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

IN THE

United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HUI HSIUNG,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HSUAN BIN CHEN,

Defendant-Appellant.

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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS HUI HSIUNG AND HSUAN BIN CHEN

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REPLY BRIEF FOR DEFENDANTS-APPELLANTS HUI HSIUNG AND HSUAN BIN CHEN

INTRODUCTION

The government does not contest that the foreign conduct alleged in this case far overshadowed domestic activity. Nor could it, given that the trial focused on foreign defendants who allegedly met in a foreign country to fix prices for foreign-made components sold to foreign-based entities and shipped from one foreign jurisdiction to another. Instead, the government contends that the foreign nature of this case has no relevance. But both the Supreme Court and this Court

have confirmed that the foreign aspects of a case matter tremendously. It dictates not only how foreign conduct should be assessed under the Sherman Act, but also whether that conduct is even capable of being prosecuted under the Act. This Court should faithfully apply those precedents and reverse defendants' convictions.

This Court need look no further than its own opinion in *Metro Industries, Inc.* v. *Sammi Corp.*, 82 F.3d 839 (1996), to understand why the foreign nature of this case matters. There, the Court definitively held 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. Yet the district court here allowed the jury to convict on a *per se* theory of antitrust liability. The government cannot harmonize that ruling with this Court's holding in *Metro Industries*, which is why it buries its discussion of that case in the middle of its 159-page brief. Even then, the government never seriously grapples with *Metro Industries*, instead offering several imaginative takes on the case that have no basis in its text, facts, or reasoning—all of which boil down to the groundless claim that this Court could not *really* have meant to apply rule-of-reason analysis to foreign price-fixing. But that reading bears no resemblance to what this Court actually said. Because the government cannot avoid *Metro Industries*' clear holding or its equally clear application to this case, defendants' convictions must be reversed.

The government fares no better with extraterritoriality. Although the government insists the Sherman Act applies abroad, it does not identify the requisite clear statement of extraterritoriality in the statutory text. Instead, it rests on the Supreme Court's offhand comment in *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764 (1993), that the Sherman Act applies abroad. But that isolated sentence is no longer good law under recent Supreme Court precedent clarifying the scope and strength of the presumption against extraterritoriality. As the Supreme Court held last month in *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013), "to rebut the presumption, [a statute] would need to evince a 'clear indication of extraterritoriality'"—and the Sherman Act has none. In any event, *Hartford Fire*, a civil case, does not govern this criminal case.

Even under the broadest reading of *Hartford Fire*, the district court ignored key territorial limits by instructing the jury that a single overt act in the United States creates U.S. jurisdiction over a conspiracy that is foreign in all other respects. The government makes no effort to square the one-overt-act instruction with the Supreme Court's repeated observation—including most recently in *Kiobel*—that prohibited extraterritorial applications of U.S. law frequently feature *some* domestic conduct. Nor can the government show beyond a reasonable doubt that the jury did not convict because of the flawed instruction. For this reason, too, the convictions cannot stand.

Finally, the government fails to show why venue was proper in the Northern District of California. The government offered no evidence whatsoever that negotiations of price-fixed panels occurred in the district, even though the prosecutor assured jurors in rebuttal summation that this fact was in evidence. That mischaracterization requires reversal, as does the absence of any other evidence of venue in the trial record.[1]

ARGUMENT

I. DEFENDANTS' CONVICTIONS VIOLATE *METRO INDUSTRIES.*

In discussing *Metro Industries*, the government spends precious little time focusing on what this Court actually said. And no wonder: *Metro Industries*' bright-line holding—"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"—demonstrates that this *per se* prosecution was fatally flawed. 82 F.3d at 845. None of the government's arguments against applying this holding withstands scrutiny.

1. The government first maintains that when this Court said it "appl[ies] rule of reason analysis" to foreign conduct, *id.*, it did not *really* mean that rule-of-reason analysis applies. Under the government's reading, this Court was merely

[1] Dr. Hsiung and Mr. Chen also adopt and incorporate by reference the arguments raised in the joint reply brief of co-defendants AUO and AUOA.

"restat[ing]" the requirement that an extraterritorial application of the Sherman Act must have a substantial and intended domestic effect. Gov't Br. 95.

But that is not what the Court said. It said that it would henceforth "apply rule of reason analysis" in cases involving foreign conduct. 82 F.3d at 845. Moreover, the Court justified that bright-line rule by reference to traditional rule-of-reason concerns, explaining that foreign restraints may "have more persuasive justifications than are likely in similar restraints at home." *Id*. (internal quotation marks omitted). And the Court observed that foreign conduct "might be more 'reasonable' than a comparable domestic transaction"—a classic rule-of-reason analysis. *Id*. In short, the Court focused on the justifications for foreign conduct, not just the quantum of its impacts.

The government cannot square these passages with the argument that *Metro Industries* simply repackaged the substantial-and-intended-effect test. And while *Metro Industries* indeed touched on the effects of foreign conduct, those sentences accord with the decision's emphasis on reasonableness. The rule of reason, after all, requires "an inquiry into market power and market structure *designed to assess the combination's actual effect*." *Copperweld Corp.* v. *Ind. Tube Corp.*, 467 U.S. 752, 768 (1984) (emphasis added).

The government's reading of *Metro Industries* is so untenable that the government never urged it below, even though the parties debated the meaning of

Metro Industries in motions to dismiss, post-trial motions, and motions for bail pending appeal. Not once in any of those district court filings did the government argue that when *Metro Industries* said it "appl[ies] rule of reason analysis" to foreign conduct, 82 F.3d at 845, it instead meant to restate the substantial-and-intended-effects test. This Court should reject the government's new position because it flatly contradicts what *Metro Industries* actually says.

2. The government next contends that *Metro Industries* cannot require rule-of-reason analysis for price fixing because price fixing is *per se* illegal. Gov't Br. 96-97.[2] That makes no sense. This Court's whole point in *Metro Industries* was that "[e]ven if" *per se* analysis would apply if anticompetitive conduct "occurred in a domestic context, application of the *per se* rule is not appropriate

[2] Similarly, the government argues that *Metro Industries* did not "hold that foreign price-fixing conspiracies * * * are judged under special substantive rules." Gov't Br. 102. But it did. According to this Court, rule-of-reason analysis applies to *all* foreign conduct—including "price fixing in a foreign country." 82 F.3d at 845 (internal quotation marks omitted). That "broad rule" 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). And that is why courts and commentators have recognized that *Metro Industries* applies to foreign price fixing. *See United States* v. *Nippon Paper Ind. Co.*, 62 F. Supp. 2d 173, 193 (D. Mass. 1999) (reading *Metro Industries* to hold 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"); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 273b, at 331 (3d ed. 2006) ("[I]n *Metro Industries*, the Ninth Circuit concluded that a rule of reason inquiry is necessary in all cases involving restraints abroad."). Beyond resisting *Metro Industries*' holding, the government offers no response to defendants' showing that the district court's unforeseeable departure from binding precedent violated due process—which independently requires reversal. *See* Opening Br. 35-37.

where the conduct in question occurred in another country." *Id.* at 844-845. *Metro Industries* thus squarely considered—and rejected—the government's argument that a foreign restraint must be outlawed *per se* if an identical domestic restraint would be *per se* illegal: "The fact that foreign conduct would be a per se offense * * * when entirely domestic" does not change the fact that "Foreign Conduct Cannot Be Examined Under the Per Se Rule." *Id.* (some internal quotation marks omitted).

