U.S. antitrust enforcement" by "limit[ing] the reach of [the U.S.] antitrust laws in a manner consistent with [the interests of America's] major trading partners." *Foreign Trade Antitrust Improvements Act: Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong., at 2 (1981)

("*FTAIA Hearings*") (statement of Rep. Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary).

**B. Factual background**

1. Petitioners are producers of Canadian potash, a key fertilizer component. Because potash is of great importance to the economies of Canada and of the Canadian province of Saskatchewan, the Province has long encouraged potash exports through a joint export-marketing and distribution company called Canpotex Ltd. that is currently owned by three of the petitioners. See The Potash Production Tax Regulations (*The Mineral Taxation Act, 1983*) ch. M-17.1 Reg. 6 (Sask. 1990), http://tiny.cc/potash3.[1] It has been the consistent policy of the Saskatchewan Department of Mineral Resources to urge "[potash] producers intending to participate in offshore markets [to] become members of" Canpotex as a means of ensuring that the Department's regulation of the potash industry "work[s] effectively." *Cent. Canada Potash Co.* v. *Saskatchewan*, [1979] S.C.R. 42, ¶22 (Can.). These joint overseas sales are permitted by Canadian law. See Canadian Competition Act § 45(5); *In re Potash Antitrust Litig.*, 954 F. Supp. 1334, 1354 n.19 (D. Minn. 1997). While Canpotex sells to many overseas purchasers, respondents concede that Canpotex does not operate in the United States. See App., *infra*, 150a (¶31). Canpotex never-

[1] Saskatchewan is the single largest global producer of potash, responsible for about one-third of world production. Natural Resources Council, *Canada's Potash Industry*, http://tiny.cc/potash1. Potash is Canada's third largest mineral export by volume. Potash, *The Canadian Encyclopedia*, http://tiny.cc/potash2.

theless is named as a co-conspirator in the alleged price-fixing conspiracy. *Ibid.*

2. Respondents are direct and indirect purchasers of potash in the United States.[2] They contend that petitioners conspired to reduce output and to fix and raise the price of potash sold in the United States. App., *infra*, 143a (¶3).[3] But respondents did not allege that petitioners agreed to charge particular prices in the United States, or to limit or allocate sales to U.S. customers; the complaint did not allege "an American price or production quota for potash," "worldwide production quotas," or a "global cartel price." App., *infra*, 48a. Instead, as the United States characterized the complaint in the *amicus* brief it filed in support of neither party before the en banc court in this case, "[p]laintiffs alleged that the defendants 'coordinated price hikes in Brazil, China, and India,' which in turn increased the price of potash imported into the United States, because the price of potash in these foreign markets served as a 'benchmark' for U.S. sales." Br. for the United States and Federal Trade Commission 3-4, 7th Cir. No. 10-1712, *Minn-Chem, Inc.* v. *Agrium Inc.* ("U.S.-FTC Br.") (citation omitted). See App., *infra*, 155a (complaint ¶52), 164a-166a (¶¶90, 94-95), 169a-170a (¶111), 172a-174a (¶¶120, 123-124), 178a-179a (¶¶142, 144).

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[2] The direct purchasers' complaint, which in relevant respects is identical to that of the indirect purchasers, is reproduced in the appendix (at 142a-185a). We refer only to that complaint.

[3] The complaint alleged that petitioners conspired with potash producers from Russia and Belarus. App., *infra,* 143a, 161a-171a. The eastern European producers, which have a much smaller share of the U.S. market, settled with respondents after the en banc decision below.

In particular, petitioners' joint export sales through Canpotex to China, India, and Brazil were alleged to have had a spillover effect on the United States through a "chain of events resulting in increased prices throughout the world and in the United States." App., *infra*, 178a-179a (¶144).[4] As part of this multi-step chain, respondents said, "[t]he prices for cartelized term contracts [in China, India, and Brazil] become benchmarks for spot market sales" that "directly affect prices of potash in the United States." *Id.* at 169a-170a (¶¶111-112).[5]

Respondents did not suggest or describe any other mechanism by which coordinated sales overseas restricted competition in the United States. They did not, for example, allege that defendants agreed to charge specific foreign prices in, or limit sales into, the United States. They alleged only that transac-

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[4] The complaint asserted that, as an element of the agreement, petitioners limited the supply of potash. As characterized by the court below, these supply restrictions were aimed directly at overseas purchasers. "China was a particular target of the cartel's efforts, given its importance as a consumer. The shortages created by [certain defendants'] supply restrictions in the first half of 2006 induced China to accept an increase in the price of potash. Shortly thereafter, a similar price increase was implemented throughout the world." App., *infra*, 7a. See *id.* at 26a ("[t]he alleged supply reductions led to price hikes in these foreign markets [Brazil, India, and China]").

[5] Respondents' allegations concerning benchmarks are vague. They allege that overseas prices themselves serve as "benchmarks" for U.S. sales (App., *infra*, 169a-170a (¶111)), and also that prices appearing in *Green Markets*, a BNA weekly report, "are considered benchmark prices" in U.S. markets. App., *infra*, 171a (¶114). The complaints do not, however, allege that petitioners agreed to adhere to foreign prices in the United States.

tions in the United States, in some undefined manner, took account of prices charged elsewhere.

