No. 14-

IN THE
Supreme Court of the United States

HUI HSIUNG, HSUAN BIN CHEN,
AU OPTRONICS CORPORATION, and
AU OPTRONICS CORPORATION AMERICA, INC.,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Foreign Trade Antitrust Improvements Act imposes special requirements on what plaintiffs, including the Federal Government, must prove to show that a restraint on foreign commerce violates federal antitrust law. Those special requirements do not apply when the "conduct involv[es] * * * import trade or import commerce." 15 U.S.C. § 6a. But in all other cases involving foreign commerce, plaintiffs must show that the "conduct has a direct, substantial, and reasonably foreseeable effect" on U.S. commerce, and that "such effect gives rise to" a Sherman Act claim. *Id.* § 6a(1), (2).

In this case, the Federal Government obtained criminal convictions against foreign sellers who agreed overseas to fix the prices of goods sold to foreign buyers. The questions presented are:

1. Whether a foreign seller's conduct can "involv[e] * * * import trade or import commerce" even when the seller himself does not import any goods into the United States.

2. Whether a foreign price-fixing agreement can have an effect on U.S. commerce that is "direct" and "gives rise to" a Sherman Act claim even when the agreement fixes prices only in foreign sales.

3. Whether foreign price-fixing agreements should be condemned as *per se* unlawful, instead of evaluated on a case-by-case basis under the rule of reason.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. Hui Hsiung, Hsuan Bin Chen, AU Optronics Corporation, and AU Optronics Corporation America, Inc., petitioners on review, were defendants-appellants below.

2. The United States of America, respondent on review, was plaintiff-appellee below.

RULE 29.6 DISCLOSURE STATEMENT

AU Optronics Corporation is a publicly traded company. It has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

AU Optronics Corporation America, Inc., is an indirect, wholly owned subsidiary of AU Optronics Corporation. It is a wholly owned subsidiary of AU Optronics (L) Corp., which is a wholly owned subsidiary of AU Optronics Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's original opinion is reported at 758 F.3d 1074. The Ninth Circuit's amended opinion is not yet published in the Federal Reporter, but is available at 2015 WL 400550. Pet. App. 1a-45a. The District Court's corrected order denying petitioners' motions for judgment of acquittal and for a new trial is unreported but available at 2012 WL 2120452. Pet. App. 46a-58a.

JURISDICTION

The Ninth Circuit entered judgment on January 30, 2015. That same day, the court denied timely petitions for panel rehearing and rehearing en banc. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. Pet. App. 59a-60a.

INTRODUCTION

This petition concerns the application of federal antitrust law beyond U.S. borders. It raises three exceptionally important questions regarding when that law can be invoked to punish foreign conduct. And it presents these questions in the context of a criminal prosecution whose stakes could hardly be higher: Following their convictions for a foreign price-fixing conspiracy in this case, petitioners were sent to prison and fined over half a billion dollars.

The first two questions presented concern the scope of the Foreign Trade Antitrust Improvements Act (FTAIA). Congress enacted the FTAIA to limit the extraterritorial reach of the Sherman Act. As a general matter, the FTAIA imposes special requirements on what plaintiffs, including the Federal Government, must prove to show that a restraint on foreign commerce violates federal antitrust law. Those special requirements do not apply, however, when the "conduct involv[es] * * * import trade or import commerce." 15 U.S.C. § 6a. The first question asks what this provision means. In its decision below, the Ninth Circuit joined the Third Circuit in holding that the provision covers any conduct consummated within an import market. The Seventh

Circuit, by contrast, has held that the provision refers only to direct transactions between foreign sellers and domestic buyers. This conflict could not be sharper: The Seventh Circuit's decision concerned the very same conspiracy alleged in this case, and yet that circuit disagreed with the Ninth Circuit's decision about whether petitioners' foreign conduct involved "import trade."

The second question concerns the FTAIA's special requirements. Where the FTAIA does apply, plaintiffs must show that the "conduct has a direct, substantial, and reasonably foreseeable effect" on U.S. commerce, and that "such effect gives rise to" a Sherman Act claim. *Id.* § 6a(1), (2). The Ninth Circuit in this case held that petitioners' foreign conduct had an effect on U.S. commerce that was "direct" and "gives rise to" a Sherman Act claim. Confronted with the same facts, the Seventh Circuit disagreed, holding that petitioners' foreign conduct did *not* have the requisite effect under the FTAIA.

The third and final question asks what standard of liability should apply to foreign price-fixing agreements under § 1 of the Sherman Act. That section prohibits unreasonable restraints on trade, and this Court has long held that the accepted standard for evaluating whether a restraint is unreasonable is the rule of reason. In this case, however, the Ninth Circuit departed from the rule of reason, instead evaluating petitioners' *foreign* conduct under a *per se* rule developed in the *domestic* context. That decision is contrary to this Court's precedents, which hold that *per se* rules are appropriate only when a practice is manifestly anticompetitive—and a foreign price-fixing agreement is not.

Because the Ninth Circuit's opinion cannot be reconciled with the decisions of this Court and other circuits, certiorari should be granted.

STATEMENT

A. Statutory Background

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Although "§ 1 could be interpreted to proscribe all contracts," this Court "has repeated time and again that § 1 outlaws only *unreasonable* restraints." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007) (emphasis added) (internal quotation marks and brackets omitted). Accordingly, "[t]he rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1." *Id.* "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* (internal quotation marks omitted). This case-by-case evaluation may be dispensed with—and a *per se* rule applied instead—only if the practice is "manifestly anticompetitive," *i.e.*, "only if courts can predict with confidence" that the practice "would always or almost always tend to restrict competition and decrease output." *Id.* at 886 (internal quotation marks omitted).

Concerned about the application of the Sherman Act to foreign conduct, Congress enacted the FTAIA to restrict the reach of § 1. The FTAIA provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other

> than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a.

The Court has parsed this "technical language" as follows:

> [The FTAIA] initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the "effect" must "giv[e] rise to a [Sherman Act] claim."

F. Hoffman-La Roche Ltd. v. *Empagran S.A.*, 542 U.S. 155, 162 (2004) (quoting 15 U.S.C. § 6a(1), (2)).

B. Factual and Procedural Background

1. Hsuan Bin Chen and Hui Hsiung, residents of Taiwan, are former officers of a Taiwanese company called AU Optronics Corporation (AUO). AUO is one of a number of Taiwanese and Korean corporations that manufacture thin-film transistor liquid crystal display (TFT-LCD) panels used in computers, cellphones, and other electronic devices.

In the early 2000s, the TFT-LCD industry was in its infancy and struggling to survive. C.A. Excerpts of Record (E.R.) 1253. Foreign TFT-LCD manufacturers had just invested in expensive fabrication facilities, the market was suffering from an oversupply of panels, and prices were plummeting. *Id.* In the midst of this crisis, representatives from AUO and other Taiwanese and Korean TFT-LCD manufacturers began convening in Taiwan for so-called "Crystal Meetings" to discuss market conditions and panel pricing. *Id.* at 1320.

2. In June 2010, the Federal Government brought criminal charges under § 1 of the Sherman Act against Mr. Chen, Dr. Hsiung, AUO, and AUO's wholly owned subsidiary, AU Optronics Corporation America, Inc. (AUOA). The superseding indictment alleged that "participants in the Crystal Meetings regularly exchanged production, shipping, supply, demand, and pricing information with each other at the meetings for the purpose of agreeing to fix the price of TFT-LCD [panels]." *Id.* at 1728.

After denying petitioners' motions to dismiss the indictment, Pet. App. 6a-7a, the District Court held a three-month trial. One of the Government's witnesses—an employee of Hewlett-Packard—testified as to how AUO's TFT-LCD panels made their way into the

United States: The raw panels would first be manufactured by AUO in Asia. They would then be sold and delivered to original equipment manufacturers (OEMs) or systems integrators (SI), also overseas. While still abroad, the panels would be assembled by these OEMs and SIs into finished consumer products, such as monitors and laptops. And finally, the finished products would be sold around the world, including in the United States. C.A. E.R. 1447-1450, 1461-1464; *see also* Pet. App. 38a. The evidence thus showed that AUO sold raw panels to foreign intermediaries, who in turn incorporated them into finished products, only some of which were later sold in the United States.

The jury found petitioners guilty of violating the Sherman Act. Pet. App. 8a. Petitioners moved for a judgment of acquittal or, in the alternative, for a new trial, renewing arguments that they had earlier preserved. *Id.* As relevant here, petitioners argued that the Government failed to prove that their conduct involved "import trade or import commerce" exempt from the FTAIA, and that their convictions should thus be vacated because their conduct did not have a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce. *Id.* at 8a-9a; *see also* C.A. E.R. 543-550. Petitioners also argued that the District Court erred in treating their price-fixing agreement as a *per se* violation of the Sherman Act, instead of evaluating the particular circumstances of their conduct under the rule of reason. Pet. App. 8a; *see also* C.A. E.R. 500-509, 554-581.

The District Court denied these post-trial motions. Pet. App. 47a. It then sentenced Mr. Chen and Dr. Hsiung to 36 months' imprisonment and ordered them each to pay a $200,000 fine. *Id.* at 9a. The

court also sentenced AUO and AUOA to three years' probation and ordered AUO to pay a $500-million fine. *Id.*; *see* 18 U.S.C. § 3571(d).

3. A three-judge panel of the Ninth Circuit affirmed. The panel acknowledged that in a previous case, *Metro Industries, Inc.* v. *Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), the Ninth Circuit had held that "'application of the *per se* rule is not appropriate where the conduct in question occurred in another country.'" Pet. App. 18a (quoting *Metro Indus.*, 82 F.3d at 844-845). The panel also acknowledged that in this case, "the agreement to fix prices occurred in Taiwan." *Id.* at 20a. The panel nevertheless held that the District Court appropriately applied a *per se* rule, distinguishing *Metro Industries* as a case involving "an unusual horizontal market division." *Id.* at 18a-19a.