3. The government reprises the same basic error by insisting that "the contemplated analysis" under *Metro Industries* does not "include[] consideration of possible justifications for price fixing." Gov't Br. 96. To be clear: Under the *per se* rule, courts do indeed ignore justifications for price fixing. But because *Metro Industries* displaced that inflexible rule with rule-of-reason analysis when the challenged conduct is foreign, the jury should have been allowed to consider "possible justifications" for the alleged price fixing, just as it would when analyzing the reasonableness of any other conduct under that rubric.

Indeed, *Metro Industries* emphasized that factfinders *must* consider the justifications for foreign conduct. The Court recognized that "the parties' necessities may be greater in view of foreign market circumstances," that "the alternatives" to a challenged restraint "may be fewer, more burdensome, or less helpful," and that foreign restraints may "have more persuasive justifications than

are likely in similar restraints at home." 82 F.3d at 845 (internal quotation marks omitted). Nothing in the opinion suggests that these statements apply to every *per se* offense *except* price-fixing. Just the opposite: The Court specifically singled out "price fixing in a foreign country" as an example of conduct to which the bright-line rule requiring rule-of-reason analysis would apply. *Id.*

Nor does *Metro Industries* "conflict[] with Supreme Court precedent" in this regard. Gov't Br. 98 n.16. The Supreme Court has never considered whether *per se* or rule-of-reason analysis governs restraints involving foreign conduct. Even in the domestic sphere, the Court has not invariably applied the *per se* rule to price fixing. For example, in *NCAA* v. *Board of Regents of University of Oklahoma*, the Court analyzed "restraints on the ability * * * to compete in terms of price" under the rule of reason because the case involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all"; thus, the Court "consider[ed] [the defendant's] justifications for the restraints." 468 U.S. 85, 101, 103 (1984). Similarly, in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, the Court applied rule-of-reason analysis to alleged price fixing, stating that the question is not "whether two or more potential competitors have literally 'fixed' a 'price,'" but whether the "particular practice * * * is plainly anticompetitive *and without redeeming virtue*." 441 U.S. 1, 9 (1979) (internal quotation marks omitted and emphasis added). The government's

claim that "no circumstances justify price fixing" and that a "price-fixing conspiracy is never reasonable," Gov't Br. 97, 111, is not the law. *NCAA*, *Broadcast Music*, and *Metro Industries* all prove that.

4. The government next suggests that *Metro Industries* applies only in cases "involv[ing] wholly foreign conduct that ha[s] no impact on U.S. commerce." Gov't Br. 101. But that formulation appears nowhere in *Metro Industries*. Nor is it consistent with the facts of that case: The conduct was not wholly foreign, and its "impact * * * [wa]s felt * * * in the United States." 82 F.3d at 847.

To be sure, the conduct in *Metro Industries* was *predominantly* foreign—just like this case. But *Metro Industries* involved a *U.S. plaintiff* who helped design a product for the *U.S. market* and sued a foreign defendant (with substantial *U.S. business*) and its *U.S.* subsidiaries, claiming that all three defendants used a design-registration system to interfere with sales *in the United States*. *See* 82 F.3d at 841, 843, 847. "Only in Superman Comics' Bizarro world, where reality is turned upside down, could the [government] reasonably conclude" that this qualifies as wholly foreign conduct with no impact on U.S. commerce. *Natural Res. Def. Council, Inc.* v. *Daley*, 209 F.3d 747, 754 (D.C. Cir. 2000). The government's take on *Metro Industries* thus has to be wrong, since it would contradict not only what this Court said but what it did.

5. Unable to evade *Metro Industries*, the government claims waiver. But its waiver objection is historical revisionism. After all, the government does not dispute that defendants invoked *Metro Industries* early and often—before trial, during trial, and after trial. Opening Br. 34-35. And the government also does not dispute that the district court refused to apply *Metro Industries* each and every time. Against all this, the government maintains that defendants somehow "invited" the district court's error by stipulating to jury instructions on a *per se* theory of liability at the end of trial. Gov't Br. 103.[3]

Not so. The government's novel waiver theory ignores both precedent and the practicalities of litigation. Had defendants objected to the *per se* jury instruction, the district court would have done exactly what it did every other time defendants raised *Metro Industries*: deny the objection. This Court does not demand that pointless exercise: "[W]here the substance of an objection has been thoroughly explored" and "the trial court's ruling was explicit and definitive," then "the issue is preserved for appeal." *United States* v. *Palmer*, 3 F.3d 300, 304 (9th Cir. 1993).

[3] The government misleadingly suggests that defendants affirmatively "sponsored" the instructions. Gov't Br. 105. But the district court ordered the parties to jointly agree on instructions with objections kept to a minimum. FER 2535. Defendants either had to raise a futile objection that would antagonize the district court or stipulate to the government's *per se* instructions. There was no option to "merely remain silent." Gov't Br. 105.

That rule makes good sense. Timely objections give the district court "an opportunity to cure any potential errors in the first instance." *Id.* But "[w]here the trial court has left no possibility of a different ruling on a renewed objection, there is no requirement that the 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). Defendants thus had no obligation to renew a well-worn objection that "would [have] be[en] a pointless formality." *United States* v. *Kessi*, 868 F.2d 1097, 1102 (9th Cir. 1989) (internal quotation marks omitted).

The pointlessness of the objection runs deeper still because instructions on the rule of reason *at the end of trial* could not have cured the error that already took place *during trial*: preventing defendants from pursuing a rule-of-reason defense. Objections to jury instructions are intended to "bring possible errors to light while there is still time to correct them without entailing the cost, delay and expenditure of judicial resources occasioned by retrials." *Bertrand* v. *S. Pac. Co.*, 282 F.2d 569, 572 (9th Cir. 1960). The damage here was already done by trial's end; asking for a rule-of-reason instruction when the defense had been precluded from putting on rule-of-reason evidence would have been useless.

Nor does the invited-error doctrine foreclose defendants from raising *Metro Industries* on appeal. The government cites no case holding that a defendant invites error after repeatedly—and unsuccessfully—objecting to it. No surprise

there. The invited-error doctrine applies only when a defendant purposefully "relinquish[es] a known right." *United States* v. *Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc). That happens when the defendant "propose[s] or accept[s] a flawed instruction" for "some tactical or other reason" despite knowing of "the controlling law." *Id.* Here, the district court repeatedly held that *Metro Industries* was *not* controlling law. Because the government cannot show that defendants "affirmatively acted to relinquish a known right," *id.*, the waiver claim is meritless.

II. THE SHERMAN ACT DOES NOT APPLY EXTRATERRITORIALLY TO CRIMINALIZE DEFENDANTS' FOREIGN CONDUCT.

1. "When 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). The Supreme Court reaffirmed this point just weeks ago in *Kiobel*, emphasizing that "to rebut the presumption, [a statute] would need to evince a clear indication of extraterritoriality." 133 S. Ct. at 1665 (internal quotation marks omitted). Yet the government never does what the presumption requires: identify the particular statement in the Act that "clearly expresse[s]" congressional intent to extend the statute abroad. *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*).

a. The government first suggests that the Sherman Act "fully support[s]" a finding of extraterritoriality by outlawing conduct "in restraint of trade or commerce among the several States, or with foreign nations," 15 U.S.C.