### C. Procedural background

Petitioners moved to dismiss the complaint, arguing (in relevant part) that respondents failed to allege either conduct "involving" U.S. import commerce (meaning the FTAIA applied to the allegations) or conduct having a "direct" effect on U.S. commerce (as required by the FTAIA in cases to which it applies).[6]

1. The district court denied the motions to dismiss in relevant part, concluding that petitioners' alleged overseas activity fell within the statute's parenthetical exclusion of conduct involving "import trade or import commerce." App., *infra*, 84a-85a. The court reasoned that, although the complaint did not allege the fixing of prices *for* U.S. sales, the allegation *of* potash sales in the United States, and of a conspiracy to fix prices separately in overseas markets, created a "tight nexus between the alleged illegal conduct and Defendants' import activities" so that "the former 'involved' the latter." *Ibid*. Having found petitioners' conduct to fall within the import-commerce exclusion, the district court declined to address whether the complaint alleged a direct effect on U.S. markets.

Recognizing that the FTAIA question is a close and contestable issue of law that controls the outcome of this case, however, the district court certified

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[6] Petitioners also unsuccessfully sought dismissal under *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), contending that the complaint failed adequately allege a violation of the antitrust laws. That issue is not before this Court.

the case for interlocutory appeal under 28 U.S.C. § 1292(b). App., *infra*, 132a-139a. The Seventh Circuit, "agree[ing] with th[e] [district] court's assessment of the importance of the issues presented," accepted the appeal. *Id.* at 1a. See *id.* at 140a-141a.

2. A panel of the Seventh Circuit reversed. App., *infra*, 30a-54a. It determined first that the FTAIA import-commerce exclusion did not apply here because "it is not enough that the defendants are engaged in the U.S. import market" and are alleged separately to have fixed prices abroad; for the exclusion to apply, "the defendants' alleged anticompetitive behavior [must be] directed at an import market.'" *Id.* at 48a (citations omitted). As for the direct-effect test that governs cases to which the FTAIA applies, the panel found "compelling" the Ninth Circuit's holding "that an effect is 'direct' if 'it follows as an immediate consequence of the defendant's activity,'" but not "'where it depends on * * * uncertain intervening developments.'" *Id.* at 49a-50a (quoting *United States* v. *LSL Biotechs.*, 379 F.3d 672, 680-681 (9th Cir. 2004)). Applying that standard, the panel held the direct-effect test not satisfied because the complaint offers only a "cryptic" "chain-of-events" theory of causation that "relies on too many intervening variables to suffice as support for application of the FTAIA's direct-effects exception." *Id. at* 53a.

3. The en banc court granted review and reached the contrary conclusion as to both FTAIA provisions. App., *infra*, 1a-29a.[7] Recognizing that "[w]hether this

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[7] The en banc court initially held that the FTAIA states a substantive and not a jurisdictional rule. App. *infra*, 9a-13a. That question is not now before this Court and has no bearing on the outcome here.

case can be entertained by a court in the United States turns * * * to a significant degree on the [FTAIA]," the en banc court explained that the case presents "two distinct questions of statutory interpretation": first, "how to define pure import commerce * * * that is not subject" to the FTAIA's direct-effect test; and second, "what it takes to show that foreign [non-import] conduct has a direct, substantial, and reasonably foreseeable effect on U.S. domestic or import commerce." *Id.* at 9a, 16a.

The court resolved the first question by observing simply that "[t]hose transactions that are directly between the plaintiff purchasers and the defendant cartel members *are* the import commerce of the United States in this sector," and that "[t]he FTAIA does not require any special showing in order to bring these transactions back into the Sherman Act." App., *infra*, 17a. The court went on to hold that "much of the Complaint alleges straightforward import transactions" to which the FTAIA is inapplicable, and that the complaint's allegations regarding those transactions are actionable because they satisfy the *Alcoa* standard. *Id.* at 17a, 21a. The court thus rejected the panel's view that the import-commerce exclusion applies only when the alleged overseas anticompetitive conduct involves importation.

Because "[s]ome of the activities alleged in the Complaint * * * may be best understood as sufficiently outside the arena of simple import transactions as to require application of the FTAIA," however, the en banc court then addressed the direct-effect exception and "the task of parsing the statute's central re-

quirements." App., *infra*, 18a-19a.[8] Here, the court found that "the requirements of substantiality and foreseeability are easily met." *Id.* at 19a. But the court recognized that "[t]he question that has caused more discussion among various courts and commentators is what it takes to show 'direct' effects" in the United States. *Id.* at 20a. That question, the court noted, has generated competing "school[s] of thought." *Ibid.* The first is the Ninth Circuit's view, which "borrowed the definition of the word 'direct' that the Supreme Court has adopted for a different statute, the Foreign Sovereign Immunities Act (FSIA)," under which an effect is "direct" only when "it follows as an immediate consequence of the defendant's [foreign] activity." *Ibid.* The opposing view is the more expansive one "articulated by the Department of Justice's Antitrust Division, which takes the position that, for FTAIA purposes, the term 'direct' means only a 'reasonably proximate causal nexus.'" *Ibid.*

Ultimately, the Seventh Circuit opined that "the Ninth Circuit jumped too quickly to the assumption that the FSIA and the FTAIA use the word 'direct' in the same way." App., *infra*, 21a. The court below instead adopted the Antitrust Division's "reasonably proximate causal nexus" standard, which the Seventh Circuit believed to be "more consistent with the language of the statute." *Ibid.* The court went on to

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[8] "For example," the court observed, "Canpotex is the unified marketing and sales agent for [petitioners] in all markets *except* Canada and the United States, yet its actions are an important part of the alleged scheme to set inflated benchmark prices," and "plaintiffs are seeking to hold firms like Canpotex jointly and severally liable for any damages the direct sellers might be ordered to pay." App., *infra*, 18a.

find this standard satisfied by respondents' allegations that "the defendants would first negotiate prices in Brazil, India, and China, and then they would use those prices for sales to U.S. customers":

> the cartel [allegedly] established benchmark prices in markets where it was relatively free to operate, and it then applied those prices to its U.S. sales. * * * It is no stretch to say that the foreign supply restrictions, and the concomitant price increases forced upon the Chinese purchasers, were a direct—that is, proximate—cause of the subsequent price increase in the United States.