The panel then turned to the FTAIA. It held that "[t]he defendants' conduct, as alleged and proven, constitutes 'import trade,' and falls outside the scope of the FTAIA," because their conduct was "consummated within" an "import market." *Id.* at 31a & n.8. The panel also held, in the alternative, that the evidence satisfied "the requirements for the domestic effects exception to the FTAIA, namely that the defendants' conduct had 'a direct, substantial, and reasonably foreseeable effect' on United States commerce." *Id.* at 34a; *see also id.* at 42a. In reaching that conclusion, the panel explained that "[c]onduct has a 'direct' effect for purposes of the domestic effects exception to the FTAIA if it follows as an immediate consequence of the defendants' activity"—a "proximate causation standard" that is also reflected in the FTAIA's requirement that the effect "give[] rise to" a § 1 claim. *Id.* at 38a-39a

(internal quotation marks and brackets omitted). According to the panel, "the impact on the United States market was direct and followed as an immediate consequence of the price fixing." *Id.* at 39a.

The Ninth Circuit denied rehearing en banc, and this petition followed.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO DECIDE TWO EXCEPTIONALLY IMPORTANT QUESTIONS REGARDING THE SCOPE OF THE FTAIA

According to the Government's theory at trial, petitioners agreed in Taiwan to fix the prices of TFT-LCD panels, which were then sold to foreign buyers and eventually incorporated into finished products that made their way into the United States. This case raises two important questions regarding the application of the FTAIA to this kind of foreign conduct. First, does a foreign seller's conduct involve "import trade or import commerce," which is exempt from the FTAIA, even when the seller himself does not import any goods into the United States? And second, can a foreign price-fixing agreement have an effect on U.S. commerce that is "direct" and "gives rise to" a Sherman Act claim, even when it fixes prices only in foreign sales?

The Ninth Circuit answered yes to both questions, in conflict with other circuits, including the Seventh Circuit with respect to precisely the same foreign price-fixing agreement. Because application of the FTAIA to this agreement should not depend on where suit is brought, this Court should grant review to resolve these circuit splits, and this criminal case is the ideal vehicle for doing so.

A. The Courts Of Appeals Are Sharply Divided Over The Meaning Of "Import Trade Or Import Commerce"

1. The federal courts of appeals are sharply divided over what constitutes "conduct involving * * * import trade or import commerce" under the FTAIA. The Seventh Circuit has held that a foreign defendant is engaged in such conduct only insofar as the defendant is an importer, who directly sells goods into the United States. The Third and Ninth Circuits, by contrast, have held that a defendant's conduct qualifies as involving "import trade or import commerce" so long as that conduct is at least consummated within an import market—meaning that a foreign defendant need not import any goods himself.

Start with the Seventh Circuit's decision in *Motorola Mobility LLC* v. *AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015). In that case, Motorola brought a civil Sherman Act suit against AUO and other foreign TFT-LCD manufacturers, challenging exactly the same price-fixing agreement at issue here. The appeal focused on TFT-LCD panels that "were bought and paid for by, and delivered to, foreign subsidiaries (mainly Chinese and Singaporean) of Motorola." *Id.* at 817. After those panels "were bought by the subsidiaries and incorporated by them into cellphones" abroad, the cellphones were "sold to and shipped to Motorola for resale in the United States." *Id.*

On these facts, the Seventh Circuit rejected Motorola's argument that AUO and the other manufacturers were engaged in "import trade or import commerce." *See id.* at 818. In the Seventh Circuit, "import trade" means "trade involving only foreign

sellers and domestic buyers." *Minn-Chem, Inc.* v. *Agrium Inc.*, 683 F.3d 845, 855 (7th Cir. 2012) (en banc). Thus, to be involved in "import trade or import commerce," a foreign seller must be an importer, who sells directly to a domestic buyer. The defendants in *Motorola* did not meet that description: "It was Motorola, rather than the defendants, that imported these panels into the United States, as components of the cellphones that its foreign subsidiaries manufactured abroad and sold and shipped to it." *Motorola*, 775 F.3d at 818. Accordingly, the Seventh Circuit held that AUO and its co-defendants were not engaged in "import trade." *Id.*

Confronted with these same facts—*i.e.*, of a foreign manufacturer that sold panels to a foreign buyer, who in turn assembled them into finished products—the Ninth Circuit in this case reached the opposite conclusion: that AUO *was* engaged in "import trade." Pet. App. 31a. That conclusion rested on an interpretation of "import trade" at odds with the Seventh Circuit's. According to the Ninth Circuit, a defendant's conduct qualifies as involving "import trade or import commerce" so long as it is "consummated within" an "import market." *Id.* at 31a n.8. Thus, in the Ninth Circuit's view, the fact that "AUO was not an 'importer' misses the point"; it was enough that some finished products, incorporating the panels, were eventually "sold into the United States," even if not by AUO. *Id.* at 33a.

As the Ninth Circuit acknowledged, the Third Circuit has adopted an even broader view of "conduct involving * * * import trade or import commerce." *See id.* at 31a n.8. In *Animal Science Products, Inc.* v. *China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), the Third Circuit held that "the relevant

inquiry is whether the defendants' alleged anticompetitive behavior was directed at an import market." *Id.* at 470 (internal quotation marks omitted). To qualify under that approach, the defendants need not "function as the physical importers of goods": "Functioning as a physical importer may satisfy the import trade or commerce exception, but it is not a necessary prerequisite." *Id.*

The circuits thus disagree about the meaning of "conduct involving * * * import trade or import commerce": The Seventh Circuit requires that a foreign defendant be an importer, while the Third and Ninth Circuits do not. This conflict has placed AUO in an untenable situation, where the very same conduct by the company has been deemed to involve "import trade" in the Ninth Circuit but not in the Seventh.

2. The Seventh Circuit has the better view of the statute. "Import trade or import commerce" has a plain meaning: It refers to the transactions between foreign sellers and domestic buyers. *See Minn-Chem*, 683 F.3d at 855. It follows that a foreign defendant is engaged in "conduct involving * * * import trade or import commerce" only insofar as the defendant himself is engaged in selling goods directly to domestic buyers.

This interpretation is confirmed by the statute's structure. The FTAIA, of course, does not apply at all if the defendant's "conduct involv[es] * * * import trade or import commerce." But if the FTAIA does apply, one way of satisfying its special requirements would be to show that the defendant's "conduct ha[d] a direct, substantial, and reasonably foreseeable effect" on "import trade or import commerce." 15

U.S.C. § 6a(1)(A). This statutory scheme makes sense only if "conduct involving * * * import trade or import commerce" is narrower in scope than "conduct ha[ving] a direct, substantial, and reasonably foreseeable effect" on "import trade or import commerce." After all, it should be more difficult to show that conduct is exempt altogether from the FTAIA than to show that it satisfies the FTAIA's special requirements.

The decisions of the Third and Ninth Circuits, however, turn this scheme on its head. Rather than limit "conduct involving * * * import trade or import commerce" to transactions between foreign sellers and domestic buyers, the Third and Ninth Circuits have expanded that exemption to encompass conduct "directed at," or "consummated within," an "import market." Their decisions thus blur the line between the statute's exemption and its special requirements. Indeed, it is hard to say, under the Third and Ninth Circuits' approaches, how application of the exemption and the special requirements would differ. Because each of the FTAIA's provisions should be given independent meaning, the Seventh Circuit's decision finds support in the structure of the statute.

The Seventh Circuit's decision also advances the FTAIA's purpose. The FTAIA reflects Congress's effort to limit the extraterritorial reach of the Sherman Act in the interest of international comity. *See Empagran*, 542 U.S. at 164 (construing the FTAIA "to avoid unreasonable interference with the sovereign authority of other nations"). By exempting "conduct * * * involving import trade or import commerce" from the scope of the FTAIA, "Congress recognized that there was no need for this self-restraint with respect to imports." *Minn-Chem*, 683

F.3d at 854. The reason for this exemption is straightforward: "The applicability of U.S. law to transactions in which a good or service is being sent *directly* into the United States, *with no intermediate stops*, is both fully predictable to foreign entities and necessary for the protection of U.S. consumers." *Id.* (emphases added). The same cannot be said of goods that make their way into the United States only after passing through foreign intermediaries. As to those transactions, the interest of international comity—together with the presumption against extraterritorial application—counsel in favor of requiring that the FTAIA's special requirements be met before the reach of U.S. law is extended. *See Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (enforcing a presumption against extraterritorial application "to protect against unintended clashes between our laws and those of other nations which could result in international discord" (internal quotation marks omitted)). The FTAIA's purpose thus supports reading the "import trade" exemption to cover only direct sales between foreign sellers and domestic buyers.

Because the Ninth Circuit's decision deepens a split over the meaning of "import trade or import commerce," and because the Ninth Circuit erred in expanding that exemption beyond importers, the first question presented warrants this Court's review.

B. The Courts Of Appeals Disagree About Whether Petitioners' Foreign Price-Fixing Agreement Had A "Direct" Effect "Giv[ing] Rise To" A Sherman Act Claim

1. The Ninth Circuit's decision in this case conflicts with the Seventh Circuit's decision in *Motorola* on a second question: whether petitioners' foreign price-fixing agreement had the requisite effect on U.S. commerce—namely, an effect that is "direct" and "give[s] rise to" a Sherman Act claim. 15 U.S.C. § 6a(1), (2).

The Seventh Circuit held that it did not. *Motorola*, 775 F.3d at 819. The court explained that "the *immediate* victims of the price fixing were [Motorola's] foreign subsidiaries," who bought the TFT-LCD panels overseas and incorporated them into finished products. *Id.* at 820 (emphasis added). They were the panels' "*direct* purchasers." *Id.* at 819 (emphasis added). By contrast, the Seventh Circuit held, "Motorola and its customers [were] *indirect* purchasers." *Id.* at 821 (emphasis added). And given their position at a "subsequent level" of distribution, the Seventh Circuit found it "difficult to assess the impact" of the price-fixing agreement on them. *Id.* at 821. Because any injury to Motorola or its customers was only "derivative," *id.* at 820, the Seventh Circuit held that "the effect of anticompetitive conduct on domestic U.S. commerce" did not "give rise to an antitrust cause of action." *Id.* at 819.

The Ninth Circuit disagreed; it held that petitioners' conduct *did* have an "immediate consequence" on U.S. commerce, satisfying the FTAIA's requirement of a "direct" effect that "gives rise to" a Sherman Act claim. Pet. App. 38a-39a. Unlike the Seventh Cir-

cuit—which questioned whether Motorola was hurt by price increases at all, *see Motorola*, 775 F.3d at 821-822—the Ninth Circuit traced the "direct" injury of U.S. customers to "increased prices" passed down the supply chain. Pet. App. 40a. The Ninth Circuit also relied on the fact that "[i]t was not uncommon that the orders placed with system integrators were based on custom orders from United States customers." *Id.* That, too, cannot be reconciled with the Seventh Circuit's decision, which held that whether Motorola was the "'target' of the price fixers" made no difference at all. *Motorola*, 775 F.3d at 822.