§ 1. Gov't Br. 67. But that jurisdictional provision is nothing more than "boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas." *Aramco*, 499 U.S. at 251. "Many Acts of Congress are based on the authority of that body to regulate commerce" and so "refer to such commerce in one way or another"—but if this were enough to "override the presumption against extraterritorial application, there would be little left of [it]." *Id.* at 253. The Supreme Court has therefore "repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply abroad." *Morrison*, 130 S. Ct. at 2882 (quoting *Aramco*, 499 U.S. at 251).

b. The government alternatively contends that the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, demonstrates that the Sherman Act extends to foreign conduct. According to the government, the FTAIA—which provides that the Sherman Act generally does not apply to "conduct involving trade or commerce (other than import trade or commerce) with foreign nations"—would not "have been necessary" if "the Sherman Act had no extraterritorial reach" to begin with. Gov't Br. 75.

Once again, the Supreme Court has rejected textual inferences identical to this one. In *Morrison*, the government argued that a provision of the Securities Exchange Act that made the Act inapplicable to individuals "transact[ing] a

business in securities without the jurisdiction of the United States" except in certain circumstances "would have no function if the Act did not apply in the first instance to securities transactions that occurred abroad." *Id.* at 2882 (internal quotation marks omitted). The Supreme Court disagreed: "[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." *Id.*[4]

Similarly, the petitioners in *Aramco* argued that Title VII applied beyond U.S. borders because one section provided that the act "shall not apply to an employer with respect to employment of aliens outside any State," 42 U.S.C. § 2000e-1. Like the government here, the petitioners claimed that "[i]f Congress believed that the statute did not apply extraterritorially, it would have had no reason to include an exemption for a certain category of individuals employed outside the United States." *Aramco*, 499 U.S. at 253 (internal quotation marks omitted). But the Supreme Court refused to apply Title VII extraterritorially

[4] The government argues that this provision was "directed at only one part of the Exchange Act" while "the FTAIA relates to the entire Sherman Act." Gov't Br. 75-76. But the provision in *Morrison* actually made the entire Exchange Act plus all rules and regulations promulgated under it inapplicable to foreign conduct except in delineated circumstances, just like the FTAIA. 130 S. Ct. at 2882. More importantly, the arguments made here and in *Morrison* are identical: that a provision would be unnecessary if the statute did not apply extraterritorially in the first place. *Morrison* rejected *that* argument.

"[w]ithout clearer evidence of congressional intent to do so than is contained in the alien-exemption clause." *Id.* at 255.

The reasoning in these cases applies with even greater force to the FTAIA, which was concerned with exempting certain *domestic* conduct from the Sherman Act and not extending jurisdiction over *foreign* conduct. *See* Gov't Br. 75 (explaining that the FTAIA was enacted to "remedy th[e] problem" of applying the Sherman Act to Americans whose anticompetitive conduct in the United States affects only export commerce); *see also Hartford Fire*, 509 U.S. at 796-797 n.23 (same). As the floor sponsor of the FTAIA described the statute, "it draws a circle around the antitrust laws and states that nothing outside the circle is covered. *But there is no implication whatsoever that everything inside the circle is covered.*" 128 Cong. Rec. H18,953 (daily ed. Aug. 3, 1982) (statement of Rep. McClory) (emphasis added). In other words, the FTAIA "establish[es] a rule for noncoverage, not a rule for coverage." *Id.*

In the end, the best that can be said for the FTAIA is that it is *possible* to infer that Congress *might* have intended the Sherman Act to apply extraterritorially. But the Supreme Court has expressly held that a "proposed inference" of extraterritorially is not enough because "possible interpretations of statutory language do not override the presumption against extraterritoriality." *Morrison*, 130 S. Ct. at 2883. The Court drove that point home last month in

Kiobel when it held that the Alien Tort Statute (ATS) does not apply to foreign conduct. The ATS "was enacted with foreign matters in mind. The statute's text refers explicitly to 'alien[s],' 'treat[ies],' and 'the law of nations.'" 133 S. Ct. at 1672 (Breyer, J., concurring in judgment) (some internal quotation marks omitted). Moreover, "the text reaches '*any* civil action,'" and it uses the word "torts," which the petitioners argued "'necessarily meant to provide for jurisdiction over extraterritorial transitory torts that could arise on foreign soil.'" *Id.* at 1665 (majority opinion). Yet the majority found that none of these possible interpretations of the statute sufficed: "[N]othing in the text of the ATS evinces the requisite clear indication of extraterritoriality." *Id.* at 1666. The same is true of the Sherman Act.

2. Because the Sherman Act contains no clear statement of extraterritoriality, the government's principal response is to urge this Court not to look for one. According to the government, this Court need not (futilely) search for extraterritoriality language in the Sherman Act because *Hartford Fire* excuses that inquiry. But the government offers no persuasive response to defendants' argument that *Morrison* (now strengthened by *Kiobel*) abrogated *Hartford Fire*'s passing comment that the Sherman Act applies extraterritorially.

a. The government first maintains that "the application of *Morrison*, a civil case, to this criminal case is doubtful." Gov't Br. 69. That is—to say the

least—ironic, given the government's later insistence that courts must interpret the Sherman Act identically in the civil and criminal contexts. *See* Gov't Br. 77 (finding "no support for the claim that the Sherman Act's extraterritorial reach should be different in civil and criminal cases"). But even casting that inconsistency aside, the government's claim fails on its own terms. *Morrison* clarified that the presumption against extraterritoriality applies across-the-board to all statutes, civil or criminal: "[W]e apply the presumption in *all* cases, preserving a stable background against which Congress can legislate with predictable effects." 130 S. Ct. at 2881 (emphasis added). This Court got the message; earlier this year, it found that the criminal provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) do not extend extraterritorially under "*Morrison*'s rationale." *United States* v. *Chao Fan Xu*, 706 F.3d 965, 974 (9th Cir. 2013).

In arguing to the contrary, the government selectively quotes from *United States* v. *Bowman*, 260 U.S. 94 (1922). According to the government, *Bowman* held that "the presumption against extraterritoriality 'should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction.'" Gov't Br. 69. But the government omits the rest of that sentence, which qualifies the quoted language with an all-important "but." Here is what the Supreme Court actually said: The presumption "should not be applied to criminal statutes which are, as a class, not logically dependent on their

locality for the government's jurisdiction, *but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents*." 260 U.S. at 98 (emphasis added). *Bowman* thus permits the extraterritorial application of criminal statutes absent a clear statement in the statutory text only for "acts that are directly injurious to the government." *Skiriotes* v. *Florida*, 313 U.S. 69, 73-74 (1941). For example, the *Bowman* exception applies when a criminal defendant steals government property located abroad, *United States* v. *Cotten*, 471 F.2d 744, 750 (9th Cir. 1974), impersonates U.S. government officials in a foreign country, *United States* v. *Aguilar*, 756 F.2d 1418, 1424-25 (9th Cir. 1985), or assists in the kidnapping and murder of a U.S. government agent overseas, *United States* v. *Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991). "On the other hand, where Congress intended a law to punish only crimes against private individuals, the law may not be extended to encompass crimes occurring outside the territorial jurisdiction of the United States." *Aguilar*, 756 F.2d at 1424-25 (citing *Bowman*, 260 U.S. at 97-98).