*Id.* at 26a.

Thus, in the Seventh Circuit's view, it was sufficient under the FTAIA that "foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) sold that product to U.S. customers." App., *infra*, 29a. In reaching this conclusion, the court acknowledged that the joint overseas export sales addressed in the complaint are permitted by the laws of the defendants' home countries, noting dismissively that Canada and Russia "would logically be pleased to reap economic rents from other countries." *Id.* at 28a. The court also recognized that the United States *itself* permits U.S. companies to engage in "just that" kind of joint overseas sales activity through export trade associations authorized by the Webb-Pomerene Act (15 U.S.C. §§ 61 *et seq.*) and Export Trading Company Act (15 U.S.C. §§ 4001 *et seq.*). *Ibid.* But the Seventh Circuit did not view this long-standing U.S. policy as having any bearing on the proper interpretation of the FTAIA.

## REASONS FOR GRANTING THE PETITION

Congress enacted the FTAIA to clarify the Sherman Act's application to transactions that have a foreign component, while limiting the danger that U.S. antitrust litigation would irritate U.S. trading partners. But the holding below frustrates both of those purposes: It expressly rejects the Ninth Circuit's view on the meaning of the FTAIA's central provision and contributes to broader confusion about the statute's application. And by doing so in a manner that disregards considerations of international comity, the Seventh Circuit stated a rule that is sure to antagonize the foreign nations that authorized the very conduct now held below to be actionable in U.S. courts. Because this decision leaves the rules governing the extraterritorial reach of the U.S. antitrust law in a state of great uncertainty, cannot be reconciled with the FTAIA's plain text, and addresses a recurring issue of great practical importance, further review by this Court is in order.

### A. The courts of appeals are divided on the proper interpretation of the FTAIA.

At the outset, the decision below cannot be reconciled with the holdings of other courts of appeals. That conflict is cause for particular concern in the special circumstances of this case: Congress enacted the FTAIA precisely because it recognized the importance of clear and uniform rules governing international antitrust claims. Divergent approaches, meanwhile, permit forum shopping by antitrust plaintiffs, encourage baseless litigation that is enormously burdensome, and leave foreign businesses uncertain about how to conform their conduct to U.S. law. This Court should resolve the conflict.

*1. The Seventh Circuit's reading of the FTAIA's "direct-effect" test expressly conflicts with the Ninth Circuit's rule.*

The Seventh Circuit recognized that some of the conduct alleged in this case must be scrutinized under the FTAIA "direct-effect" test—but its application of that test expressly rejects the Ninth Circuit's approach.

Construing "what Congress meant by 'direct'" in the FTAIA, the Ninth Circuit held in *LSL Biotechnologies* that an effect is direct when it follows from the challenged activity "without deviation or interruption." 379 F.3d at 680 (quoting *Webster's Third New International Dictionary* 640 (1982)). "An effect cannot be 'direct,'" according to the Ninth Circuit, "where it depends on * * * uncertain intervening developments." *Id*. at 681. In reaching that conclusion, the court relied on *Republic of Argentina* v. *Weltover*, 504 U.S. 607 (1992), where this Court, interpreting identical language, held that foreign conduct "causes a direct effect in the United States" within the meaning of the FSIA when "it follows as an *immediate consequence* of the defendant's activity." *LSL Biotechs.*, 379 F.3d at 680 (emphasis added).

Applying the *Weltover* definition of "direct" to the facts of *LSL Biotechnologies*—and squarely rejecting the government's contrary contention that the word "[d]irect, in this context, invokes the concept of proximate causation" (Gov't Br. 15, *LSL Biotechs.*, http://tiny.cc/potash4)—the Ninth Circuit concluded that the effects in that case were *not* direct. The government there had contended that a foreign defendant's agreement not to develop a particular product had a "direct effect" in the United States because that agreement would withhold the (yet-to-be-devel-

oped) product from U.S. consumers; the court rejected that contention because an effect is not "direct" when it is "speculative" or "certainly not guaranteed." 379 F.3d at 681. Accord *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 560 (D. Del. 2006) (an effect is not direct if it results from a "chain" of events).

The Seventh Circuit did not suggest that the U.S. effects of petitioners' foreign conduct in this case satisfied this "immediate consequence" test. To the contrary, evidently recognizing that respondents' allegations do not meet the Ninth Circuit's standard, the court below expressly rejected the approach of *LSL Biotechnologies*, instead adopting the government's competing view that "the term 'direct' means only 'a reasonably proximate causal nexus'" (App., *infra*, 20a)—the very approach previously rejected by the Ninth Circuit. Having adopted this looser standard, the en banc court found the "direct-effect" test satisfied here: Because "potash is a homogeneous commodity" sold in a "global market" (*id.* at 1a-2a) with "uniform [prices] throughout the world" (*id.* at 20a), "the foreign supply restrictions, and the concomitant price increases forced upon the Chinese purchasers, were a direct—that is, proximate—cause of the subsequent price increases in the United States" (*id.* at 26a).