It is true that the Seventh Circuit ultimately rested its decision on the FTAIA's "give rise to" requirement, while assuming, without deciding, that the effect of petitioners' conduct was "direct." *Id.* at 819. But that does nothing to reduce the conflict between the two circuits' decisions. After all, the Ninth Circuit's decision is addressed *both* to whether an effect is "direct" *and* to whether it "gives rise to" a Sherman Act claim, so conflict with the Seventh Circuit's decision on at least the latter requirement is unavoidable. *See* Pet. App. 38a-39a. Moreover, as the Ninth Circuit's analysis demonstrates, the two inquiries are overlapping: Both concern the immediacy of the effects caused by a challenged practice in the United States. *See id.* And with respect to the price-fixing agreement here, there can be no doubt that the two circuits reached contrary conclusions about the nature of those effects: The Seventh Circuit concluded that they were "indirect" and "derivative," *Motorola*, 775 F.3d at 820, 821, while the Ninth Circuit concluded that they were "direct" and "immediate." Pet. App. 38a. The two circuits' decisions cannot be reconciled.

2. The Ninth Circuit's decision, moreover, is incorrect. "No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165. To "avoid unreasonable interference with the sovereign authority of other nations," this Court has construed the FTAIA to "reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Id.* at 164, 165; *see also Kiobel*, 133 S. Ct. at 1664 (recognizing a presumption against extraterritorial application for reasons of international comity). Put simply, "U.S. antitrust laws are not to be used for injury to foreign customers." *Motorola*, 775 F.3d at 820 (internal quotation marks omitted).

The Ninth Circuit's decision runs afoul of that basic principle. As the Seventh Circuit correctly observed, "the cartel-engendered price increase in the components and in the price of [finished products] that incorporated them occurred entirely in foreign commerce." *Id.* at 819. If OEMs and SIs thought they "overpa[id] for inputs that they b[ought] abroad," they could have sought recourse in "the law of the countries in which [they] are incorporated * * * , or the law of the countries in which the price fixers they bought from operate, or [the law] of the countries in which the purchases were made." *Id.* at 823. The foreign agreement in this case falls within the authority of those foreign countries to regulate. So by extending the reach of the U.S. antitrust law to cover the same conduct, the Ninth Circuit risks the very interference this Court has admonished it to avoid. *See id.* at 824 (explaining that a "primary concern motivating the [FTAIA]" was that, without the

statute, foreign countries would resent "the apparent effort of the United States to act as the world's competition officer" (internal quotation marks and brackets omitted)). This Court's review is necessary to resolve this split and reverse the error of the Ninth Circuit.

C. This Case Is The Ideal Vehicle For Considering These Questions

This case is the ideal vehicle for considering both of these questions under the FTAIA. Indeed, this Court has considered such questions together in the past: In *Empagran*, this Court decided first a question whether the FTAIA applied, and second a question whether the FTAIA's special requirements were satisfied. *See* 542 U.S. at 158-159. This Court should seize this opportunity to do the same here. Indeed, a better opportunity is unlikely to present itself.

1. To begin, this case comes to the Court following final judgment in the District Court. *See Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree."). Accordingly, the questions presented are ripe for this Court's review: the legal issues have been fully addressed, the record has been completely developed, and there will not be another opportunity for petitioners to seek certiorari.

2. Furthermore, the FTAIA questions here are outcome-determinative. Recall that under the FTAIA, the Government had to prove either (1) that petitioners' "conduct involv[ed] * * * import trade or import commerce," or (2) that it had an effect on U.S. commerce that was "direct" and "gives rise to" a

Sherman Act claim. 15 U.S.C. § 6a; *see also* Pet. App. 26a-27a.

When the "import trade" exemption is properly limited to the conduct of importers, the evidence was insufficient to convict on the first theory. The Ninth Circuit seemed to think there was evidence that petitioners sold goods directly to domestic buyers; in its view, "[t]rial testimony established that AUO imported over one million price-fixed panels per month into the United States." Pet. App. 33a. But the trial testimony did no such thing: What Michael Wong, a government witness, stated at trial was that AUO sold, at peak, one million panels per month to U.S.-*headquartered* companies, such as Dell and Apple. C.A. E.R. 1418. Those companies might be headquartered in the United States, but they do not assemble finished products here. Thus, what Mr. Wong was describing were sales to overseas OEMs, not direct sales into the United States. The Ninth Circuit also stated that the "Crystal Meeting participants earned over $600 million from the importation of TFT-LCDs into the United States." Pet. App. 33a. But there was no evidence that any of those direct sales were made by *petitioners*, as opposed to the several *other* Crystal Meeting participants. Nor was there any evidence that petitioners entered an agreement "intending to help" those other participants "target[]" the United States. *Id.* at 26a. Thus, when "conduct involving * * * import trade or import commerce" is given its proper meaning, the Government's first theory fails.

In any event, whatever merit there is to the first theory, the Government is doomed by the second. The jury in this case returned a general verdict, which did not identify which of the Government's two

theories was the basis for the convictions. C.A. E.R. 587-588. As a consequence, that general verdict must be set aside if either one of those theories was "legally inadequate." *Griffin* v. *United States*, 502 U.S. 46, 59 (1991); *see also Yates* v. *United States*, 354 U.S. 298, 312 (1957). Here, the jury was told, for purposes of the Government's second theory, to consider only the effect of "fixing the price of TFT-LCD panels that were incorporated into finished products." Pet. App. 26a. And for reasons explained above, that theory was legally inadequate: When "direct" is given its proper meaning, petitioners' sales of panels to foreign intermediaries (who then incorporated the panels into finished products) "fails to come within the statutory definition of the crime." *Griffin*, 502 U.S. at 59. Thus, even if the verdict were "supportable" on the Government's first theory, the convictions must be reversed because "it is impossible to tell" whether the jury relied on the second. *Yates*, 354 U.S. at 312.

At a minimum, a remand would be necessary for the lower courts to apply a proper interpretation of the FTAIA to this case in the first instance. In addition to the issues already discussed, the Ninth Circuit would have to reconsider whether the indictment sufficiently alleged "conduct involving * * * import trade," as properly construed. *See* Pet. App. 28a-32a. That question implicates yet another circuit split over whether, in a case arising under the FTAIA, "import trade" must be pled at all. *Compare Animal Sci.*, 654 F.3d at 467, 471 (yes), *with Minn-Chem*, 683 F.3d at 854 (no), *and* Pet. App. 28a (no). The Ninth Circuit would also have to reconsider whether the indictment sufficiently alleged conduct having a "direct" effect, as that term is properly

construed, and whether a correct interpretation of these provisions of the FTAIA requires at least that petitioners be resentenced. *See* Pet. App. 34a-37a; AUO & AUOA's Pet. for Panel Reh'g at 8-12, No. 12-10492 (9th Cir. Aug. 25, 2014), ECF No. 100-1. In short, the outcome of this case would turn on this Court's resolution of the questions presented.

3. Finally, the stakes in this case are massive. This is not just any case arising under the Sherman Act, but a criminal prosecution brought by the Federal Government. Confident that U.S. antitrust law would sensibly limit its reach regarding conduct abroad that is not directed at the United States, Mr. Chen and Dr. Hsiung—both Taiwanese citizens living in Taiwan—voluntarily traveled to the United States to face the charges in the indictment. The prosecution resulted in substantial prison terms for Mr. Chen and Dr. Hsiung and half a billion dollars in fines for AUO. If the Court is to consider these questions under the FTAIA, it should do so here, where criminal convictions and sentences hang in the balance.

II. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER FOREIGN PRICE-FIXING AGREEMENTS ARE SUBJECT TO *PER SE* CONDEMNATION

Regardless of the scope of the FTAIA, this Court's review is warranted for another reason: The Ninth Circuit's condemnation of foreign price-fixing agreements as *per se* unreasonable cannot be squared with this Court's precedents.

A. Under This Court's Precedents, A *Per Se* Rule Is Not Appropriate When Evaluating Foreign Price-Fixing Agreements

1. "Ordinarily, whether particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the rule of reason—that is, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (internal quotation marks omitted). The point of the inquiry is to determine whether the challenged practice "has an effect of a kind that antitrust law considers harmful." *Empagran*, 542 U.S. at 162. And because "American antitrust laws do not regulate the competitive conditions of *other nations'* economies," *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) (emphasis added), the only effects that matter are those on *American* commerce. *See Empagran*, 542 U.S. at 165 ("[A]pplication of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable * * * insofar as they reflect a legislative effort to redress *domestic injury* that foreign anticompetitive conduct has caused."). Only if those *domestic* effects are "anticompetitive" is the practice an unreasonable restraint on trade. *Leegin*, 551 U.S. at 886; *see also NCAA* v. *Board of Regents*, 468 U.S. 85, 104 (1984) ("[T]he criterion to be used in judging the validity of a restraint on trade is its impact on competition.").

Dispensing with this case-by-case evaluation in favor of a *per se* rule is justified only in narrow circumstances. "To justify a *per se* prohibition a restraint must have manifestly anticompetitive

effects and lack any redeeming virtue." *Leegin*, 551 U.S. at 886 (internal quotation marks, citation, and ellipsis omitted). "As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Id.* at 886-887 (citation omitted). Any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than * * * upon formalistic line drawing." *Cont'l T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977).

Accordingly, this Court has "been slow * * * to extend *per se* analysis to restraints imposed in the context of business relationships where the impact of certain practices is not immediately obvious." *FTC* v. *Ind. Fed'n of Dentists*, 476 U.S. 447, 458-459 (1986); *see, e.g.*, *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963) ("We need to know more than we do about the actual impact of [the practices] on competition to decide whether they have such a pernicious effect on competition and lack * * * any redeeming virtue." (internal quotation marks omitted)). And it has not hesitated to overrule *per se* rules where empirical evidence or economic scholarship no longer supports the assumptions on which they were based. *See, e.g.*, *Leegin*, 551 U.S. at 907; *State Oil Co.* v. *Khan*, 522 U.S. 3, 22 (1997); *GTE Sylvania*, 433 U.S. at 57-58.