Indeed, *Bowman* draws this distinction between crimes against the government and crimes against individuals using the Sherman Act itself. In contrast to the extraterritoriality analysis for crimes that directly injure the government, *Bowman* cited antitrust laws as an example of "[c]rimes against

private individuals or their property," including "frauds of all kinds," which "must, of course, be committed within the territorial jurisdiction" of the nation attempting to punish the conduct. 260 U.S. at 98. When it comes to the Sherman Act, *Bowman* left no doubt that "[i]f punishment * * * is to be extended to include those [acts] committed outside of the strict territorial jurisdiction, 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." *Id.*

b. The government next insists that *Morrison* did not disapprove an effects-based test of extraterritoriality. Gov't Br. 73. But it did for statutes lacking a clear statement of extraterritorial application. For those statutes, the Supreme Court held that effects in the United States do not justify applying the law abroad, even if a court believes this is "what Congress would have wanted if it had thought of the situation." 130 S. Ct. at 2881. That doesn't just make the effects test "unnecessary," as the government maintains, Gov't Br. 73; it makes the effects test improper. To be sure, Congress has the *power* to extend a law extraterritorially based on U.S. effects—and the government's authorities recognize this basis for prescriptive jurisdiction. But *Morrison* held that Congress must exercise this power explicitly. "When a statute gives no clear indication of an extraterritorial application, it has none"—even if the foreign conduct produces domestic effects. 130 S. Ct. at 2878.

c. The government next invites this Court to punt the extraterritoriality issue, contending that the argument is "directed at the wrong court." Gov't Br. 67. But an isolated sentence in *Hartford Fire* does not pretermit this Court's obligation to apply *Morrison*'s binding holding. The dispute in *Hartford Fire* focused on comity, not the extraterritorial application of the Sherman Act, and the parties did not brief the question of congressional intent to extend the Act abroad; indeed, the petitioners "concede[d]" that the Sherman Act applied extraterritorially. *Hartford Fire*, 509 U.S. at 795. The Court's discussion of extraterritoriality was limited to a single sentence that did not consider the statutory text or the strong presumption against extending U.S. law to foreign conduct. Because *Morrison* has now confirmed that the presumption applies "in all cases," 130 S. Ct. at 2881, this Court need not wait for permission from another tribunal before recognizing that *Morrison* abrogated *Hartford Fire*'s offhand remark about the scope of the Sherman Act. *See Ledo Fin. Corp.* v. *Summers*, 122 F.3d 825, 828 (9th Cir. 1997) (declining to apply a Supreme Court case when "[t]wo recent Supreme Court decisions * * * have called into question" whether the prior case remained good law).

3. In any event, *Hartford Fire* does not govern this criminal case, where the presumption against extraterritoriality carries even more weight. The government says virtually nothing to the contrary.

a. Citing a Supreme Court dissent and a plurality decision applying the rule of lenity in a civil case, the government vacillates[5] and insists that "interpreting a criminal statute in a civil setting establishes its authoritative meaning." Gov't Br. 76 (internal quotation marks omitted). But the government offers no authority suggesting that criminal defendants can be *deprived* of lenity through rote application of an interpretation first rendered in the civil context, where the court never considered the lenity rule. Indeed, by the government's logic, courts adjudicating civil antitrust disputes would have to consider lenity in every case—even though this contradicts a century of Sherman Act jurisprudence. *See* Areeda & Hovenkamp, *supra*, ¶ 303b4, at 41 (the Sherman Act's "generality of purpose and function could never have been achieved had the courts interpreted and applied the Sherman Act in the manner of a criminal statute").

b. The government's argument also contradicts the Supreme Court's decision in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 435 (1978),

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[5] The government cannot make up its mind whether it really believes that a statute imposing civil and criminal sanctions must have parallel meanings in both contexts. Just months ago, it submitted a Second Circuit brief disagreeing with the argument that "the text of a statute can have only one authoritative meaning in its criminal and civil applications." Brief for the United States in *United States* v. *Mandell*, Nos. 12-2090, 12-1967, 2012 WL 6811426, at *41 (2d Cir. Dec. 20, 2012). "In recognition of the different interests at stake in criminal and civil cases," the government contended that "[t]he very same statutory language [can] give[] rise to different elements depending on whether there is a civil action or a criminal case"—including different "standard[s] for extraterritorial application." *Id.* at *41-43. That is exactly right.

where the Court modified the elements of antitrust liability depending on whether a suit is criminal or civil. The government dismisses *Gypsum* as a case that invoked a "legal tradition that criminal liability—unlike civil liability—must ordinarily be premised on malevolent intent." Gov't Br. 77. But the government misses the point. *Gypsum* demonstrates that the *exact same words* in the Sherman Act can assume different meanings depending on whether a case is civil or criminal. *Gypsum* thus eviscerates the government's claim that the Sherman Act's text is so inflexible that the statute can never be interpreted differently in civil and criminal cases. It already has—by the Supreme Court, no less.

c. The government next contends that there is no stronger presumption of extraterritoriality in the criminal sphere; rather, "the presumption against extraterritoriality articulated in *Morrison* must be applied statute by statute and should not vary from the civil to the criminal context." Gov't Br. 78. Numerous authorities have recognized that a more robust presumption applies in criminal cases given that "the exercise of criminal (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive." Restatement (Third) of Foreign Relations Law § 403, Reporters' Note 8 (1986); Opening Br. 49-52. But in any event, the government gains nothing by arguing that courts in criminal cases apply the "ordinary presumption," Gov't Br. 79, because the Sherman Act's criminal prohibitions contain no clear statement of

extraterritoriality. They therefore do not extend abroad even under the regular rule.

4. The government's final bid to get this Court to ignore the extraterritoriality issue is to claim the argument waived and to contend that extraterritoriality analysis is unnecessary whenever a single act has occurred in the United States. Neither contention has merit.

a. The government's waiver claim misreads the record, as defendants argued from the outset that the prosecution was flawed because the alleged conspiracy was foreign in all essential respects. ER 1683-1691. Defendants also pressed the extraterritoriality point in their post-trial motions, ER 489-497; ER 528-529, and in their requests for bail pending appeal, FER 2527-29; FER 2506-07. While the government now alleges waiver, it *conceded* in the district court that the extraterritoriality issue had been "extensively briefed and argued" on multiple occasions. FER 2493. The district court did not agree with defendants' extraterritoriality claim on the merits, but it never found that argument waived. Rather, the district court observed that it "ha[d] repeatedly held that the Sherman Act applies to foreign conduct that was intended to produce, and did in fact produce, an effect in the United States." ER 199. Because the court made clear from the inception of this prosecution that it believed the Sherman Act applied to defendants' foreign conduct, defendants were not required to "engage in a futile

and formalistic ritual" of repeatedly objecting "to preserve the issue for appeal." *Varela-Rivera*, 279 F.3d at 1177-78.

