No. 14-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTOROLA MOBILITY LLC,
Plaintiff-Appellant,

v.

AU OPTRONICS CORP., et al.,
Defendants-Appellees

UNOPPOSED MOTION OF THE AMERICAN ANTITRUST INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

The American Antitrust Institute (AAI) respectfully moves to file the accompanying brief as amicus curiae in support of appellant's petition for rehearing en banc. Pursuant to Fed. R. App. P. 29(a), amicus sought the consent of all parties to the filing of this brief. The Plaintiff consents to this filing, and the Defendants take no position. The brief contains 10 pages of written text and 3351 words as specified under Fed. R. App. 32(a)(7)(B)(iii).

AAI is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of more than 125 prominent antitrust lawyers, law professors, economists, and business leaders. AAI frequently appears as amicus curiae in important antitrust cases, including, for example, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009), in which it participated in oral argument before the Supreme Court, and *Minn-Chem, Inc. v. Agrium, Inc*., 683 F.3d 845 (7th Cir. 2012), in which it participated as amicus

curiae in support of en banc rehearing to address issues closely related to the issues involved in this case.

AAI requests leave to submit the accompanying brief in support of appellant's petition for rehearing en banc because the panel decision unduly narrows the application of the Sherman Act as it applies to foreign conduct that adversely affects American consumers, conflicts with this Court's en banc decision in *Minn-Chem*, and undercuts the enforcement of the antitrust laws against international cartels.

The panel's decision throws up new hurdles to the U.S. prosecution of international cartels and private actions that are a necessary component of the deterrence mission of the U.S. antitrust laws. Antitrust enforcement against international cartels is a critical priority of the Justice Department, having resulted in billions of dollars in fines against foreign companies that have caused even more billions of dollars of harm to American businesses and consumers. Yet they continue to plague the U.S. economy.

AAI's proposed brief will be helpful to the court because it provides a broad perspective on the implications of the panel's decision on antitrust enforcement generally, and advances arguments that are complementary to those made by the appellants and other amici.

For the foregoing reasons, AAI's motion for leave to file the accompanying amicus curiae brief should be granted.

Respectfully submitted,

s/ Richard Brunell

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April 24, 2014

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

s/ Richard M. Brunell

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

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

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CORPORATE DISCLOSURE STATEMENT

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

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April 24, 2014

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INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

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

This Court's en banc opinion in *Minn-Chem, Inc. v. Agrium, Inc.* held that foreign anticompetitive conduct may be actionable under the "domestic effects" exception of the Foreign Trade Antitrust Improvements Act (FTAIA) if the foreign conduct proximately causes domestic effects that give rise to a Sherman Act claim, rejecting an interpretation that required such effects to "follow[] as an immediate consequence" of the foreign harm. 683 F.3d 845, 857 (7th Cir. 2012). *Minn-Chem* confirmed that the FTAIA's "directness" inquiry focuses on whether "foreign activities are too remote from the ultimate effects on U.S. domestic or import commerce." *Id.* at 857. By contrast, the panel held that foreign price fixing of components sold overseas and incorporated into products imported to the United States cannot "directly" harm U.S. commerce, without regard to proximate cause. In one stroke, the panel re-interpreted the statutory text of the FTAIA to equate directness with immediacy, and it introduced a "super" *Illinois Brick* rule as the new "directness" standard under the domestic effects exception. Whereas *Illinois Brick* bars indirect purchasers of price-fixed components from recovering damages from foreign cartels as a matter of antitrust standing, the panel's rule also bars direct purchasers and the government, as well as indirect purchasers seeking alternative relief, from redressing such harm as a matter of law under the FTAIA.

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[1] The Board of Directors of AAI alone has approved this filing for AAI. Individual views of board members or members of the Advisory Board may differ from AAI's positions. Pursuant to Fed. R. App. P. 29(c)(5), amicus states that no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity – other than AAI or its counsel – has contributed money that was intended to fund the preparation or submission of this brief. Kenneth Adams, who is one of the attorneys representing appellant, is a member of AAI's Advisory Board, but he played no role in the Directors' deliberations or the drafting of the brief.