2. There is no justification for departing from the rule of reason here. In this case, as the Ninth Circuit acknowledged, "the agreement to fix prices occurred in Taiwan." Pet. App. 20a. Foreign manufacturers

met overseas to fix the prices of TFT-LCD panels in foreign sales to foreign buyers. *See supra* pp. 6-7, 19.

The Ninth Circuit made no attempt to explain why *foreign* price-fixing agreements such as this one "would always or almost always tend to restrict competition and decrease output" *in the United States*. *Leegin*, 551 U.S. at 886 (internal quotation marks omitted). Instead, the Ninth Circuit sought to justify application of a *per se* rule based on mere precedent alone. "For over a century," the Ninth Circuit maintained, "courts have treated horizontal price-fixing as a *per se* violation of the Sherman Act." Pet. App. 17a.

The cases cited by the Ninth Circuit, however, all concerned *domestic* price-fixing agreements. *See, e.g.*, *Leegin*, 551 U.S. at 882-884; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 167-168 (1940). And that is important, because a foreign agreement does not necessarily have the same effect on U.S. competition as a domestic one, even though they both might involve "price-fixing." *See Broad. Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) ("[E]asy labels do not always supply ready answers."). Indeed, as the leading antitrust treatise explains, "the conventional assumptions that courts make in appraising restraints in domestic markets are not necessarily applicable in foreign markets." 1B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 273b (4th ed. 2013). Accordingly, courts should not indiscriminately apply *per se* rules developed in the domestic context "to foreign restraints that, in many instances, either pose very little danger to American commerce or have more persuasive justifications than are likely in similar restraints at home." *Id.*

A simple hypothetical illustrates how foreign price-fixing agreements can be different. Suppose three foreign manufacturers—*A*, *B*, and *C*—agree to fix the prices of bolts. *A* and *B* sell exclusively to buyers in Asia. *C* sells primarily in Asia, but also sells directly to buyers in the United States. Even if *C* were to sell enough bolts here to have a "substantial effect in the United States," *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993), that effect would not be harmful to domestic competition under U.S. antitrust law. After all, *C* did not enter into a price-fixing agreement with any other seller in the U.S. market; *C* entered into a price-fixing agreement with *A* and *B*, who compete with *C* abroad but not in the United States. As far as the U.S. market is concerned, *C* is just a single entity, acting independently of all of its market competitors. *C*'s price-fixing agreement with *A* and *B* has no adverse effect on competition in the U.S. market.

Indeed, this hypothetical presents circumstances similar to those in *Texaco, Inc.* v. *Dagher*, 547 U.S. 1 (2006). In *Dagher*, two oil companies, Texaco and Shell Oil, formed a joint venture to sell gasoline at a fixed price. *Id.* at 3-4, 6-7. The Court nevertheless held that the *per se* rule against price-fixing did not apply, "because Texaco and Shell Oil did not compete with one another in the relevant market * * * but instead participated in that market jointly." *Id.* at 5-6. "In other words, the pricing policy challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products." *Id*. at 6.

The economic consequences of the hypothetical foreign price-fixing agreement above are no different. *C* did not compete with *A* and *B* in the United States, so their price-fixing agreement was not one "between competing entities" in the "relevant market." *Id.* at 5-6. Application of a *per se* rule would thus be as inappropriate as it was in *Dagher*.

It therefore cannot be said that foreign price-fixing agreements have "manifestly anticompetitive effects," or "always or almost always tend to restrict competition and decrease output," in the United States. *Leegin*, 551 U.S. at 886 (internal quotation marks omitted). Because the impact of foreign price-fixing agreements on competition in U.S. markets is far from "immediately obvious," there is no justification for condemning all such schemes as *per se* unlawful. *Ind. Fed'n*, 476 U.S. at 459.[*]

In reaching a contrary conclusion, the Ninth Circuit added to the growing confusion among the courts of appeals regarding how to evaluate foreign conduct. The decision below and the First Circuit in *United States* v. *Nippon Industries Co.*, 109 F.3d 1 (1st Cir. 1997), took for granted that *per se* rules developed in the domestic context should apply with equal force to foreign agreements. *See id.* at 7 (concluding that a

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[*] The Ninth Circuit's determination that petitioners' conduct had "substantial effects in the United States" is beside the point. Pet. App. 20a. So too is the Ninth Circuit's determination that their conduct "did not occur in a solely foreign bubble." *Id.* Those determinations might bear on whether petitioners' conduct "sufficiently affect[ed] American commerce," but that is a separate question from whether that "effect" was "of a kind that antitrust law considers harmful," *i.e.*, of a kind that harms U.S. competition. *Empagran*, 542 U.S. at 162.

foreign price-fixing scheme "falls within the rubric" of a *per se* rule). Other circuit decisions, however, have rightly questioned that premise. The Ninth Circuit itself did so in *Metro Industries*, quoting with approval the observation of a leading treatise that "'price fixing in a foreign country might have some but very little impact on United States commerce.'" 82 F.3d at 845 (quoting 1 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 237 (1978)). The court in that case even went so far as to declare that the rule of reason should be applied whenever "a Sherman Act claim is based on conduct outside the United States." *Id.* The Fourth Circuit echoed that view in *Dee-K Enterprises, Inc.* v. *Heveafil Sdn. Bhd.*, 299 F.3d 281, 292 (4th Cir. 2002), explaining that "the rationale for *per se* rules in cases addressing domestic conduct seems plainly inapplicable to foreign restraints that * * * pose very little danger to American commerce." *Id.* at 292 (internal quotation marks omitted).

This Court's review is necessary to end this confusion and correct the Ninth Circuit's unjustified departure from the "accepted standard for testing whether a practice restrains trade in violation of § 1." *Leegin*, 551 U.S. at 885. The Ninth Circuit's decision to apply a *per se* rule cannot be squared with this Court's precedents, and petitioners' conduct should instead have been evaluated under the rule of reason.

B. Under The Rule Of Reason, Petitioners' Convictions Cannot Stand

Because petitioners' conduct should have been evaluated under the rule of reason, their convictions cannot stand. In a criminal prosecution governed by

the rule of reason, the Government must plead and prove that the challenged practice was "undertaken with knowledge that the proscribed [anticompetitive] effects would most likely follow." *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 444 (1978). In addition, the Government must plead and prove that there was an "unreasonable restraint on competition" in light of "all of the circumstances." *Leegin*, 551 U.S. at 885 (internal quotation marks omitted). Those circumstances include "specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Khan*, 522 U.S. at 10.

In this case, the Government did none of the above. Indeed, when petitioners moved to dismiss the superseding indictment on these very grounds, the Government did not dispute that it had failed to plead any of these elements. *See* C.A. E.R. 1673-1680. The Government's only response was that petitioners' conduct was *per se* unlawful, rendering such pleading unnecessary. *See id.* at 1675-1680. Nor was the jury asked to consider any of the foregoing elements at trial. In fact, the District Court expressly prohibited petitioners from arguing the rule of reason to the jury; prior to trial, it specifically enjoined petitioners from saying that the agreement "'was a reasonable one, and therefore, we're okay.'" *Id.* at 146.

These errors are fatal to the judgment in this case. The Government's failure to plead the necessary elements under the rule of reason requires reversal and dismissal of the indictment. *See Stirone* v. *United States*, 361 U.S. 212, 216-218 (1960). And the District Court's failure to instruct the jury on the necessary elements independently requires reversal,

because it is far from "clear beyond a reasonable doubt that a rational jury would have found [petitioners] guilty absent the error." *Neder* v. *United States*, 527 U.S. 1, 18 (1999). Had the Government been required to prove the requisite elements, petitioners would have prevailed. As the District Court itself recognized, petitioners faced substantial "business pressures" as they participated in "a fledgling industry in another country," and those "offsetting features" of their conduct went "a long way to explain it." C.A. E.R. 248-249; *see also Motorola*, 775 F.3d at 821 (noting the "remarkable dearth of evidence from which to infer actual harm to Motorola" from the foreign price-fixing scheme). When evaluated under the rule of reason, petitioners' conduct was lawful.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2015

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 12-10492, 12-10493, 12-10500, 12-10514

D.C. Nos. 3:09-cr-00110-SI-8,
3:09-cr-00110-SI-9, 3:09-cr-00110-SI-10,
3:09-cr-00110-SI-11

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HUI HSIUNG, AKA KUMA,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HSUAN BIN CHEN, AKA H.B. CHEN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

AU OPTRONICS CORPORATION,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

AU OPTRONICS CORPORATION AMERICA, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted
October 18, 2013

Filed July 10, 2014
Amended January 30, 2015

Before THOMAS, Chief Judge, McKEOWN, Circuit Judge, and KENDALL, District Judge.[*]

ORDER

The opinion filed on July 10, 2014, is amended. The amended opinion is filed concurrently with this order.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**. No further

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[*] The Honorable Virginia M. Kendall, District Judge for the U.S. District Court for the Northern District of Illinois, sitting by designation.

petitions for panel rehearing or petitions for rehearing en banc will be entertained.

OPINION

McKEOWN, Circuit Judge:

This criminal antitrust case stems from an international conspiracy between Taiwanese and Korean electronics manufacturers to fix prices for what is now ubiquitous technology, Liquid Crystal Display panels known as "TFT-LCDs."[1] After five years of secret meetings in Taiwan, sales worldwide including in the United States, and millions of dollars in profits to the participating companies, the conspiracy ended when the FBI raided the offices of AU Optronics Corporation of America ("AUOA") in Houston, Texas.

The defendants, AU Optronics ("AUO"), a Taiwanese company, and AUOA, AUO's retailer and wholly owned subsidiary (collectively, "the corporate defendants"), and two executives from AUO, Hsuan Bin Chen, its President and Chief Operating Officer, and Hui Hsiung, its Executive Vice President, were convicted of conspiracy to fix prices in violation of the

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[1] TFT-LCD, which is an abbreviation for Thin-Film-Transistor Liquid-Crystal Display, is a display technology used in flat panel computer monitors, notebook computers, flat panel televisions, and other devices. A "TFT display" is "[a] display using a refinement of LCD technology in which each liquid-crystal cell, or pixel, is controlled by three separate transistors, one each for red, blue, and green." Stephen Kleinedler (ed.), *Dictionary of Computer and Internet Words: An A to Z Guide to Hardware, Software, and Cyberspace* 270 (2001).