Nor can the government show that defendants "affirmatively acted to relinquish a known right" and so invited error in the jury instructions on extraterritoriality. *Perez*, 116 F.3d at 845. The government notes that defendants told the district court that the substantial-and-intended effects test "is a correct statement of the *Hartford Fire* requirements" and a jury instruction on it "should be given." Gov't Br. 65 (quoting ER 1216). But by then, the district court "ha[d] repeatedly held" that the *Hartford Fire* substantial-and-intended-effects test applied. ER 199. Defendants "were entitled to accept the judge's ruling as final and to take all proper steps [they] deem[ed] necessary to obtain the best possible defense" without waiving their initial objections. *United States* v. *Arlt*, 41 F.3d 516, 523-524 (9th Cir. 1994). And to pursue their best possible defense, defendants tried (unsuccessfully) to convince the district court that it should not wrongly instruct jurors that a single overt act in the United States suffices to extend the Sherman Act extraterritorially; it was only in contrast to this erroneous one-overt-act instruction that defendants maintained that the jury should instead be instructed on the *Hartford Fire* substantial-and-intended-effects test. ER1216. Defendants were not "relinquish[ing] a known right," *Perez*, 116 F.3d at 845; they

were simply attempting to keep the district court from committing additional reversible instructional error. *See infra*, at 28-34.

In any event, this Court need not sift through the record to determine who said what when about which arguments because courts must address extraterritoriality issues even when the parties have not squarely raised them. That is because extending U.S. law abroad touches on the institutional competence of courts and implicates foreign-relations concerns that transcend individual rights in a particular case. As the Supreme Court just emphasized in *Kiobel*, the vindication of extraterritoriality principles protects against "unwarranted judicial interference in the conduct of foreign policy" and "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." 133 S. Ct. at 1664.

For these reasons, courts have considered extraterritoriality limits on federal power even when the parties have not squarely presented that question. That happened in *Kiobel*, where the Supreme Court held that the ATS does not apply extraterritorially even though the issue was not raised or decided below. *See id.* at 1666; Brief for Respondents in *Kiobel*, No. 10-1491, 2012 WL 259389, at *53 (Jan. 27, 2012) (conceding extraterritoriality was not pressed or passed upon in the lower courts). And this Court, too, recently held that RICO does not apply extraterritorially even though the defendants did not raise that issue in the district

court. *Chao Fan Xu*, 706 F.3d at 974-975; Defendants' Consolidated Reply Brief in *Chao Fan Xu*, Nos. 09-10189, 09-10193, 09-10201, 09-10202, 2011 WL 7461677, at *xiii (conceding that RICO's extraterritorial application "was not raised below"). In this circumstance, given the critical foreign-relations interests at stake, courts are "not limited to the particular legal theories advanced by the parties, but rather retain[] the independent power to identify and apply the proper construction of governing law, even where the proper construction is that a law does not govern." *In re Greene*, 223 F.3d 1064, 1068 n. 7 (9th Cir. 2000) (quoting *U.S. Nat'l Bank* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993)).

b. The government fares no better with its claim that this case does not implicate extraterritoriality principles at all because at least one overt act occurred domestically. Gov't Br. 65. The same argument was raised—and rejected—in *Morrison*. There, the Supreme Court observed that "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." 130 S. Ct. at 2884. "But the presumption against extraterritorial application would be a craven watchdog indeed it if retreated to its kennel whenever *some* domestic activity is involved in the case"; instead, the presumption must be applied any time the conduct that is the "focus" of the statute occurs beyond U.S. borders. *Id.*; *see also Kiobel*, 133 S. Ct. at 1669 ("[E]ven where the

claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.").

As this Court recently recognized, *Morrison* "defined the concept of focus in terms of the 'objects of the statute's solicitude' and 'th[e] transactions that the statute seeks to regulate.'" *Chao Fan Xu*, 706 F.3d at 975. Thus, "a cause of action falls outside the scope of the presumption—and thus is not barred by the presumption—only if the event or relationship that was 'the focus of congressional concern' under the relevant statute takes place within the United States." *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring). Applying this analysis to the Sherman Act, it has long been settled that the "essence of any violation of § 1 is the illegal agreement itself—rather than the overt acts performed in furtherance of it." *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 330 (1991). A Sherman Act conspiracy becomes complete the moment the illegal agreement is consummated; "an overt act is not required for antitrust conspiracy liability" at all. *United States* v. *Shabani*, 513 U.S. 10, 13 (1994). Thus, the illegal agreement is "th[e] transaction[] that the statute seeks to regulate"; it alone suffices for liability, and so it qualifies as the "object[] of the statute's solicitude." *Morrison*, 130 S. Ct. at 2884.

Proof of one domestic overt act therefore cannot defeat the presumption against extraterritoriality—at least where, as here, all the agreements were formed

on foreign soil and the overwhelming majority of conduct in furtherance of the conspiracy occurred abroad. Because the government cannot evade extraterritoriality analysis, and because that analysis demonstrates that the Sherman Act does not apply here, defendants' convictions must be reversed.

III. THE DISTRICT COURT ERRED BY INSTRUCTING THE JURY THAT JUST ONE OVERT ACT IN THE UNITED STATES CREATES JURISDICTION UNDER THE SHERMAN ACT.

1. The government maintains that the district court properly told jurors that a single overt act in the United States—no matter how insubstantial—is enough to trigger the Sherman Act because substantial and intended effects need only be proven in cases involving "wholly foreign conduct." Gov't Br. 84 (internal quotation marks omitted). That contention is impossible to square with *Hartford Fire*, which itself involved domestic conspirators acting in the United States. To be sure, the participants and conduct in *Hartford Fire* were overwhelmingly foreign, just like this case. But one of the relevant claims alleged a "§ 1 violation by the [foreign] reinsurers who, *along with domestic retrocessional reinsurers*, conspired to" restrict insurance coverage in North America. *Hartford Fire*, 509 U.S. at 795 (emphasis added). And the lower court emphasized that another relevant claim involved "conduct [that] occurred within the United States," including "activities in the United States [that] are an incident of the market agreement which is the gravamen of the action." *In re Ins. Antitrust Litig.*, 723 F.

Supp. 464, 490 (N.D. Cal. 1989).[6] Subsequent courts have likewise recognized that *Hartford Fire* involved some U.S. participants and U.S. conduct, which is why the Fourth Circuit has rejected the same argument the government recycles here: that "the substantial-effect test applies only to 'wholly' foreign conduct." *Dee-K Enters., Inc.* v. *Heveafil Sendirian Berhad*, 299 F.3d 281, 291 (4th Cir. 2002).

No court, for that matter, has ever endorsed the rule the government urges. That is why the government's brief fails to cite a single case where a court approved jurisdiction over a conspiracy that was foreign in all respects, save for a single domestic overt act.[7] As the facts of *Hartford Fire* demonstrate, the Sherman

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[6] The government notes that the petition for certiorari in *Hartford Fire* characterized the claims as "invol[ving] wholly foreign actors and conduct." Gov't Br. 85 (internal quotation marks omitted). The petitioners, who sought dismissal on grounds of comity, had every reason to play up the foreign elements of the conspiracy. But the respondents' opposition paints a different picture, explaining that the complaints alleged "conspiratorial activity engaged in by both foreign and domestic actors that targeted United States markets," belying "any notion that such activity was 'wholly foreign.'" Respondents' Consolidated Brief in Opposition to Petitions for Writs of Certiorari at 22, *Hartford Fire*, 509 U.S. 764 (Nos. 91-1111, 1128, 1131, & 1146). The Supreme Court apparently agreed with respondents, since it recognized that one of the relevant claims involved both foreign and domestic conspirators. *Hartford Fire*, 509 U.S. at 795.