That conclusion cannot be squared with the Ninth Circuit's decision in *LSL Biotechnologies*. Had this case been litigated in that Circuit, the outcome would have been different: Respondents allege a concededly *in*direct theory of causation. *E.g.*, App., *infra*, 178a-179a (¶144) (describing "each *step* in the *chain of events* resulting in increased prices throughout the world and in the United States") (emphasis added).

Absent allegations of an agreement to charge particular prices in the United States or to forgo pricing independence in U.S. potash sales—allegations not made in the complaint—respondents' contention that petitioners' overseas pricing had an effect in the United States is "speculative" and "depends on * * * uncertain intervening developments." *LSL Biotechs.*, 379 F.3d at 681.

That the courts of appeals are in conflict on this question is not surprising. This Court "has never explained the relationship between the FTAIA and the older, judicially-created [*Alcoa*] effects test," leaving "unclear the extent to which the FTAIA is a codification of that test and the extent to which the FTAIA amends it." *McBee* v. *Delica Co.*, 417 F.3d 107, 119 n.8 (1st Cir. 2005). In fact, as we have noted, the Court has twice reserved that question, observing in *Hartford Fire* that it is "unclear" whether the FTAIA "amends existing law or merely codifies it" (509 F.3d at 796 n.23) and in *Empagran* that the statute "perhaps" limits existing law. 542 U.S. at 169. The result has been disagreement in the courts of appeals. Compare *United States* v. *Nippon Paper Indus.*, 109 F.3d 1, 4 (1st Cir. 1997) (*Hartford Fire* "declin[es] to place any weight on" the FTAIA in determining "Congress' intent to apply the Sherman Act extraterritorially") with *LSL Biotechnologies*, 379 F.3d at 679 ("applying the *Alcoa* test would render meaningless the word 'direct' in the FTAIA").

The precise meaning of the FTAIA test did not matter in *Hartford Fire* or *Empagran*, but it determines the outcome here. This Court accordingly should use this case to settle the issue reserved in those decisions.

*2. The lower court's "import-commerce" holding conflicts with decisions of the Second and Third Circuits.*

The court below also held that some of the conduct alleged in this case falls within the FTAIA's exclusion for "conduct involving * * * import trade or import commerce" because petitioners imported potash into the United States, even though the specific anti-competitive conduct alleged in the complaint (*e.g.*, joint sales and production restraints directed at China) occurred entirely overseas. Under the Seventh Circuit's reading of the FTAIA, the import-commerce exclusion applies, not to "conduct involving" U.S. import commerce, but to *parties involved in* such commerce (App., *infra*, 22a), and may be triggered even if the anticompetitive conduct underlying the suit is wholly foreign. *Id.* at 17a. But this approach is inconsistent with decisions of other circuits, which ask, for purposes of the FTAIA's import-commerce exclusion, whether the complained-of conduct is an element of the import sales and not whether the challenged foreign conduct merely has some possible effect on those sales.

*a.* The Third Circuit has explained that "the FTAIA differentiates between conduct that 'involves' * * * import commerce, and conduct that 'directly, substantially, and foreseeably' affects such commerce." *Turicentro, S.A.* v. *Am. Airlines Inc.*, 303 F.3d 293, 303 (3d Cir. 2002), overruled on unrelated grounds by *Animal Sci. Prods., Inc.* v. *China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011), cert. denied, 132 S. Ct. 1744 (2012). That court therefore understands the question whether conduct involves import commerce to be not whether the conduct merely *affects* or has an impact on import

transactions (a question subsumed by the separate direct-effect test), but whether the anticompetitive conduct itself "target[s] import goods or services" (*Animal Sci. Prods.*, 654 F.3d at 470) or is "directed at an import market" (*Turicentro*, 303 F.3d at 303-304). Because the "alleged conduct" in *Turicentro* "was directed at reducing the competitiveness of Costa Rican, Nicaraguan," and other "foreign-based" transactions, with only an alleged spillover effect on U.S. consumers, the Third Circuit found the import-commerce exclusion inapplicable. *Id.* at 302.

Similarly, the Second Circuit has explained that the "relevant inquiry" for determining when alleged foreign conduct falls within the import-commerce exclusion is "whether the conduct of the defendants * * * was directed at an import market," rather than "at controlling the prices they charged for their services in foreign [markets]." *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384, 395, 398-399 (2d Cir. 2002), abrogated on unrelated grounds by *Empagran*, 542 U.S. 155 (2004). In that case, "the focus" of the alleged conspiracy was "the charging of fixed commissions on the purchase and sale of goods at foreign auctions." *Id.* at 395. Because "the object of the conspiracy was the price that the defendants charged for their auction services" abroad, the Second Circuit found the import exclusion inapplicable notwithstanding possible domestic effects. *Id.* at 396.

Had this suit been brought in either the Second or Third Circuits, the import-commerce exclusion would have been deemed inapplicable because the specific anticompetitive conduct alleged in this case was "targeted" and "directed," not at U.S. commerce, but at *foreign* markets in Brazil, China, and India—as the court below recognized. App., *infra,* 7a,

16a-19a. The only connection asserted between that alleged foreign conduct and U.S. import commerce is an indirect spillover effect.

*b*. The court below departed from the approach not only of other circuits, but that of the United States. In their brief to the en banc Seventh Circuit, the United States and the FTC agreed with the *panel's* understanding of the import-commerce exclusion, explaining that, "[a]s the panel correctly observed, this exception does not apply merely because the defendants engaged in import commerce. * * * Rather, the *conduct being challenged* must itself 'involve' import trade or commerce." U.S.-FTC Br. 14.