Sherman Act after an eight-week jury trial.[2] Their appeal raises complicated issues of first impression regarding the reach of the Sherman Act in a globalized economy. More specifically, they contend that the rule of reason applies to this price-fixing conspiracy because of its foreign character. This proposition, pegged to foreign involvement, does not over-ride the long standing rule that a horizontal price-fixing conspiracy is subject to *per se* analysis under the antitrust laws. The defendants also urge that because the bulk of the panels were sold to third parties worldwide rather than for direct import into the United States, the nexus to United States commerce was insufficient under the Sherman Act as amended by the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a ("FTAIA"). The defendants' efforts to place their conduct beyond the reach of United States law and to escape culpability under the rubric of extraterritoriality are unavailing. To begin, the defendants waived their challenge that *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010), displaced the Supreme Court's landmark case regarding antitrust and extraterritoriality, *Hartford Fire Insurance v. California*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993). In light of the substantial volume of goods sold to customers in the United States, the verdict may be sustained as import commerce falling within the Sherman Act. The verdict may also be sustained under the FTAIA's domestic effects pro-vision because the conduct had a "direct, substantial, and reasonably foreseeable effect

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[2] Seven other individuals who are not parties to this appeal were named as coconspirators in the operative indictment.

on United States commerce." 15 U.S.C. § 6a. We affirm the convictions of all defendants and the sentence of AUO, the only defendant to challenge the sentence.

FACTUAL AND PROCEDURAL BACKGROUND

I. THE CONSPIRACY

From October 2001 to January 2006, representatives from six leading TFT-LCD manufacturers met in Taiwan to "set[] the target price" and "stabilize the price" of TFT-LCDs, which were sold in the United States principally to Dell, Hewlett Packard ("HP"), Compaq, Apple, and Motorola for use in consumer electronics. This series of meetings, in which Chen, Hsiung, and other AUO employees participated, came to be known as the "Crystal Meetings."

Following each Crystal Meeting, the participating companies produced "Crystal Meeting Reports." These reports provided pricing targets for TFT-LCD sales, which, in turn, were used by retail branches of the companies as price benchmarks for selling panels to wholesale customers. More specifically, AUOA used the Crystal Meeting Reports that AUO provided to negotiate prices for the sale of TFT-LCDs to United States customers including HP, Compaq, View-Sonic, Dell, and Apple. AUOA employees and executives routinely traveled to the United States offices of Dell, Apple, and HP in Texas and California to discuss pricing for TFT-LCDs based on the targets coming out of the Crystal Meetings. Chen and Hsiung played the most "critical role[s]" in settling price disputes with executives at Dell.

Crystal Meeting participants stood to make enormous profits from TFT-LCD sales to United

States technology retailers. During the conspiracy period, the United States comprised approximately one-third of the global market for personal computers incorporating TFT-LCDs, and sales of panels by Crystal Meeting participants to the United States generated over $600 million in revenue. Sales to key United States companies, Dell, Compaq, and HP, were particularly important because they were bellwether companies—if they accepted a price increase, "the entire market could also accept the price increase."

II. PROCEEDINGS IN THE DISTRICT COURT

The defendants were indicted in the Northern District of California and charged with one count of conspiracy to fix prices for TFT-LCDs in violation of the Sherman Act, 15 U.S.C. § 1 *et seq*. The indictment also contained a sentencing allegation pursuant to the Alternative Fine Statute, 18 U.S.C. § 3571(d), alleging that AUO and AUOA, along with their coconspirators, "derived gross gains of at least $500,000,000."

The defendants twice moved to dismiss the indictment. The district court denied the first motion and rejected the arguments that (i) the rule of reason should apply pursuant to *Metro Industries v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), and (ii) the government was required to plead and prove that the defendants acted with knowledge that their conduct would have anticompetitive effects on United States commerce. The district court held that the rule of reason did not apply because horizontal price-fixing historically has been considered a *per se* violation of the Sherman Act, *Metro Industries* notwithstanding.

The district court also denied the second motion to dismiss the indictment and rejected the argument that the indictment was deficient for failing to allege an "intended and substantial effect" on United States commerce as required by the FTAIA. According to the district court, "[b]y its express terms, the [FTAIA] is inapplicable to [the] import activity conducted by defendants." The district court also concluded that the FTAIA did not bar prosecution of this price-fixing conspiracy involving both foreign and domestic conduct.

At trial, the government presented evidence regarding the defendants' extensive involvement in the Crystal Meetings and their sales of price-fixed TFT-LCDs to customers in the United States, including evidence that the defendants specifically targeted United States technology companies, principally, Apple, Compaq, and HP. Government experts testified regarding the financial impact of those sales, specifically that the defendants derived hundreds of millions of dollars in profits from sales of price-fixed TFT-LCDs in the United States.

In closing arguments, defense counsel argued, among other things, that the government had not met its burden of proving venue by a preponderance of the evidence. On rebuttal, the government responded and directly addressed venue for the first time, explaining that venue was appropriate in the Northern District of California because "[t]he conspirators' negotiation of price-fixed panels with HP in Cupertino were acts in furtherance of this conspiracy." Defense counsel objected on the ground that the government's representation misstated the evidence. The district court overruled the objection,

relying on the government's representation that this fact was in evidence.

During the jury instruction conference, as well as in pretrial proceedings, the reach of the Sherman Act to conduct occurring outside of the United States was a contentious subject. In describing the application of the Sherman Act, the district judge settled on the following charge:

> The Sherman Act [] applies to conspiracies that occur entirely outside the United States if they have a substantial and intended effect in the United States. Thus, to convict the defendants you must find beyond a reasonable doubt one or both of the following:
>
> (A) that at least one member of the conspiracy took at least one action in furtherance of the conspiracy within the United States, or
>
> (B) that the conspiracy had a substantial and in-tended effect in the United States.

The jury found the defendants guilty of conspiracy to fix prices in violation of the Sherman Act. The jury also found that the "combined gross gains derived from the conspiracy by all the participants in the conspiracy" were "$500 million or more."

The defendants moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, and, in the alternative, for a new trial under Federal Rule of Criminal Procedure 33. They argued that (i) the government had failed to establish venue in the Northern District of California, (ii) the rule of reason should have applied pursuant to *Metro Industries*, (iii) the defendants did not have notice of the unlawfulness of their conduct, (iv) the government

had failed to prove an exception to the FTAIA, and (v) the evidence was insufficient as a matter of law to establish the $500 million or more loss amount. AUOA also claimed that the government did not prove that any agent of AUOA knowingly and intentionally participated in the price-fixing agreement. The district court denied the motions.

The district court sentenced Hsiung and Chen principally to a term of thirty-six months' imprisonment and a $200,000 fine each. The district court sentenced the corporate defendants principally to a three-year term of probation with conditions. The district court also imposed a $500 million fine on AUO. All of the defendants appeal their convictions, and AUO appeals its sentence.

ANALYSIS

I. VENUE CHALLENGE

As a preliminary matter, the defendants appeal on the basis of improper venue.[3] Four issues are subsumed in the venue challenge: (i) our standard of review, (ii) the proper standard for proof at trial, (iii) whether the government's representation in closing arguments constituted prosecutorial misconduct, and (iv) whether the government proved venue.

Although the defendants suggest otherwise, we review de novo whether venue was proper. *United States v. Liang*, 224 F.3d 1057, 1059 (9th Cir. 2000). The defendants argue that the standard of review

[3] Hsiung and Chen raise the issue of improper venue; however, all of the defendants adopt by reference and join in all arguments raised by their co-defendants for purposes of this appeal. *See* Fed. R. App. P. 28(i).

should be whether "a rational jury could not fail to conclude that * * * the evidence establishes venue," because the district court "in substance" decided the issue of venue as a matter of law when it overruled the objection to the government's representation in rebuttal that negotiations of price-fixed TFT-LCDs occurred in the Northern District of California. *See United States v. Lukashov*, 694 F.3d 1107, 1120 (9th Cir. 2012). That's a mouthful. Nonetheless, the district court's evidentiary ruling did not decide venue as a matter of law. *See id.* at 1112–13, 1120 (finding venue decided as a matter of law when the jury did not find venue proper, and the district court ruled that venue was proper on a Rule 29 motion). The proper standard of review remains de novo.

It is well established that a preponderance of the evidence is the proper standard of proof for venue. *See, e.g., id.* at 1120. The defendants' position that the standard is beyond a reasonable doubt has no support in the law. The district court appropriately instructed the jury on the standard of proof for venue.

Next, we consider the government's timing in addressing venue. The issue of venue was affirmatively highlighted for the first time in the defendants' closing argument, and the government then responded in its rebuttal argument. The defendants argue that it was prosecutorial misconduct and reversible error for the prosecutor to represent in rebuttal that "[t]he conspirator's negotiation of price-fixed panels with HP in Cupertino were acts in furtherance of this conspiracy." Neither the timing of this statement nor its substance constitutes misconduct. The

defendants accuse the government of sandbagging by relying on "late-breaking theories" of venue in rebuttal. However, the defense invited a response by raising the venue issue in the first place. A prosecutor may respond in rebuttal to an attack made in the defendant's closing argument. *See Lawn v. United States*, 355 U.S. 339, 359 n.15, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958). The substance of the government's response was not new evidence or allegations; instead, it was permissible argument based on the indictment's allegations and the evidence produced at trial. The indictment alleged that the charged conspiracy "was carried out, in part, in the Northern District of California." Trial testimony established that AUO employees negotiated prices for TFT-LCDs with HP in Cupertino, California. *See United States v. Reyes*, 660 F.3d 454, 462 (9th Cir. 2011) ("It is certainly within the bounds of fair advocacy for a prosecutor, like any lawyer, to ask the jury to draw inferences from the evidence that the prosecutor believes in good faith might be true." (quoting *United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002))). The jury also was instructed that closing arguments were not evidence. Accordingly, the prosecutor did not commit misconduct by making these statements during closing argument, and the district court properly overruled the defendant's objection.

Finally, the evidence referenced by the government was sufficient to establish venue by a preponderance of the evidence. "It is by now well settled that venue on a conspiracy charge is proper where * * * any overt act committed in furtherance of the conspiracy occurred." *United States v. Gonzalez*, 683 F.3d 1221,

1224 (9th Cir. 2012). In addition to the HP negotiations, the government introduced evidence that AUOA representatives negotiated sales of price-fixed TFT-LCDs with Apple in the Northern District of California and that AUOA maintained offices in the Northern District of California from which it conducted price negotiations by e-mail and phone. This evidence is sufficient to establish by a preponderance of the evidence that overt acts in furtherance of the conspiracy occurred in the Northern District of California. Thus, venue was proper.