[7] The government cites a handful of cases applying the Sherman Act to conduct that included some foreign aspects, but in each instance the domestic elements of the conspiracy predominated. *See United States* v. *Endicott*, 803 F.2d 506, 512 (9th Cir. 1986) (defendant convicted for firearms offenses after selling rifles in Washington); *Woitte* v. *United States*, 19 F.2d 506, 507 (9th Cir. 1927) (defendant convicted for importing intoxicating liquor into Oregon); *United States* v. *Pac. & Arctic Ry. & Nav. Co.*, 228 U.S. 87, 101 (1913) (defendants conspired to destroy competition among transit services involving U.S. ports); *United States* v.

Act—if it has *any* extraterritorial application—is triggered only when there are substantial and intended effects in the United States, *even if* conspirators have committed one overt act here.

2. With no precedent on its side, the government is left arguing that a one-overt-act rule would be easy to administer, while a rule requiring "a preponderance of domestic conduct" would be "unworkable." Gov't Br. 86. But administrability is not a valid reason to dispense with extraterritoriality analysis. If it were, *Morrison* would have come out differently, since it recognized that "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Morrison*, 130 S. Ct. at 2874; *see also Kiobel*, 133 S. Ct. at 1669 (claims must not only "touch and concern the territory of the United States," but "do so with sufficient force to displace the presumption against extraterritorial application"). Nor has the government shown that courts would face difficulty determining whether a challenged conspiracy is foreign or domestic. The Fourth Circuit, for example, considers whether "the participants, acts, targets, and effects involved in an asserted antitrust violation are primarily foreign or

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Sisal Sales Corp., 274 U.S. 268, 272, 274, 276 (1927) (domestic banks conspired in the United States to monopolize domestic sale of Sisal). Indeed, one of the government's authorities involves no foreign conduct at all. *United States* v. *Angotti*, 105 F.3d 539, 541 (9th Cir. 1997) (domestic defendant prosecuted for filing false loan documents in California). Suffice it to say, these cases—which all pre-date *Hartford Fire*—provide no support for the contention that a single domestic overt act vests U.S. courts with jurisdiction over a conspiracy that is foreign in every other respect.

primarily domestic." *Dee-K Enters.*, 299 F.3d at 294. That follows *Hartford Fire* and avoids the "unintended and unfortunate results" that could stem from "simplistic rules" like the government's proposed one-overt-act test. *Id.*

3. The government itself balks at the breadth of the one-overt-act instruction because it takes great pains to assure the Court that separate instructions on the FTAIA will ensure that a conspiracy has "the requisite nexus to U.S. commerce." Gov't Br. 81. This argument ignores that the substantial-and-intended-effects test and the FTAIA require separate and distinct jurisdictional findings. That is why the Supreme Court in *Hartford Fire* declined to rely on the FTAIA at all. 509 U.S. at 796 n.23. For the same reason, the government cannot escape the flawed one-overt-act instruction by relying on the FTAIA here.

4. Finally, the government contends that any error in the one-overt-act instruction was harmless. But the government cannot, as it must, prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States* v. *McFall*, 558 F.3d 951, 960 (9th Cir. 2009) (internal quotation marks omitted).

The government's harmless-error argument rests on the testimony of its expert witness that the conspirators gained more than $500 million in overcharges on TFT-LCD panels. Gov't Br. 88-90. There is just one problem: The district

court categorically forbade jurors from considering this evidence when determining the guilt or innocence of Dr. Hsiung and Mr. Chen.

The court gave this limiting instruction not just once, but four separate times throughout trial. In preliminary jury instructions, the court warned jurors that they would "hear evidence * * * about the gain derived from the conspiracy" but that "[t]he evidence concerning monetary or economic gain will be introduced only against the corporate defendants. *You will not consider it when deciding the guilt or innocence of the individual defendants*." ER 1471-72 (emphasis added). After the government's expert testified about the purported $500 million overcharge, the court again told jurors that "[t]he Government does not have to prove that anyone derived monetary or economic gain" and that the testimony regarding gain was not admissible against the individuals. ER 1309-10. Lest there be any confusion, the court repeated this interim instruction, emphasizing that the testimony regarding the gain could not be considered against the individuals. ER 1308. And in the final jury instructions the court repeated that jurors had "heard economic evidence, which includes testimony about the alleged gain derived from the alleged conspiracy. The testimony regarding the amount of the alleged gain * * * is admissible *only* against the corporate defendants * * * for a limited purpose." ER 1153-54. (emphasis added). The government maintains that all these instructions "merely explained that gain from the offense was a separate and distinct question

from whether the offense was committed." Gov't Br. 89. But that is not what the court said. Rather, the court told jurors that evidence of gain was not admissible against the individual defendants at all.[8]

Given the "crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions," *Francis*, 471 U.S. at 324 n.9, this Court cannot presume that jurors ignored the district court's repeated admonition to disregard all evidence of gain when evaluating the guilt of the individual defendants. And without that evidence, jurors had no basis to determine that the conspiracy had any effect on U.S. commerce, let alone a substantial one. After all, conspiracies to restrain trade are illegal even if ineffective, and proof of gain is the only way to demonstrate that a conspiracy affected prices. Because jurors were told they could not consider this evidence against Dr. Hsiung and Mr. Chen, the government cannot prove beyond a reasonable doubt that the jury convicted based on substantial effects rather than the erroneous one-overt-act theory of jurisdiction.

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[8] Against all this, the government notes that the court also instructed jurors at the end of the case that "[t]he testimony regarding the effect of the conspiracy is admissible as to all defendants." SER 2040. Later in those same instructions, however, the court clarified that "economic evidence which includes testimony about the alleged gain * * * is admissible only against the corporate defendants," and not against Dr. Hsiung or Mr. Chen. ER 1153-54. To the extent the final instructions were inconsistent, the government cannot rely on the court's more general instruction about effects evidence to demonstrate harmless error. *See Francis* v. *Franklin*, 471 U.S. 307, 322 (1985) ("A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.").

Nor does the jury finding regarding the FTAIA prove otherwise. *See* Gov't Br. 90 & n.14. *Hartford Fire* confirms that the FTAIA and the substantial-and-intended-effects test are not coextensive. *See supra* at 31. The district court put that rule to practice. In instructing on the import-commerce exception to the FTAIA, the court told jurors that they needed only to find that conspirators "fix[ed] the price of TFT-LCD panels targeted by the participants to be sold in the United States, or for delivery to the United States." ER 1156. Nothing in that instruction indicated that any effect in the United States had to be substantial. And the court's alternative instruction that the FTAIA is satisfied by a "reasonably foreseeable" effect on U.S. commerce suggests a lesser standard than an "intended" effect. *Id.* Because the jury's findings under the FTAIA do not prove beyond a reasonable doubt that the erroneous one-overt-act instruction "did not contribute to the verdict," *McFall*, 558 F.3d at 960, the government cannot demonstrate that the error was harmless. Instead, defendants' convictions must be reversed.

IV. REVERSAL IS WARRANTED BECAUSE THE GOVERNMENT FAILED TO PROVE VENUE.

The government emphasizes out of the gates that "[d]irect proof [of venue] is not required." Gov't Br. 130. The government is quick to make that point because it did not offer any evidence—none—during trial directly linking the alleged conspiracy to the Northern District of California. Yet the prosecutor told a different story to jurors in rebuttal closing argument. At that point, the prosecutor

insisted that negotiations of price-fixed panels occurred in the district. ER 1041-42. And when the district court drew attention to this representation—or, more accurately, misrepresentation—and asked, "[i]s that in evidence?", the prosecutor said, without qualification, "[i]t is in evidence, your honor." ER 1042.