Accordingly,

> a price-fixing conspiracy among foreign manufacturers "involve[s]" import commerce if the conspirators fix the price of goods sold in or for delivery to the United States—i.e., goods in import commerce. * * * Likewise, import commerce is involved if conspirators fix the price of services necessary to the importation of goods, for example, freight transportation into the United States. A group boycott or market allocation in which foreign participants agree not to sell into the United States also involves import commerce because the conspirators restrain import commerce by agreeing not to engage in it.

U.S.-FTC Br. 15. But, the government concluded, "the panel appears to have correctly understood the exception" when it "held that the import commerce exception did *not* apply [here] because the complaint failed to adequately allege that defendants agreed either 'to an American price or production quota' or

'to worldwide production quotas * * * or that a global cartel price was ever set.'" *Id.* at 19 (emphasis added).

This conclusion followed from the Justice Department's Antitrust Enforcement Guidelines. See Antitrust Enforcement Guidelines for International Operations (1995), http://tiny.cc/potash5. The Guidelines make clear that "sales in or into the United States" are not grist for a U.S. antitrust suit, even if the seller is a member of a global cartel, so long as "sales in or into the United States are not within the scope of the [cartel] agreement." Guidelines § 3.121 (ill. ex. C, var. 1). Indeed, "in the absence of an agreement with respect to the U.S. market, [non-predatory] sales into the U.S. market * * * do not raise antitrust concerns"; and "[t]he mere fact * * * that U.S. prices may ultimately be affected by the cartel agreement is not enough for * * * the FTAIA." *Ibid.* By nevertheless setting aside the panel's decision and ruling categorically that "trade involving only foreign sellers and domestic buyers (*i.e.*, import trade) is not subject to the FTAIA's extra layer of protection" (App., *infra*, 18a), the en banc decision rejected that rule and, accordingly, took an aberrational approach to the import-commerce exclusion.[9]

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[9] The government did take issue with specific language in the panel opinion that the government feared might lead future courts to require a subjective intent to harm U.S. imports. U.S.-FTC Br. 17-18. But the government recognized that "the panel did not require a subjective intent to restrain U.S. imports or a specific focus on U.S. imports." *Id.* at 19. The concerns raised by the government about the phrasing of the panel opinion therefore are not implicated by this case, as the government itself acknowledged. *Ibid.*

*3. This case is an appropriate vehicle for clarifying the meaning of the FTAIA.*

This case presents a suitable vehicle for resolving these conflicts about the meaning of the FTAIA. The Seventh Circuit acknowledged that the case involves commerce "with foreign nations," the threshold requirement for application of the statute. App., *infra*, 19a, 24a. The court also found expressly that resolution of the suit requires application of *both* the FTAIA's "import commerce" *and* its "direct-effect" provisions. *Id.* at 16a. There likewise is no doubt that the choice of test is outcome determinative: While the panel sided with the Second, Third, and Ninth Circuits on the questions presented and *reversed* the district court on that basis, the en banc court took the opposite approach and *affirmed* the order denying petitioners' motion to dismiss.

And there are compelling reasons for the Court to address these issues now. It is unlikely that another case raising these questions will come before the Court any time soon. That is not because the questions presented are infrequently litigated—to the contrary, the FTAIA is invoked regularly by litigants before the district courts.[10] Cases presenting the questions raised here nevertheless rarely make it to this Court because massive international antitrust suits often settle early on. Indeed, it is a commonplace that plaintiffs in sprawling antitrust cases like this one use the threat of expensive discovery as a club against "multibillion dollar corporation[s] with legions of management level employees." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 560 n.6 (2007). The

[10] A Westlaw search indicates that the FTAIA has been raised in dispositive motions in more than 50 cases since 2000.

prospect of engaging in such discovery, at "potentially enormous expense," "push[es] cost-conscious defendants to settle even anemic cases." *Id.* at 559. That is especially so in international lawsuits like this one, where discovery may involve the substantial additional burden of translating innumerable documents.

Moreover, the Sherman Act's liberal venue provisions will allow plaintiffs to bring suit in the Seventh Circuit against *any* firm conducting a national business. See 15 U.S.C. §§ 15, 22. Experience suggests that there will be no shortage of plaintiffs willing to take advantage of the opportunity to sue in a forum with favorable and malleable rules. Faced with similarly important questions, the Court has not hesitated to grant review in antitrust cases even absent the showing of a deep conflict among the lower courts that is present here. *E.g.*, *Weyerhaeuser* v. *Ross-Simmons Hardwood Lumber,* 549 U.S. 312 (2007); *FTC* v. *Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

### B. Proper interpretation of the FTAIA is a matter of enormous practical importance.

The need for review is particularly acute because the issues presented here are ones of substantial practical importance. As we have noted, the FTAIA is invoked frequently, most often in cases—like this one—involving claims of global conspiracy that individually are highly consequential in their own right.

And the context in which these cases arise greatly magnifies their significance. As the government acknowledged before the D.C. Circuit in *Empagran*, the extraterritorial "scope of the antitrust laws" is "an issue of exceptional and recurring importance."

Gov't Br. 7, *Empagran*, http://tiny.cc/potash6. That observation is equally true today. In the interconnected global economy, plaintiffs can easily allege a wide range of foreign conduct by U.S. importers that had some spillover effect on U.S. consumers; it has long been recognized, as Judge Learned Hand famously put it in *Alcoa*, that "[a]lmost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two." 148 F.2d at 443. If an antitrust suit need allege only a "reasonably proximate causal nexus" to state a claim that is actionable in the United States, there is little doubt that plaintiffs, attracted by the powerful lure of treble damages, attorneys' fees, liberal discovery, joint and several liability, class action procedures, and jury trials, will "flock to United States federal courts" (*DenNorske Stats Oljeselskap As* v. *HeereMac Vof*, 241 F.3d 420, 427 (5th Cir. 2001)) rather than pursue claims in the foreign nations whose consumers are the real targets of the challenged conduct. That risk is heightened by the vagueness and uncertainty that attends the court of appeals' novel "reasonably proximate causal nexus" standard.