This was a serious error of law with potentially grave consequences for U.S. businesses and consumers. Deterrence of international cartels that adversely affect American victims is already woefully inadequate. If harm to American purchasers of price-fixed components sold overseas is categorically eliminated as a basis for the "extraterritorial" application of the Sherman Act, deterrence of foreign cartels will only be further undermined. Accordingly, the Court should grant en banc review to consider whether domestic harm to U.S. indirect purchasers of price-fixed components provides a basis for applying the domestic effects exception or the import exclusion of the FTAIA.

ARGUMENT

I. THE PANEL'S CRABBED READING OF THE FTAIA'S DOMESTIC EFFECTS EXCEPTION UNDERMINES DETERRENCE OF FOREIGN CARTELS THAT HARM U.S. BUSINESSES AND CONSUMERS

International cartels are a scourge of American commerce. The Justice Department "has prosecuted international cartels affecting billions of dollars in U.S. commerce" in numerous sectors of the world economy, cartels "cost[ing] U.S. businesses and consumers billions of dollars annually." Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, *Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program*, Remarks Presented at the 56th Annual ABA Spring Meeting 17 (March 26, 2008). In recent years, the Department has prosecuted and obtained billions of dollars in fines from international cartels involving air transportation (affecting over $20 billion in U.S. commerce), auto parts (affecting over $8 billion in U.S. commerce and more than 25 million cars), and liquid crystal display panels at issue in this case (affecting over $23 billion in U.S. commerce). Statement of William J. Baer, Assistant Att'y Gen., Antitrust Div., and Ronald T. Hosko, Assistant Director, Criminal Investigative Div., Federal Bureau of Investigation, Before

the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights 4-7 (Nov. 14, 2013).

The U.S. antitrust laws, and the criminal and private enforcement provisions of the Sherman Act in particular, were specifically designed to deter this kind of injury to the American economy, but effective deterrence requires penalties that exceed ill-gotten profits, adjusted for the likelihood of getting caught. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev 427, 429 (2012). An exhaustive survey of cartel detection literature shows that, conservatively, detection rates are at most 25-30%, meaning price-fixing cartelists have about a 75% chance of getting away with their crimes. *Id.* at 462-65. Because secret, foreign price-fixing agreements are so difficult to uncover, the ratio of a cartel's total economic penalties for getting caught relative to the amount of monopoly profits it can extract from American consumers (the "penalty-to-harm ratio") must exceed 400% to adequately deter international cartels that would otherwise prey on Americans. *See* John M. Connor, *Private Recoveries in International Cartel Cases Worldwide: What do the Data Show?* 16 (Am. Antitrust Inst., Working Paper No. 12-03, Oct. 2012).

The collective efforts of the Justice Department and private attorneys general, while laudable, have not come close to achieving this level of deterrence. Combining fines and payments resulting from both government and private cases, on average the penalty-to-harm ratio for international cartels operating in the United States does not even reach 100%. *Id.* at 15. In other words, on average it is currently *net profitable* for international cartels to illicitly appropriate American wealth from U.S. consumers, including if they are caught. Even without the panel's ruling, international cartels will pay less for their crimes than they will make by committing them.

The situation has been getting worse, not better. From 2000-2010, as compared to 1990-1999, the penalty-to-harm ratio for international cartels has significantly *declined*. *Id.* In the United States, the average ratio declined by 40% during that time. *Id.* Predictably, international cartels are proliferating. Over the last 15 years, 91 of the 97 cases yielding DOJ corporate fines of $10 million or more involved international cartels, the bulk of which produced intermediate goods incorporated into other goods. *See* U.S. Dep't of Justice, Antitrust Division, *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More* (Feb. 11, 2014). The Antitrust Division has had to reallocate resources to focus on international cases involving larger volumes of commerce, and it typically has approximately 50 international cartel investigations open at a time. Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't Of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Remarks Presented at the 24th Annual National Institute on White Collar Crime 3 (Feb. 25, 2010).