But it wasn't. The government did not call a single witness or introduce a single document demonstrating that negotiations of price-fixed panels occurred in the district. At best, the price-negotiation theory hinges on a chain of speculative inferences. That is presumably why the government has largely retreated from that argument in this Court, instead attempting to prove venue by citing various e-mails that could have been sent or received anywhere in the world, but which the government speculates might (or might not) have made their way into the Northern District. Because the government's misstatement of the venue evidence denied defendants due process, and because none of the government's new venue theories withstands scrutiny, defendants' convictions must be reversed.

1. The government does not—and cannot—dispute that if the prosecutor misstated the venue evidence, there exists "a 'reasonable probability'" that the jury would have found insufficient evidence of venue. *Hein* v. *Sullivan*, 601 F.3d 897, 915 (9th Cir. 2010). Instead, the government maintains only that "the prosecutor fairly characterized the evidence when he stated that * * * pricing negotiations affected by the conspiracy were carried out" in the district. Gov't Br. 144. But

even now, after having thoroughly mined the trial transcript, the only evidence the government has dredged up to support its price-negotiation theory is that AUO and HP both maintained offices in Cupertino for a nine-month period between September 2001 and May 2002. *See* Gov't Br. 144-145.[9] Beyond this lesson in geography, the government points to nothing: no witness testimony concerning price negotiations in the district; no e-mails setting up such negotiations; no business records reflecting discussions in Cupertino. Nothing.

The government suggests that these evidentiary gaps do not matter because prosecutors are "free to argue reasonable inferences from the evidence." Gov't Br. 144 (internal quotation marks omitted). Inferences are one thing; misstatements are quite another. Here, the prosecutor did not infer from the evidence; rather, he reconstructed it, misleading jurors into thinking no inferences were necessary because the fact that price negotiations occurred in the district "*[wa]s in evidence*." ER 1042 (emphasis added). That misstatement alone constitutes reversible misconduct. *See United States* v. *Kojayan*, 8 F.3d 1315, 1321 (9th Cir. 1993) (finding a due-process violation when "the prosecutor went well beyond asking the

[9] The government's reliance on office location during this time frame fails for the additional reason that it deviates from the indictment's charge that the conspiracy was carried out in the district within the statute of limitations. ER 1732. The government maintains that it was not bound by the indictment. Gov't Br. 125-126. But just as a time-barred act cannot establish the crime, it cannot establish venue. And that is especially true here, where the government's switch to a new venue theory at trial resulted in a constructive amendment of the indictment.

jury to *infer* matters outside the record" and "actually made unsupported factual claims"; "[w]hen a lawyer asserts that something not in the record is true, he is, in effect, testifying. He is telling the jury: 'Look, I know a lot more about this case than you, so believe me when I tell you X is a fact.' This is definitely improper.").[10]

To make matters worse, the inference the government now relies on—that having an office in a location necessarily means price negotiations occurred there—is not reasonable under this Court's precedent. In *United States* v. *Pace*, 314 F.3d 344, 350-351 (9th Cir. 2002), this Court refused to infer that acts occurred in the district simply because the defendant maintained his business headquarters there. The government responds that *Pace* was a wire-fraud case. True, but irrelevant. After all, *Pace* noted that the act of "orchestrating" wire fraud establishes venue, yet *Pace* refused to infer that orchestrating acts occurred in the venue simply because the defendant had an office there. 314 F.3d at 349-350. The

[10] Moreover, the district court's endorsement of the prosecutor's misstatement triggers a heightened standard of review because the court "in substance" decided the venue issue. *United States* v. *Lukashov*, 694 F.3d 1107, 1120 (9th Cir. 2012). The government brushes off the court's action in approving the prosecutor's misstatement as an "opaque" ruling. Gov't Br. 143. But the court went far beyond just neutrally overruling an objection. The court specifically asked whether the fact that price negotiations occurred in the district was in evidence and permitted the prosecutor to wrongly testify that it was. ER 1042. Then the court signaled agreement with that misstatement by overruling defendants' objection that this evidence did not exist. ER 1042. This sequence of events is exactly the kind of "abnormal procedure," Gov't Br. 142, that prompted this Court to apply a heighted standard of review in *Lukashov*.

rule in *Pace*—that a court may not infer that acts occurred in the district by dint of office location alone—applies just as much to overt acts as to orchestrating acts. Nor can the government sidestep *Pace* by insisting that it involved only "two stray communications" in the district. Gov't Br. 138. At least in *Pace* it was undisputed that those communications occurred in the venue, not outside it. 314 F.3d at 350. The government offered even less evidence of activity in the venue here, failing to directly link even one e-mail, communication, or price negotiation to the Northern District.

2. It's not just that the government misstated the facts in the record; it's how and when the government did that: during rebuttal summation. Although the government may not always have an obligation to address venue in its initial closing argument, *see* Gov't Br. 143, it certainly had that obligation here. The government knew defendants planned to contest venue because they moved for acquittal on this ground at the close of evidence; indeed, the court asked the government whether it was "at all worried about [its] venue proof," and the government suggested it *was* worried, which is why it sought leave to augment an exhibit that "could have something to do with venue." ER 1162-63. Despite these circumstances, the government conspicuously ignored venue in its initial closing argument, choosing instead to ambush defendants with a mischaracterization of the evidence in rebuttal when defendants would have no opportunity to respond.

Because the government should have been "expected to negate" defendants' venue challenge in its initial summation, *United States* v. *Rubinson*, 543 F.2d 951, 966 (2d Cir. 1976), it cannot excuse its sandbagging by suggesting that defendants opened the door to an erroneous description of the evidence in rebuttal.

Nor did the district court's standard jury instruction that closing arguments are not evidence adequately mitigate the prejudice. *See* Gov't Br. 143. This Court has held that the failure "to correct the improper statements at the time they [a]re made cannot be salvaged by the later generalized jury instruction reminding jurors that a lawyer's statements during closing argument do not constitute evidence." *United States* v. *Weatherspoon*, 410 F.3d 1142, 1151 (9th Cir. 2005); *accord United States* v. *Sanchez*, 659 F.3d 1252, 1258 (9th Cir. 2011). Far from neutralizing the prejudice, the court here amplified it by asking the prosecutor in front of the jury whether the facts were in evidence, permitting him to falsely testify that they were, and then erroneously overruling defendants' objection that the prosecutor had misstated the record. That violates due process.

3. In any event, the government offers no persuasive rebuttal to defendants' showing that the venue evidence was insufficient. Although the government placed all its chips on the price-negotiation theory when it argued venue to the jury, it retreats from that claim here, relegating the argument to a few paragraphs that all sound a variation on the theme that having an office in the

district equates to conducting price negotiations there. Gov't Br. 138-140.[11] Because *Pace* forecloses that argument, the government is left only with its theory that various e-mails in the record constituted overt acts in the venue.[12] But the government ignores the central flaw with that theory: it did not link a single e-mail to the district, whether through IP address evidence, testimony about where the senders and receivers were located on particular dates, or other evidence establishing location.