II. JURY INSTRUCTION CHALLENGE AND EXTRATERRITORIALITY OF THE SHERMAN ACT

The Supreme Court's seminal case on antitrust and foreign conduct is *Hartford Fire*, in which the Court held that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. at 796. The district court instructed the jury to this effect: "to convict the defendants you must find beyond a reasonable doubt one or both of the following [] (A) that at least one member of the conspiracy took at least one action in furtherance of the conspiracy within the United States, or (B) that the conspiracy had a substantial and intended effect in the United States."

Before trial, the defendants moved to dismiss the indictment on the basis that it did not allege adequately the *Hartford Fire* "substantial and intended effects" test. At the jury instructions conference, the defendants urged the district court to give the *Hartford Fire* instruction, while also claiming that part A of the instruction was erroneous

because it permitted the jury to convict on the basis of one domestic act. Although the defendants contested part A, they all concurred that part B "is a correct statement of the *Hartford Fire* requirements for establishing extraterritorial jurisdiction over foreign anticompetitive con-duct, and should be given."

In an about face, in post-trial motions, the defendants rejected the principle of *Hartford Fire* and argued for the first time that the Sherman Act cannot be used to prosecute foreign conduct because there is no affirmative indication that the Sherman Act applies extraterritorially. They cited to the Supreme Court's decision in *Morrison*, which addressed the extraterritorial reach of the federal securities laws.

At the time of the jury instructions conference, in February 2012, *Morrison* had been on the books for more than eighteen months. Commentary about the case was extensive. *See, e.g.*, Nathan Koppel & Ashby Jones, *Securities Ruling Limits Claims of Fraud*, Wall St. J., Sept. 28, 2010, at C1; Hogan Lovells, *US Supreme Court rejects extraterritorial reach of Securities Exchange Act antifraud provisions*, June 30, 2010. The opinion was hardly breaking news. In light of the defendants' request that the court give the *Hartford Fire* jury instruction and their untimely objection to the instruction in post-trial motions, we hold that the defendants waived the argument that *Morrison* overruled *Hartford Fire* and that an extraterritoriality defense bars their convictions.

Because the defendants were the ones who proposed the instruction in the first place, they

cannot now claim that giving the instruction was error. The defendants considered the effects of the instruction and intentionally relinquished the right to argue that the Sherman Act does not apply extraterritorially. *See United States v. Baldwin*, 987 F.2d 1432, 1437 (9th Cir. 1993) ("Where the defendant himself proposes the jury instruction he later challenges on appeal, we deny review under the invited error doctrine."). To be sure, the defendants point out that they raised the extraterritoriality argument in post-trial motions. However, the complete reversal of their position after the verdict and in post-trial motions "was so untimely as to amount to a waiver," with respect to the *Morrison* objection to the jury instruction. *See United States v. Stapleton*, 600 F.2d 780, 782 (9th Cir. 1979) (internal quotation marks omitted). This case falls squarely within the "invited error" doctrine, which covers "known rights that have been intentionally relinquished or abandoned."[4] *United States v. Perez*,

[4] We note that we would reach the same conclusion if the defendants' conduct were characterized as forfeiture subject to plain error review. *See United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *United States v. Perez*, 116 F.3d 840, 846–48 (9th Cir. 1997) (en banc). "The Supreme Court mandated a four-part inquiry to determine whether an error may be corrected under Rule 52(b): (1) there must be error; (2) it must be plain; and (3) it must affect substantial rights. Even after a reviewing court finds plain error under this three-part rubric, relief remains discretionary under *Olano's* fourth and final requirement. The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Perez*, 116 F.3d at 846 (internal quotation marks omitted). No plain error resulted from the jury instruction because neither the Supreme Court nor this court has determined that *Morrison*

116 F.3d 840, 842 (9th Cir. 1997) (en banc) (quoting *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)) (internal quotation marks and alterations omitted). This is not a case of forfeiture, where defense counsel simply failed "to make a timely assertion of a [claimed] right." *Id.* at 845. Waiver occurred here because, de-spite having knowledge of the law, the defendants "proposed or accepted" what they now claim to be "a flawed instruction." *See id.* That this election was knowing is underscored by the defendants' challenge to part A of the instruction versus their support for part B, the *Hartford Fire* formulation.

As to part A of the instruction, the defendants objected on the basis that it "would render *Hartford Fire* entirely nugatory, as, having proven the most minimal act in furtherance of a charged agreement, the government would never have to prove an intended and substantial effect on U.S. commerce." In support of this argument, the defendants rely on the following statement in *Hartford Fire*: "[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States," 509 U.S. at 796, and *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945) (L. Hand, J.). As to part B, the defendants agreed that the instruction was accurate.

We have held that the FTAIA's requirement that the defendants' conduct had a "direct, substantial, and reasonably foreseeable effect" on domestic

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over-ruled *Hartford Fire*. *See Johnson v. United States*, 520 U.S. 461, 467–68, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

commerce displaced the intentionality requirement of *Hartford Fire* where the FTAIA applies. *See United States v. LSL Biotechnologies*, 379 F.3d 672, 678–79 (9th Cir. 2004). To the extent that the prosecution was not subject to the FTAIA, the jury instructions as a whole belie the assertion that the jury could have convicted on the basis of one, unintentional domestic act. *See United States v. Frega*, 179 F.3d 793, 806 n.16 (9th Cir. 1999) ("In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation."). Immediately following the *Hartford Fire* instruction, the district court instructed the jury that it must find the following beyond a reasonable doubt:

> [T]hat the members of the conspiracy engaged in one or both of the following activities:
>
> (A) fixing the price of TFT-LCD panels targeted by the participants to be sold in the United States or for delivery to the United States; or
>
> (B) fixing the price of TFT-LCD panels that were incorporated into finished products such as notebook computers, desktop computer monitors, and televisions, and that this conduct had a direct, substantial, and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States or for delivery to the United States. In determining whether the conspiracy had such an effect, you may consider the total amount of trade or commerce in those finished products sold in the United States or for delivery to the United

States; however, the government's proof need not quantify or value that effect.

The effect of foreign conduct in the United States was a central point of controversy throughout the trial. Nonetheless, the conduct always was linked, as in the above instruction, to targeting for sale or delivery in the United States. Part A of the instruction required the jury to find that the defendants fixed the prices of TFT-LCDs "targeted" for sale or delivery in the United States. This "targeting" language subsumed intentionality. *See Oxford English Dictionary* 642 (2d ed.1989) (defining "targeted" as "[d]esignated or chosen as a target"). There is no way that the defendants could have unintentionally designated or chosen the United States market as a target of the conspiracy. Viewing the instructions as a whole, nothing misled the jury as to its task. The *Hartford Fire* jury instruction was neither a surprise nor was it improper. Part A of the instruction passes legal muster, and the defendants solicited part B.

III. *PER SE* LIABILITY FOR HORIZONTAL PRICE-FIXING

Having determined that the prosecution was not barred by an extraterritoriality defense, we address the appropriate standard for judging liability in this price-fixing scheme. For over a century, courts have treated horizontal price-fixing as a *per se* violation of the Sherman Act. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) ("[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no

showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."). Twice in recent years, the Supreme Court reiterated this principle. The directive in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 893, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007), is unequivocal: "A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful." And just last year, the Chief Justice emphasized that "it is *per se* unlawful to fix prices under antitrust law." *F.T.C. v. Actavis, Inc.*, —— U.S. ——, ——, 133 S.Ct. 2223, 2239, 186 L.Ed.2d 343 (2013) (Roberts, C.J., dissenting on other grounds).

Consistent with Supreme Court precedent, the district court treated this price-fixing case as governed by the *per se* rule. The defendants claim that the district court erred by not adopting the rule of reason as the benchmark and that the indictment, jury instructions, and proof were deficient under rule of reason analysis. We hold that the price-fixing scheme as alleged and proven is subject to *per se* analysis under the Sherman Act.

According to the defendants, this is not a per se case because under *Metro Industries*, "application of the per se rule is not appropriate where the conduct in question occurred in another country." 82 F.3d at 844–45. This approach invites us to ignore the significant differences between *Metro Industries* and this case. We decline to do so.

To begin, *Metro Industries* was not a price-fixing case; rather, it involved an unusual horizontal

market division for stainless steamers by a group of Korean companies. 82 F.3d at 843–44. The Korean Holloware Association (the "Association") established a design committee consisting of Korean manufacturers, traders, patent attorneys, and government officials. *Id.* at 841. The Association prohibited trading companies from holding a patent to a design, unless it was held jointly with a manufacturing company. *Id.* When Metro Industries, a manufacturer, experienced a disruption in stainless steamer supply from its trading counterpart, Sammi Corporation, the Association blocked its attempts to partner with another trading company. *Id.* at 841–42. Based on that interference, Metro Industries brought suit against Sammi and its American subsidiaries alleging, among other claims, violations of §§ 1 and 2 of the Sherman Act. *Id.* at 842; *see* 15 U.S.C. §§ 1, 2. The district court granted summary judgment in the defendants' favor and denied Metro Industries's cross-motion for summary judgment on the claim "that the Korean design registration system under which Sammi had the exclusive rights to manufacture a particular steamer design constituted a market division that was illegal per se under § 1 of the Sherman Act." *Metro Industries*, 82 F.3d at 843.

Our court affirmed and held that because the market division at issue was "not a classic horizontal market division agreement," the rule of reason applied. *Id.* at 844 (emphasis added). We then went on to write that even if the registration system constituted a market division that would ordinarily be treated as a *per se* violation of the Sherman Act, the rule of reason applied because the allegedly

unlawful con-duct occurred in a foreign country. *Id.* at 844–45.[5]

Unlike *Metro Industries*, this case centers on a classic horizontal price-fixing scheme. Also unlike *Metro Industries*, in which there was "no evidence of actual injury to competition in the United States," 82 F.3d at 848, the voluminous evidence here documents substantial effects in the United States. The conduct here did not occur in a solely foreign bubble. Although the agreement to fix prices occurred in Taiwan, the sale of price-fixed TFT-LCDs occurred in large part in the United States. So, too, did part of the conspiracy to carry out that price-fixing agreement. We are unwilling to extend *Metro Industries* to a case where both part of the conduct and the effects of that conduct occurred in the United States.