The panel's opinion would categorically bar application of the FTAIA's domestic effects exception, while also denying application of the import commerce exclusion,[2] where foreign cartels sell component goods overseas to be incorporated into finished goods imported into the United States. This result would seriously undermine the deterrence mission of the U.S. antitrust laws because it would eliminate *both* public and private enforcement actions in these instances, reducing the already insufficient deterrence value of these cases to $0.

International cartels selling industrial intermediate goods account for the large majority of all cartel sales worldwide. John M. Connor & C. Gustav Helmers, *Statistics on Modern Private International Cartels, 1990-2005*, at 17 (Am. Antitrust Inst. Working Paper No. 07-01 (Jan. 2007). American consumers, who are direct purchasers of the end product and indirect purchasers of

[2] The panel did not expressly address the import exclusion, but it was raised in connection with the petition for interlocutory appeal, and the panel's holding presumes the exclusion does not apply.

the intermediate goods, ultimately bear the cost of higher input prices. *See, e.g.*, Herbert Hovenkamp, *The Antitrust Enterprise* 307 (2005) ("Typically the final consumer is the one most seriously injured by cartel or monopoly prices, while retailers and intermediaries have relatively minor injuries caused by lost volume of sales."). Indeed, the panel fully recognized that "[t]he stakes are large," as "[n]othing is more common" than the inclusion of foreign-sold intermediate goods in finished U.S. products, "the prices of many" of which "are elevated to some extent by price fixing or other anticompetitive acts." Slip op. at 7-8. Yet the panel's opinion will send a clear signal to intermediate goods manufacturers abroad that insofar as they do not export their products directly to the United States, they are free to appropriate American wealth in this enormous global industrial sector, without interference from the U.S. antitrust laws.

II. THE PANEL ERRED BY REJECTING THE *MINN-CHEM* PROXIMATE CAUSE STANDARD IN FAVOR OF A "SUPER" *ILLINOIS BRICK* RULE

Minn-Chem held that "[t]he word 'direct' addresses the classic concern about remoteness," which is to avoid "'punish[ing] . . . conduct which has no consequences within the United States.'" 683 F. 3d at 857 (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (Learned Hand, J.)). The Court rejected the standard for "directness" used in cases arising under the Foreign Sovereign Immunities Act, which requires that a "direct" effect must "follow as an immediate consequence of the defendant's activity," because "[s]uperimposing the idea of immediate consequence . . . results in a stricter test than the complete text of the [FTAIA] can bear." *Id.* (internal quote marks omitted). "To demand a foreseeable, substantial, and 'immediate' consequence on import or domestic commerce comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA's coverage." *Id.* Accepting the Justice Department's proposed standard instead, the Court held that, for purposes of the FTAIA, "the term 'direct' means only a 'reasonably proximate causal nexus.'" *Id.* (citation

omitted); *see also id.* at 859 (foreign supply restrictions "were a direct—that is, proximate—cause of . . . price increases in the United States").

The panel's holding reverses course, replacing the *Minn-Chem* "proximate cause" standard with an *Illinois Brick* standard that embraces the "immediacy" requirement the *en banc* Court explicitly rejected. The panel held that the "effect of [foreign] component price fixing on the price of the [domestic] product of which it is a component" is "remote" insofar as it is "indirect," without regard to whether the effect proximately causes U.S. domestic injury. Slip op. at 4-5. Likewise, the panel holds that a domestic effect of foreign component price-fixing "could not give rise to" a Sherman Act claim because "[t]he effect . . . on [domestic] commerce . . . is mediated by Motorola's decision on what prices to charge U.S. consumers . . . ." *Id.* at 6.