That makes this case nothing like the decisions the government cites to support its e-mail theory. In those cases, it was undisputed that the specific overt acts had occurred in the forum district. *See United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 403-404 (1927) ("The secretary testified that, acting for the association, he effected sales within the district."); *United States* v. *Rommy*, 506 F.3d 108, 113-114, 122-125 (2d Cir. 2007) (finding venue because individual

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[11] The government makes much ado of Apple's presence in Cupertino. Gov't Br. 139 & n.31. But even if this had been in evidence (and it wasn't), all it shows is that Apple had an office in the district—which under *Pace* is insufficient to establish that price negotiations were carried out there.

[12] The government also briefly flirts with a new theory: that venue may have been proper nowhere, so the prosecution could proceed in the Northern District as the "last known residence" of AUOA under 18 U.S.C. § 3328. Gov't Br. 123 n.24. But the premise that venue was proper nowhere is preposterous given the direct evidence that some overt acts occurred in Texas. *See, e.g.*, ER 1412, SER 2161-62 (pricing negotiations in Austin). The government's problem is not that it could not prove venue *anywhere*, but that it did not prove venue *in the Northern District*.

indisputably placed telephone call from the district); *United States* v. *Gonzalez*, 2011 WL 500502, at *1 (N.D. Cal. Feb. 9, 2011) (same). Here, however, jurors could only speculate that any particular email was sent from or received in the Northern District.

Nor can the government elevate this rank speculation into a reasonable inference by pointing out that AUOA employees Michael Wong and Evan Huang were sometimes in the district.[13] After all, they were also sometimes outside the district—and the government offers no reason to think they were inside the district rather than outside it when they sent and received the particular e-mails in the record. Indeed, the vast majority of the 40 e-mails involving Wong post-date 2002, when he began working primarily from Texas. And many of those e-mails make clear that Wong was in Austin or Houston, not California, when he drafted them. ER 802-805. That is critical. In *United States* v. *Durades*, 607 F.2d 818 (9th Cir. 1979), this Court, in reviewing a venue challenge, held that evidence that a defendant occasionally obtained narcotics from Mexico could not support an

[13] The government also notes that the two e-mails in the record involving Huang included his signature block with a telephone number featuring a South Bay area code. Gov't Br. 136. But "[w]ith the mobility of cellular phones," area codes do not provide concrete geographical clues. *Wright* v. *City of Las Vegas*, 395 F. Supp. 2d 789, 803 n.11 (S.D. Iowa 2005) (observing that an individual "equipped with a number brandishing a Georgia area code could have called from virtually anywhere"). Nor does Huang's signature block prove that he sent or received those e-mails in the same jurisdiction that happened to have issued his phone number.

inference that the "*particular kilo* of heroin" at issue came from Mexico. *Id.* at 820 n.1 (emphasis added). Here, because the government failed to prove that a single e-mail to the district had been sent or received there—only that it *could have* been sent or received there—it cannot rely on this evidence to establish venue.

4. Finally, the verdict is fatally flawed because the district court erroneously told jurors they could find the element of venue by a preponderance of the evidence, rather than beyond a reasonable doubt.[14] The government misleadingly suggests that this Court has "never wavered from the rule that the government need establish venue only by a preponderance." Gov't Br. 124. But the more accurate description is that this Court has never really considered the proper burden of proof; no party has previously raised the issue, and the Court has thus had no occasion to seriously consider it. This Court's occasional statement

[14] The government suggests that defendants invited this error by stipulating to the jury instructions on venue. Gov't Br. 121-122. Once again, the government cannot show that defendants were aware of the error yet "intentionally relinquish[ed] a known right" to have correct instructions submitted to the jury. *United States* v. *Alferahin*, 433 F.3d 1148, 1154 n.2 (9th Cir. 2006). There is no basis to think that defendants "propose[d] or accept[ed] a flawed instruction" for "some tactical or other reason" despite knowing of "the controlling law," *Perez*, 116 F.3d at 845; rather, defense counsel never thought to question the burden of proof until they examined the venue issues on appeal and realized the preponderance standard had no sound basis in precedent. This Court has declined to find invited error in similar circumstances. *See*, *e.g.*, *United States* v. *Hugs*, 384 F.3d 762, 766-767 (9th Cir. 2004) (refusing to apply invited-error doctrine where defense counsel stipulated to instructions because there was no evidence that counsel was aware they were flawed); *United States* v. *Lindsey*, 634 F.3d 541, 555 (9th Cir. 2011) (same).

that venue need only be proved by a preponderance is exactly the type of casual comment "uttered in passing without due consideration of the alternatives" that does not bind future panels. *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).

The government further misrepresents this Court's precedent when it claims that the Court has "explained that the burden for proving venue is lower than 'beyond a reasonable' doubt because venue 'is not an essential fact constituting the offense charged.'" Gov't Br. 124 (quoting *United States* v. *Powell*, 498 F.2d 890, 891 (9th Cir. 1974)). *Powell* reflexively stated that venue need only be proved by a preponderance, and separately noted in a different sentence that the venue right can be waived and so is not essential. The Court did not connect these points or suggest that the latter justified the former. 498 F.2d at 891. Nor does the government's proposed justification for the preponderance standard make sense. Venue is no different from the numerous prerequisites to conviction that require proof beyond a reasonable doubt but do not bear directly on substantive guilt, such as proof that the crime occurred within the limitations period or satisfied jurisdictional requirements. *See, e.g.*, *United States* v. *Thomas*, 893 F.2d 1066, 1071 (9th Cir. 1990) (applying beyond-a-reasonable-doubt standard to statute of limitations); *United States* v. *Cruz*, 554 F.3d 840, 850-851 (9th Cir. 2009) (jurisdictional fact of "Indian status" under 18 U.S.C. § 1153 must be proved

beyond a reasonable doubt); *United States* v. *Morgan*, 238 F.3d 1180, 1185-86 (9th Cir. 2001) (considering whether "the government proved a sufficient connection to interstate commerce beyond a reasonable doubt").

These cases vindicate the Supreme Court's instruction that a defendant has the "right to have the jury find the existence of any particular fact that the law makes essential to his punishment" beyond a reasonable doubt. *United States* v. *Booker*, 543 U.S. 220, 232 (2005) (internal quotation marks omitted). And, as this Court has observed, "proof of venue in a criminal prosecution is essential" to a finding of guilt. *Hill* v. *United States*, 284 F.2d 754, 755 (9th Cir. 1960); *see also United States* v. *Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984) ("[V]enue is a constitutional right and an element of every crime"). Because the jury verdict here rested on a deficient burden of proof that violates Supreme Court precedent, it cannot stand.

CONCLUSION

For the foregoing reasons, and for the reasons in defendants' opening briefs, defendants' convictions must be reversed.

Respectfully submitted,

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May 13, 2013

CERTIFICATE OF COMPLIANCE

This Reply Brief is accompanied by a motion for leave to file an oversized brief pursuant to Ninth Circuit Rule 32-2. I hereby certify that the attached Reply Brief is proportionally spaced, has a typeface of 14 point, and contains 10,999 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Christopher T. Handman
Christopher T. Handman

CERTIFICATE OF SERVICE

I certify that the foregoing Reply Brief and accompanying Further Excerpts of Record were filed with the Clerk using the appellate CM/ECF system on May 13, 2013. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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