Yet inviting these cases into U.S. court is sure to irritate U.S. trading partners, who want to regulate their own markets according to their own laws and policies. "No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165. As we have noted, relieving "foreign animosity toward U.S. antitrust enforcement" and mollifying "our closest allies and trading partners[,] [who] resent the extraterritorial reach of our antitrust laws," was a principal reason for the FTAIA's enactment.

*FTAIA Hearings*, at 2 (statement of Rep. Rodino). At the same time, a related motivation for passage of the FTAIA was to "encourage our trading partners to take more effective steps to protect competition in their markets." H.R. Rep. No. 97-686, at 14 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2499. And in fact, "nearly 100 jurisdictions now have comprehensive antitrust laws," and "nearly all" of these "ban cartels either civilly or criminally." R. Hewitt Pate, *The DOJ International Antitrust Program—Maintaining the Momentum*, Speech Before the ABA Section of Antitrust Law, at 6, 8 (Feb, 6, 2003), http://-tiny.cc/potash7.

But "even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies." *Empagran*, 542 U.S. at 167. Many countries have rejected treble damages, for example, as "one of the most unacceptable aspects of U.S. regulatory law." Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 Yale J. Int'l L. 219, 251 (2001). That policy choice should not be overridden by U.S. courts.

The prospect of foreign antagonism arising from suits such as this one is neither fanciful nor speculative. Other nations participated as *amici* before this Court in *Empagran* to complain about the ways in which an expansive extraterritorial application of U.S. antitrust law interferes with their domestic commerce. See *Empagran*, 542 U.S. at 167-168 (citing *amicus* briefs from Canada, Germany, and Japan that labeled "particularly troublesome" the potential "interfere[nce] with [foreign] governmental regulation of [foreign] market[s]"). The same danger is evident in this case. Petitioners' participation in a joint

export association—the central element of respondents' antitrust claim—is sanctioned by Canadian law. In fact, participation in Canpotex is affirmatively *encouraged* by the government of Saskatchewan as an "imperative" element of its economic regulations. *Cent. Canada Potash Co.,* [1979] S.C.R. 42, ¶22).[11] And while Canpotex does not engage in any anticompetitive activity in U.S. markets (App., *infra*, 150a (¶31), 159a (¶68)), respondents allege that participation in Canpotex, with respect to conduct directed entirely at foreign markets, may be used to establish liability under U.S. antitrust law. See App., *infra*, 162a-163a (¶¶80-86). Allowing use of the Sherman Act to outlaw foreign operations that are expressly approved and encouraged by the nations in which the defendants are based is precisely the sort of "legal imperialism" (*Empagran*, 542 U.S. at 169) that this Court has instructed U.S. courts to avoid.

If anything, the prospect that the decision below will create tension with our trading partners is greater here than it was in *Empagran*. As the Seventh Circuit acknowledged (App., *infra*, 28a), the United States permits coordinated export marketing by U.S. companies through organizations *just like Canpotex*, exempting U.S. participants in those organizations from U.S. antitrust scrutiny through the Webb-Pomerene Export Trade Act and the Export Trading Company Act. These laws allow U.S. companies to coordinate overseas sales of U.S.-made goods, exempt from scrutiny under the very same an-

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[11] Similar joint export operations by a since-settled defendant were approved by the government of Belarus, which, like Saskatchewan, encourages its potash producers to engage in joint export marketing. See Dkt. No. 224 Ex. 5.

titrust laws the Seventh Circuit now says apply to Canpotex. The double standard permitted by the decision below inevitably will foment tension and resentment between the United States and its trading partners. If that unfortunate outcome really is required by U.S. law, it should be this Court, and not the Seventh Circuit, that says so.

### C. The Seventh Circuit's interpretation of the FTAIA is wrong.

This Court's review of the decision below also is imperative because the Seventh Circuit's interpretation of the FTAIA is incorrect. That holding devotes much of its attention to the court of appeals' understanding of economic theory, while ignoring the statute's text and purpose—and affirmatively disparaging the serious international comity concerns that are central to the proper interpretation of the FTAIA.

#### *1. The Seventh Circuit's construction of the direct-effect test is incorrect.*

We begin with the Seventh Circuit's construction of the direct-effect test. Here, the FTAIA's language is unambiguous: the Sherman Act "shall not apply to conduct involving trade or commerce * * * with foreign nations unless such conduct has a direct, substantial, and reasonably foreseeable effect on [domestic] trade or commerce." 15 U.S.C. § 6a (paragraph designations omitted). The decision below ignored the plain meaning of this text.

*a.* Perhaps most fundamentally, *direct* simply does not mean *reasonably proximate causal nexus*. "When a term goes undefined in a statute, [courts must] give the term its ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002

(2012). That meaning typically is determined by reference to "the relevant dictionaries." *Id.* at 2003. That is the approach taken by the Ninth Circuit in *LSL Biotechnologies*. In defining the word "direct" as used in the FTAIA, that court turned to an authoritative "dictionary published contemporaneously with the enactment of the FTAIA" and concluded that the meaning of the word "direct" is "proceeding from one point to another in time or space without deviation or interruption." 379 F.3d at 680 (quoting *Webster's Third New International Dictionary* 640 (1982)).