Implicitly, the panel has adopted a "directness" standard from the *Illinois Brick* indirect-purchaser rule of antitrust standing doctrine, which *categorically* bars indirect purchasers from recovering damages under the Sherman Act. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 726 (1977) (defining "indirect" purchaser as antitrust victim whose injury "passes through . . . [a] separate level[] in the chain of distribution"). The panel's *Illinois Brick* standard for "directness" closely approximates the immediacy requirement rejected by *Minn-Chem* because it limits "direct" injuries to those injuries that are the immediate result of a cartel overcharge. This standard is *a fortiori* a departure from the *Minn-Chem* proximate cause standard, because courts have long recognized that anticompetitive harm can proximately cause injury to indirect purchasers, including those positioned similarly to the consumers who bought from Motorola. *See, e.g., Mid-west Paper Products Co. v. Continental Group, Inc.*, 596 F.3d 573, 592-93 (3d Cir. 1979) (holding that price-fixing conspiracy proximately caused injury to indirect purchasers for purposes of injunctive relief, and noting that indirect purchasers are not merely "remotely affected by the ripples caused by" the conspiracy); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct.

1377, 1394 (2014) (proximate cause satisfied under Lanham Act even though "the causal chain linking [plaintiff's] injuries to consumer confusion is not direct"); *cf.* Dan B. Dobbs, *The Law of Torts* 452 (2000) ("The distinction between direct and indirect causes could very well be abolished, leaving courts merely to ask whether the injury that occurred was within the risk created by the defendant [that liability was intended to address].").[3]

The panel's standard makes no economic sense and leads to absurd results, because it confines the "directness" inquiry to the locus of the sale rather than the locus of the sale's effects.[4] Under the panel's standard, the availability of the FTAIA domestic "effects" exception depends inevitably on where the cartel's sale to the first (direct) purchaser takes place, rather than where that sale's effects were substantial and reasonably foreseeable. Suppose Motorola were the exclusive seller of smart phones, and suppose all smart phones were sold exclusively in the United States. Suppose further that the Motorola parent had one foreign subsidiary that was the exclusive foreign manufacturer of smart phones, and suppose defendants sold 100% of the cartelized panels to Motorola's lone foreign subsidiary for assembly overseas and shipment to the United States as components of end-product phones. Under the panel's standard, the U.S. domestic effect of importing 100% of all extant smart phones containing 100% of all extant cartelized panels would be *incapable* of causing anything more than "a few ripples in the United States," because it is "indirect." Slip op. at 5.

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[3] Were it otherwise, the sizeable majority of state antitrust law regimes that allow suits by indirect purchasers, and the Supreme Court's decision recognizing the validity of those regimes, would be anomalous. *See California v. ARC America Corp.*, 490 U.S. 93, 102 (1989) (state laws permitting indirect purchaser recovery "are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct").

[4] Moreover, the panel's *Illinois Brick* standard erroneously focuses on "who" is injured (direct v. indirect purchaser), rather than "where" the anticompetitive effects are felt. The former is a question of standing, which is independent of the FTAIA, a statute that "relate[s] to the merits of a [Sherman Act] claim." *Minn-Chem*, 683 F.3d at 848.

The panel's rejection of the *Minn-Chem* proximate cause standard in favor of an *Illinois Brick* standard serves neither the underlying principles of the FTAIA nor those of *Illinois Brick*. The FTAIA sought to assure exporters that they are free to form anticompetitive agreements that adversely affect only foreign markets, and to recognize the United States' adherence to comity principles. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). The Supreme Court, however, has left little doubt that the Sherman Act still applies to "*domestic* antitrust injury that foreign anticompetitive conduct has caused." *Id.* at 165; *cf. Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314 (1978) ("Congress' foremost concern in passing the antitrust laws was the protection of Americans") (internal quotation and citation omitted).