In invoking the *per se* rule for horizontal price-fixing, we join the reasoning of other circuits. *See,*

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[5] Not surprisingly, this statement has been the subject of scholarly criticism. *See, e.g.*, Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 273b (3d ed. 2006) ("Perhaps the court's conclusion that restraints abroad always require rule of reason analysis would have been more qualified had the restraint before it belonged more clearly in the per se category without offsetting considerations of comity."); Stephen Calkins, *The Antitrust Year in Review: Antitrust Olympics 1995–96*, 11 Fall Antitrust 22, 22, 25 (1996) ("Surely a classic international cartel that substantially affects U.S. commerce ought to qualify for *per se* treatment. *Metro Industries* was a procedurally unusual case, in which the record from one unsuccessful proceeding was offered to support a second in which there was 'no evidence of actual injury to competition in the United States.' Courts in future cases should limit *Metro Industries's* language to its facts." (quoting *Metro Indus.*, 82 F.3d at 848)).

e.g., *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 2–3, 7, 9 (1st Cir. 1997) (upholding an indictment alleging a *per se* violation of the Sherman Act against a Japanese fax paper manufacturer that entered into a price-fixing conspiracy overseas for fax paper that was sold to companies in the United States at fixed prices.). The district court appropriately rejected the rule of reason defense.[6]

IV. THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

The international implications of this case are not limited to the challenges to the jury instructions or the *per se* rule. The defendants also argue that the indictment and proof did not satisfy the requirements of the FTAIA. The FTAIA provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—(1) such conduct has a direct, substantial, and reasonably foreseeable effect—(A) on trade or commerce which is not trade or commerce with foreign nations * * * ." 15 U.S.C. § 6a.

Although the statute is a web of words, it boils down to two principles. First, the Sherman Act applies to "import trade or import commerce" with foreign nations. *Id.* Put differently, the FTAIA does not alter the Sherman Act's coverage of import trade; import trade is excluded from the FTAIA altogether. Second, under the FTAIA, the Sherman Act does not

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[6] In light of our holding and Supreme Court precedent, we cannot embrace the defendants' argument that adopting a *per se* standard violates the fair notice principle of the Due Process Clause.

apply to nonimport trade or commerce with foreign nations, unless the domestic effects exception is met. *Id.* For the Sherman Act to apply to nonimport trade or commerce with foreign nations, the conduct at issue must have a "direct, substantial, and reasonably foreseeable effect—(A) on trade or commerce which is not trade or commerce with foreign nations * * * ." *Id.*

Congress enacted the FTAIA in 1982 in "respon[se] to concerns regarding the scope of the broad jurisdictional language in the Sherman Act." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 985 (9th Cir. 2008). As the Supreme Court explained, "[t]he FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004) (citing H.R.Rep. No. 97-686, at 1-3, 9-10 (1982), U.S.Code Cong. & Admin. News 1982, 2487, 2487-2488, 2494-2495). *Empagran* teaches that the FTAIA removes from the reach of the Sherman Act "(1) export activities and (2) other commercial activities taking place abroad, *unless* those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States." 542 U.S. at 161. We now consider the multiple legal issues the FTAIA challenge raises.

A. JURISDICTION VERSUS MERITS

Whether the FTAIA "affects the subject-matter relates to the scope of coverage of the antitrust laws," is our first inquiry. *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 851 (7th Cir. 2012) (en banc). We start here because "[a] court has a duty to assure itself of its own jurisdiction, regardless of whether jurisdiction is contested by the parties," *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010), and "the Supreme Court has emphasized the need to draw a careful line between true jurisdictional limitations and other types of rules," *Minn-Chem*, 683 F.3d at 851–52 (citing *Morrison*, 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 and *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 131 S.Ct. 1197, 1202, 179 L.Ed.2d 159 (2011)). We hold that the FTAIA is not a subject-matter jurisdiction limitation on the power of the federal courts but a component of the merits of a Sherman Act claim involving nonimport trade or commerce with foreign nations.

We have not definitively addressed this issue in the past. In *LSL Biotechnologies*, 379 F.3d at 680, we rejected the argument that foreign conduct having only a "substantial" effect on United States commerce satisfied the FTAIA and held that the FTAIA "created [a] jurisdictional test" requiring "a direct, substantial, and reasonably foreseeable effect" on domestic commerce. *Id.* at 679 (internal quotation marks omitted). Despite our use of the term "jurisdictional," we did not analyze whether the FTAIA provided a jurisdictional limitation on the power of the federal courts nor did we discuss our use of the term "jurisdictional." Seven years later, in

In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, we observed that "[i]t is unclear, however, whether the FTAIA is more appropriately viewed as withdrawing jurisdiction from the federal courts * * * or as simply establishing a limited cause of action" and "decline[d] to resolve the question." 546 F.3d at 985 n.3.

As a consequence of clarification by the Supreme Court, much has changed since *LSL Biotechnologies*. The Court has made a point of distinguishing between a true jurisdictional limitation and a merits determination, noting that "Courts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010). The Court emphasized that "[its] recent cases evince a marked desire to curtail [ ] drive-by jurisdictional rulings, which too easily can miss the critical difference[s] between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Id.* (internal quotation marks and citation omitted).

As the Court framed the issue in *Morrison*, "to ask what conduct § 10(b) [of the Securities Exchange Act] reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case." 561 U.S. at 254 (internal quotation marks omitted). The FTAIA, like § 10(b) of the Securities Exchange Act, plainly "remov[es conduct] from the Sherman Act's reach." *Empagran*, 542 U.S.

at 161. To the extent *LSL Biotechnologies* signaled the contrary, intervening Supreme Court precedent clarifies that the issue of "what conduct [the FTAIA] prohibits" is a merits question, not a jurisdictional one. *See Morrison*, 561 U.S. at 254. In concluding that the FTAIA is not a jurisdictional limitation on the court's power, we bring our precedent into line with the Court's admonition "to bring some discipline to the use of" the term "jurisdictional." *See Henderson*, 131 S.Ct. at 1202 ("We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction.").

Other circuits that have considered the question post-*Morrison* are in accord.[7] Relying on *Morrison*, the Seventh Circuit held that "the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts." *Minn-Chem*, 683 F.3d at 852. The Second and Third Circuits reached the same conclusion. *See Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014) ("[W]e have little difficulty concluding that the requirements of the FTAIA go to

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[7] A number of courts have referred to the FTAIA as jurisdictional, but did so prior to the Supreme Court's decisions in *Reed Elsevier* and *Morrison* and without analyzing whether the FTAIA concerns subject-matter jurisdiction or the scope of coverage of antitrust laws. *See, e.g.*, *United States v. Anderson*, 326 F.3d 1319, 1329-30 (11th Cir. 2003); *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd*, 299 F.3d 281, 287 (4th Cir. 2002); *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 429–30 (5th Cir. 2001); *Nippon Paper Indus. Co.*, 109 F.3d at 3–4; *see also Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 439 n.4 (6th Cir. 2012) ("sav[ing] the resolution of this is-sue for another day" post-*Morrison*).

the merits of an antitrust claim rather than to subject matter jurisdiction."); *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467-68 (3d Cir. 2011) ("[T]he FTAIA constitutes a substantive merits limitation rather than a jurisdictional limitation."). The FTAIA does not limit the power of the federal courts; rather, it provides substantive elements under the Sherman Act in cases involving non-import trade with foreign nations.

B. THE FTAIA CHALLENGES

The following jury instruction sums up the heart of the Sherman Act violation:

> [T]he government must prove each of the following elements beyond a reasonable doubt:
>
> *First*, that the conspiracy existed at or about the time stated in the indictment;
>
> *Second*, that the defendants knowingly-that is, voluntarily and intentionally-became members of the conspiracy charged in the indictment, knowing of its goal and intending to help accomplish it; and
>
> *Third*, that the members of the conspiracy engaged in one or both of the following activities:
>
> (A) fixing the price of TFT-LCD panels targeted by the participants to be sold in the United States or for delivery to the United States; or
>
> (B) fixing the price of TFT-LCD panels that were incorporated into finished products such as note-book computers, desktop computer monitors, and televisions, and that

> this conduct had a direct, substantial, and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States or for delivery to the United States. In determining whether the conspiracy had such an effect, you may consider the total amount of trade or commerce in those finished products sold in the United States or for delivery to the United States; however, the Government's proof need not quantify or value that effect.

The defendants argue that (i) the indictment was insufficient because it did not name or cite the FTAIA, (ii) the indictment and evidence are insufficient as to both import trade and domestic effects, and (iii) the domestic effects exception, which was not alleged in the indictment, is an element of a Sherman Act offense that implicates the FTAIA and thus this instruction constructively amended the indictment.

1. THE FTAIA IN THE INDICTMENT

The defendants argue that the indictment was flawed for failing to mention the FTAIA by name or statutory citation. However, as explained in detail with regard to import trade and domestic effects, the indictment contained the factual allegations necessary to establish that the FTAIA either did not apply or that its requirements were satisfied.

In any event, there was absolutely no prejudice from the indictment's failure to cite the FTAIA. "Unless the defendant[s] w[ere] misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction."

Fed. R. Crim. P. 7(c)(2); *see United States v. Vroman*, 975 F.2d 669, 671 (9th Cir. 1992) ("Correct citation to the relevant statute, though always desirable, is not fatal if omitted."). The parties raised the FTAIA requirements throughout the proceedings, and the district court record is full of briefing and argument on the FTAIA.

2. IMPORT TRADE AND THE FTAIA

The appropriate characterization of the import trade provision of the FTAIA is essential to our analysis. The statute provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce)," and then goes on to provide limitations vis-a-vis nonimport commerce. 15 U.S.C. § 6a. We agree with the defendants that this section should not be labeled an FTAIA exception. Rather, more accurately, import trade, as referenced in the parenthetical statement, does not fall within the FTAIA at all. It falls within the Sherman Act without further clarification or pleading. Consequently, we disagree with the defendants' view that the indictment was insufficient because it did not allege import trade under the FTAIA.

The indictment charged a violation of § 1 of the Sherman Act and alleged that the defendants "entered into and engaged in a combination and conspiracy to suppress and eliminate competition by fixing the prices of thin-film transistor liquid crystal display panels ("TFT-LCD") in the United States and elsewhere." *See United States v. Morrison*, 536 F.2d 286, 288 (9th Cir. 1976) ("It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of

themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." (internal quotation marks omitted)). Apart from tracking the language of the Sherman Act in the indictment, the government did, in fact, plead and prove that the defendants engaged in import trade.