The Ninth Circuit bolstered the dictionary definition by pointing to this Court's consonant construction of the FSIA, which uses a phrase identical to the FTAIA in providing for jurisdiction in U.S. court over a foreign sovereign when the action "is based * * * upon an act outside the territory of the United States * * * that causes a *direct effect* in the United States." 28 U.S.C. § 1605(a)(2) (emphasis added). Construing the words "direct effect" in that statute, which is similar to the FSIA in both vintage (it was enacted in 1976) and subject matter (the power of federal courts to resolve disputes touching on foreign interests), this Court in *Weltover* explained that the domestic effect of extraterritorial conduct "is direct if it follows as an *immediate consequence* of the defendant's activity." 504 U.S. at 618 (emphasis added; alteration and quotation marks omitted). On this understanding, the Ninth Circuit held that "[a]n effect cannot be 'direct'" within the meaning of the FTAIA when, as here, "it depends on * * * uncertain intervening developments." *LSL Biotechs.*, 379 F.3d at 681.

*b.* In rejecting the Ninth Circuit's reasoning in *LSL Biotechnologies*, the Seventh Circuit believed that "the Ninth Circuit jumped too quickly to the as-

sumption that the FSIA and the FTAIA use the word 'direct' in the same way." App., *infra*, 21a. The court below thought it "[c]ritical[]" (*ibid*.) that, in construing the FSIA, *Weltover* rejected the petitioner's contention in that case that "an effect is not 'direct' unless it is both 'substantial' and 'foreseeable'" because those words did not appear in that statute. 504 U.S. at 617. "No one needs to read the words 'substantial' and 'foreseeable' into the FTAIA," the Seventh Circuit concluded, because "Congress put them there, and in so doing, it signaled that the word 'direct' used along with them had to be interpreted as part of an integrated phrase." App., *infra,* 21a.

This conclusion, however, gets matters backwards. While it doubtless is true that "a word is given more precise content by the neighboring words with which it is associated" (*Freeman* v. *Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012)), Congress's separate inclusion of the words "substantial" and "reasonably foreseeable" in the FTAIA confirms that the word "direct" in that statute does *not* merely reprise those concepts; it must add an additional requirement. Yet the Seventh Circuit's interpretation of "direct" reduces the accompanying terms to surplusage, as it is difficult to imagine when conduct that has a "reasonably foreseeable" and "substantial" U.S. effect will not also have a reasonably proximate causal nexus with that effect. There accordingly is no basis for the Seventh Circuit's otherwise unexplained conclusion "the Department of Justice's [proximate cause] approach is more consistent with the language of the statute." App., *infra*, 21a.

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it

says." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). If Congress had intended to require a "reasonably proximate" effect rather than a "direct" one, it could have used the term "proximate" in the FTAIA, as it has in numerous other statutes. See, *e.g.*, 15 U.S.C. § 7903(5)(A)(v); 18 U.S.C. § 38(b)(2); 21 U.S.C. § 1606(a)(1)(A); 42 U.S.C. § 3796(a). It tellingly did not.

*c.* The Seventh Circuit's approach to the direct-effect test is also fundamentally inconsistent with the purpose of the FTAIA "to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce." *Empagran*, 542 U.S. at 169. Here, the court of appeals' reading of the FTAIA turns these policies upside down: it both muddles and expands the extraterritorial scope of the antitrust laws.

To begin with, courts have long recognized that the doctrine of proximate cause is "difficult to comprehend." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2637 (2011). "[C]ommentators have often lamented the degree of disagreement regarding the principles of proximate causation and confusion in the doctrine's application." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 838 (1996). Indeed, the concept is so confusing and unhelpful that the most recent Restatement of Torts abandoned use of the term "proximate cause" altogether. See *Restatement (Third) of Torts*, ch. 6, Special Note on Proximate Cause (2011).

Against this background, what it means to have a "reasonably proximate causal nexus"—evidently, a watered-down version of an already confusing concept, embodied in a term that does not appear in any statute and, so far as we have been able to deter-

mine, has never before been used by a court in this context—is wholly obscure. Accordingly, "reasonably proximate causal nexus" cannot be the meaning that Congress enacted when it sought to achieve a "straightforward *clarification* of existing American law" to *resolve* "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction." H.R. Rep. No. 97-686, at 2, 5, 1982 U.S.C.C.A.N. at 2488, 2490 (emphasis added).

The "reasonably proximate causal nexus" standard also risks greatly expanding the scope of the antitrust law prevailing at the time of the FTAIA's enactment. The "direct-effect" test traces back to the seminal decision in *Alcoa*. And in that decision, Judge Hand, writing for the Second Circuit, rejected the sort of ripple-effect theory of liability permitted by the Seventh Circuit's holding here: although "[a]lmost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two[,] * * * Congress certainly did not intend the [Sherman] Act to cover them." *Alcoa,* 148 F.2d at 443. The complaint here—upheld under the Seventh Circuit's amorphous standard—is predicated on precisely such a theory of indirect repercussions.[12]

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[12] The U.S. Department of Commerce's guidelines for U.S. export trade associations (whose foreign activities are also subject to the FTAIA) are similarly inconsistent with the Seventh Circuit's holding below. The Department will not approve an association whose foreign activities create "unreasonable domestic price effects"—but, according to the Department's guidelines, "an effect on domestic prices resulting from export sales that are a legitimate business response to demand in foreign mar-

*2. The Seventh Circuit's construction of the import-commerce exclusion is incorrect.*