The panel's overriding concern was that applying the Sherman Act to price fixing of intermediate goods sold abroad and incorporated into finished products imported to the U.S. would offend principles of comity, creating "friction" and "resentment" toward the United States. Slip op. at 8. But the panel's elevation of comity concerns in these circumstances is inexplicable, because no principle of comity is served by permitting Americans to be injured in the United States by international cartels. *Empagran*, 542 U.S. at 165. Moreover, where, as here, the Justice Department has brought a criminal complaint against an international cartel, judicial comity concerns arguably have no place at all in the analysis. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.2 (April 1995) ("In cases where the United States decides to prosecute an antitrust action, such a decision represents a determination by the Executive Branch that the importance of antitrust enforcement outweighs any relevant foreign policy concerns. The Department does not believe that it is the role of the courts to second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.") (internal quotation marks omitted).

Applying an *Illinois Brick* standard to the FTAIA also turns the policies of *Illinois Brick* on their head. *Illinois Brick* and *Hanover Shoe* sought to promote deterrence. The Supreme Court reasoned that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers," *Illinois Brick*, 431 U.S. at 735, because wrongdoers would be less likely to "retain the fruits of their illegality" for want of an economically motivated challenger to bring suit, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968); *see also BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 756 (7th Cir. 2011) ("By allowing a windfall to the direct purchasers . . . the law gives them a greater incentive to sue, which should increase deterrence, which should benefit the indirect purchasers indirectly.").

Insofar as *Hanover Shoe* and *Illinois Brick* ask who would be the most effective or efficient "enforcer" of the U.S. antitrust laws, the answer cannot be "nobody." "In *Illinois Brick*, the Court was concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws . . . , but rather that *at least some party* have sufficient incentive to bring suit." *ARC America*, 490 U.S. at 102 n.6 (emphasis added); *see Illinois Brick*, 431 U.S. at 746 ("'[F]rom the deterrence standpoint, it is irrelevant to whom damages are paid, so long as *someone* redresses the violation.'" (quoting dissent)) (emphasis added). However, if indirect purchasers, because of *Illinois Brick*, cannot bring suit against international cartels that increase end product prices in the U.S., and direct purchasers of components abroad—who are their surrogates under *Illinois Brick*—*also* cannot bring suit because of the FTAIA,[5] and the government likewise cannot sue,

[5] While *Illinois Brick* bars damages suits by indirect purchasers under Section 4 of the Clayton Act, there is no reason that harm to indirect purchasers cannot "give rise to a claim under the provisions of sections 1 to 7 [of the Sherman Act]," as the FTAIA requires. Although the panel improperly applied an *Illinois Brick* standard to the "gives rise to" prong, it did recognize that a plaintiff need only prove the domestic effect gives rise to "an antitrust claim," slip op. at 5, at least where the foreign effect is not independent of the domestic harm, *see Empagran*, 542 U.S. at 162, 173-74.

then common cartel conduct will be completely undeterred by the Sherman Act. And foreign jurisdictions have no incentive to police what to them is essentially export commerce, much as the United States does not. *See Minn-Chem*, 683 F.3d at 860 ("The host country for the [export] cartel will often have no incentive to prosecute it"). Moreover, while foreign jurisdictions are moving slowly towards permitting private remedies for antitrust violations, those jurisdictions generally do not have a *Hanover Shoe* rule prohibiting a pass-on defense, nor a class action device that would enable indirect purchasers to recover for their harm.[6] Perversely, then, in those jurisdictions, the more that direct purchasers abroad pass on to American indirect purchasers, the less cartelists will be deterred. And if they pass on the full 100% of the overcharge to American indirect purchasers, the panel's ruling means there would be no deterrence whatsoever from the U.S. government or injured victims at home and abroad. That the panel's ruling leads to such a senseless result is reason enough to warrant en banc review.

CONCLUSION

For the foregoing reasons, and those stated in appellant's petition for rehearing en banc, the petition should be granted.

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[6] *See, e.g.*, European Union, Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, Apr. 9, 2014 (requiring Member States to adopt laws allowing both indirect purchaser claims and pass-on defense, but not requiring collective redress mechanisms).

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

s/ Richard M. Brunell