The Seventh Circuit also erred in its application of the import-commerce exclusion. The statute provides that the Sherman Act "shall *not* apply to *conduct involving* trade or commerce (*other than* import trade or import commerce) with foreign nations." 15 U.S.C. § 6a (emphases added). The meaning of this double negative, inelegant though it may be, is clear: The Sherman Act "applies to conduct 'involving' import trade or import commerce with foreign nations." *Turicentro*, 303 F.3d at 301. Thus, for the import-commerce exclusion to apply, the challenged anti-competitive "conduct" must *itself* involve "import trade or import commerce." As the Third Circuit put it, the "proper inquiry" under the FTAIA's import exclusion is "whether the * * * *conduct* * * * *being challenged as violative of the Sherman Act[]* 'involved' import trade or commerce." *Carpet Group Int'l* v. *Oriental Rug Importers Ass'n*, 227 F.3d 62, 71 (3d Cir. 2000) (emphasis added). An agreement to fix the price of products sold in the United States, or to refrain from selling to certain customers or in certain locations in the United States (as alleged, for example, in *Hartford Fire*), satisfies this requirement; an agreement to engage in conduct abroad that is unrelated to particular U.S. import transactions does not.

The Seventh Circuit below rewrote the import-commerce exclusion to mean something very different: In its view, the exclusion applies (and the FTAIA therefore does not apply) whenever a defendant sells its product in the United States. Thus, ac-

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kets, will in itself not constitute" an impermissible domestic effect. See *The Export Trade Certificate of Review Program—The Competitive Edge for U.S. Exporters*, http://tiny.cc/potash8.

cording to the Seventh Circuit, an alleged foreign conspiracy accomplished entirely through overseas anti-competitive activity is actionable under the Sherman Act without regard to the FTAIA (and therefore with no showing of a "direct" effect on U.S. commerce) even where there is no contention that the defendants jointly set import prices or allocated the U.S. market, so long as the defendant also made "import sales" of the product. App., *infra*, 17a-18a, 22a. That, however, is not what the FTAIA says. For the FTAIA to be inapplicable under the import exclusion, the anticompetitive "conduct" said to be actionable must *itself* be an element of the import commerce.

The Seventh Circuit's interpretation of the import-commerce exclusion likewise ignores this Court's frequent admonition that a court "must consider the provision's entire text, read as an integrated whole." *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (quotation marks omitted). Here, the import-commerce exclusion operates alongside the FTAIA's *separate* exception for foreign conduct having a "direct, substantial, and reasonably foreseeable effect" on U.S. import commerce. For a very large category of companies—those that import goods into the United States—the Seventh Circuit's reading of the import-commerce exclusion reads the direct-effect test out of the FTAIA altogether.

The most natural reading of the import-commerce exclusion, taken in context, is therefore to exempt a narrowly defined range of conduct from the FTAIA's reach—*import transactions* that are *themselves* alleged to have been unlawfully restrained—leaving the direct-effect test to govern all other alleg-

edly anticompetitive foreign trade activity that separately *affects* such transactions. As the Third Circuit explained,

> the FTAIA differentiates between conduct that "involves" [import] commerce, and conduct that "directly, substantially, and foreseeably" affects such commerce. To give the latter provision meaning, the former must be given a relatively strict construction.

*Turicentro*, 303 F.3d. at 304 (quoting *Carpet Group*, 227 F.3d at 72). The Seventh Circuit's expansive reading of the import-commerce exclusion disregards that principle.

*3. The Seventh Circuit disregarded the serious international comity concerns at issue in this case.*

Finally, in construing both the direct-effect and the import-commerce provisions, the Seventh Circuit paid no heed to the serious international comity considerations implicated by its expansive reading of the FTAIA and the maintenance of this particular lawsuit. The court of appeals thus dismissed the interests of other nations as immaterial, complaining that "Canada and Russia * * * would logically be pleased to reap economic rents from other countries." App., *infra*, 28a. But to the extent that there is any room for disagreement concerning the meaning of the FTAIA, comity counsels strongly in favor of the narrower interpretation.

Courts must "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164; see also *Restatement (Third) of Foreign Relations Law of the United States* § 403 (1987). This cen-

tral rule of statutory interpretation "assume[s] that legislators take account of the legitimate sovereign interests of other nations when they write American laws" (*Empagran*, 542 U.S. at 164), and "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord" (*EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

The holding below, however, cuts the FTAIA loose from this principle. The Seventh Circuit's rule would open U.S. courts to many complex antitrust disputes based on overseas activity of only indirect interest to the United States, activity that likely is already governed by the competition laws of the countries where the challenged conduct had its principal effect. Cf. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (rejecting the "parochial concept that all disputes must be resolved under our laws and in our courts"). Of course, the United States has an interest in resolving disputes with international implications when the challenged conduct restrains U.S. imports or otherwise has a direct and substantial domestic impact—but the Seventh Circuit's loose construction of the FTAIA will allow imposition of liability without such showings.

If nations like China, India, and Brazil—the countries where the sales at issue in this case actually took place—wish to enforce antitrust regulations against such conduct, they are capable of doing so. See Donald Baker, *Antitrust and World Trade: Tempest in an International Teapot*, 8 Cornell Int'l L.J. 16, 41 (1974). But "if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, [this Court]

must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat." *Empagran*, 542 U.S. at 169. Accordingly, to the extent there is any doubt, ambiguity must be resolved against offense to international comity. The Seventh Circuit's express refusal to take account of the interests of U.S. trading partners confirms the need for review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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