In *Empagran*, the Supreme Court explained the somewhat convoluted scope of the FTAIA:

> [The FTAIA] initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it has a direct, substantial, and reasonably foreseeable effect on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the effect must giv[e] rise to a [Sherman Act] claim.

542 U.S. at 162 (internal quotation marks omitted). Under its plain terms, the FTAIA does not affect import trade. *See id.*; *Dee-K Enters.*, 299 F.3d at 287 ("Because this case involves importation of foreign-made goods, however—conduct Congress *expressly exempted* from FTAIA coverage as involving * * * import trade or import commerce * * * with foreign nations—the FTAIA standard obviously does not directly govern this case." (internal quotations marks and citation omitted)).

The legislative history supports this statutory interpretation. House Reports are clear that the FTAIA does not implicate import trade. "A transaction be-tween two foreign firms, even if American-owned, should not, merely by virtue of the American owner-ship, come within the reach of our antitrust laws. Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as ex-port transactions—that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor * * * . It is thus clear that wholly foreign transactions as well as export transactions are covered by the Amendment, but that import transactions are not." H.R. Rep. 97-686, at 9–10.

Although our circuit has not defined "import trade" for purposes of the FTAIA, not much imagination is required to say that this phrase means precisely what it says. As the Seventh Circuit held in a case involving foreign cartel members, "transactions that are directly between the [U.S.] plaintiff purchasers and the defendant cartel members *are* the import commerce of the United States * * * ." *Minn-Chem*, 683 F.3d at 855. Similarly, the Sixth Circuit labeled goods manufactured abroad and sold in the United States "import commerce." *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438 n.3, 440 (6th Cir. 2012). So too are transactions between the foreign defendant producers of TFT-LCDs and purchasers located in the United States.[8] *See id.*

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[8] The Third Circuit also addressed the import trade exclusion, holding that it applies to importers and to defendants whose "conduct is directed at a U.S. import market," even if the

The defendants' conduct, as alleged and proven, constitutes "import trade," and falls outside the scope of the FTAIA. The allegations in the indictment, which we review de novo, *United States v. O'Donnell*, 608 F.3d 546, 555 (9th Cir. 2010), must "ensure that [the defendants were] prosecuted only on the basis of the facts presented to the grand jury," *see United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999) (internal quotation marks omitted). Thus, "[a]n indictment must be specific in its charges and necessary allegations cannot be left to inference * * * . [A]n indictment should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied." *O'Donnell*, 608 F.3d at 555 (citations and internal quotation marks omitted).

The indictment is replete with allegations that support the government's position that the defendants engaged in import trade. The indictment alleged that, within the conspiracy period, AUO and AUOA "engaged in the business of producing and selling TFT-LCDs to customers in the United States." During the conspiracy period, AUO employees "had one-on-one discussions in person or by phone with representatives of coconspirator TFT-LCD manufacturers during which they reached agreements on pricing of TFT-LCD sold to certain

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defendants did not engage in importation of products into the United States. *Animal Sci. Prods.*, 654 F.3d at 471 & n.11. We need not determine the outer bounds of import trade by considering whether commerce directed at, but not consummated within, an import market is also outside the scope of the FTAIA's import provisions because at least a portion of the transactions here involves the heartland situation of the direct importation of foreign goods into the United States. *See id.*

customers, including customers located in the United States." The indictment went on to allege that AUO attempted to attain the price goals set with coconspirators by, during the conspiracy period, "regularly instruct[ing] employees of [AUOA] located in the United States to contact employees of other TFT-LCD manufacturers in the United States to discuss pricing to major United States TFT-LCD customers," and that "[i]n response to these instructions, employees of [AUOA] located in the United States had regular contact through in-person meetings and phone calls with employees of other TFT-LCD manufacturers in the United States to discuss and confirm pricing, and at times agree on pricing, to certain TFT-LCD customers in the United States."

These allegations directly describe that the defendants and their coconspirators engaged in import commerce with the United States—indeed, the conspiracy's intent, as alleged, was to "suppress and eliminate competition" by fixing the prices for panels that AUO and AUOA sold to manufacturers "in the United States and elsewhere" for incorporation into retail technology sold to consumers in the United States and elsewhere.

Going into trial, there was no surprise regarding the import trade allegations; likewise, the evidence at trial was ample on this aspect of the conspiracy. We review the defendants' sufficiency of the evidence challenge under the well established standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979): "viewing the evidence in the light most favorable to the prosecution," we determine whether "*any* rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

Trial testimony established that AUO imported over one million price-fixed panels per month into the United States. The Crystal Meeting participants earned over $600 million from the importation of TFT-LCDs into the United States. Although it was undisputed at trial that AUO and AUOA did not manufacture any consumer products for importation into the United States, the evidence revealed that AUO and AUOA executives and employees negotiated with United States companies in the United States to sell TFT-LCD panels at the prices set at the Crystal Meetings. Importation of this critical component of various electronic devices is surely "import trade or import commerce." To suggest, as the defendants do, that AUO was not an "importer" misses the point. The panels were sold into the United States, falling squarely within the scope of the Sherman Act.

The defendants also claim that the transactions did not "target" the United States. Targeting is not a legal element for import trade under the Sherman Act, though it was included in the jury instructions at the defendants' request. In any event, the negotiations in the United States and the significant direct sales to the United States certainly qualify as targeting. The challenge to the sufficiency of the evidence fails.

In sum, the FTAIA does not apply to the defendants' import trade conduct. The government sufficiently pleaded and proved that the conspirators en-gaged in import commerce with the United States

and that the price-fixing conspiracy violated § 1 of the Sherman Act.

3. DOMESTIC EFFECTS UNDER THE FTAIA

Unlike import trade, which is exempted from the FTAIA altogether, if the government proceeds on a domestic effects theory, which it did here, the government must plead and prove the requirements for the domestic effects exception to the FTAIA, namely that the defendants' conduct had "a direct, substantial, and reasonably foreseeable effect" on United States commerce. *See* 15 U.S.C. § 6a. We hold that the indictment sufficiently alleged such conduct and reject the defendants' sufficiency of the evidence challenge to the domestic effects exception.

As with import commerce, it is important to place the domestic effects exception within the statutory framework of the FTAIA. We do not agree with the government that the FTAIA is an affirmative defense to a Sherman Act offense. The government's interpretation is at odds with the plain language of the statute, which establishes that when a case involves nonimport trade with foreign nations, the Sherman Act does not apply *unless* the FTAIA domestic effects exception applies. *See* 15 U.S.C. § 6a; *United States v. Davenport*, 519 F.3d 940, 945 (9th Cir. 2008) (contrasting elements and affirmative defenses).

The government's reliance on *McKelvey v. United States*, 260 U.S. 353, 356–57, 43 S.Ct. 132, 67 L.Ed. 301 (1922), and *United States v. Gravenmeir*, 121 F.3d 526, 528 (9th Cir. 1997), which both held that the government did not have to disprove an exception to a criminal statute to obtain a conviction, is misplaced. In those cases, the statutes at issue

laid out prohibited conduct and then provided an escape hatch exception. *See McKelvey*, 260 U.S. at 356 (statute prohibiting the obstruction of access to public lands "[p]rovided, this section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith" (citing Act of February 25, 1885, c. 149, 23 Stat. 321 (Comp.St. §§ 4999, 5000))); *Gravenmeir*, 121 F.3d at 528 (statute prohibiting the transfer or possession of a machine gun except "with respect to * * * (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect" (alteration in original) (citing 18 U.S.C. § 922(o))). In contrast, as a default, the FTAIA provides that when the alleged conduct involves nonimport trade with foreign nations, the Sherman Act does *not* apply. 15 U.S.C. § 6a; *see Empagran*, 542 U.S. at 158. To allege a nonimport trade claim under the Sherman Act, the claim must encompass the domestic effects elements.

The indictment alleged that AUO "was en-gaged in the business of producing and selling TFT-LCDs to customers in the United States and else-where;" that, at Crystal Meetings, in telephone conversations, and in e-mail messages with other coconspirators, AUO employees reached agreements on prices for TFT-LCDs sold in the United States; and that "senior-level employees of [AUO] regularly instructed employees of [AUOA] located in the United States to contact employees of other TFT-LCD manufacturers in the United States to discuss pricing to major United States TFT-LCD customers."

The indictment also alleged that the price-fixed TFT-LCDs were used in computers and other monitors that were sold in and substantially affected interstate commerce. Specifically, the indictment charged that "the substantial terms" of the conspiracy were an agreement "to fix the prices of TFT-LCDs for use in notebook computers, desktop monitors, and televisions in the United States and elsewhere."

The magic words—"domestic effects"—were not necessary to make clear that the overseas sale of panels for incorporation into products destined for sale in the United States was a key focus of the indictment. From the outset, the indictment targeted both import trade of panels and the effects of foreign sales on domestic commerce. The scope of the charges was not a mystery.

The defendants argue that the FTAIA jury instruction worked a constructive amendment of the indictment because it permitted the jury to convict based on either an import trade or domestic effects theory when prior to trial the government had only sought to rely on an import trade theory. We "have found constructive amendment of an indictment where (1) there is a complex of facts [presented at trial] distinctly different from those set forth in the charging instrument, or the crime charged [in the indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved." *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002) (alterations in original) (internal quotation marks omitted), *modified on other grounds by United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007).

Here, there was no constructive amendment because the facts in the indictment necessarily supported the domestic effects claim, namely by allegations that AUO and AUOA sold price-fixed panels in the United States and abroad for use in finished consumer goods sold in or delivered to the United States. The allegations gave fair notice that the claimed conduct had a "direct, substantial, and reasonably foreseeable effect" on United States commerce. *See* 15 U.S.C. § 6a(1)(A). Based on the allegations, the domestic effects instruction did not result in a constructive amendment of the indictment.

Finally, we address the sufficiency of the evidence under the domestic effects exception, which was directed at foreign sales of panels that were incorporated into finished consumer products ultimately sold in the United States. The defendants question whether the government proved the domestic effects exception at trial. As an initial matter, the parties acknowledge that the conduct was both substantial and had a reasonably foreseeable impact on United States commerce.

The defendants, however, contend that the overseas conduct was not sufficiently "direct" under the FTAIA, and that the jury was not required to find "the elements of an intent to negatively affect, and a substantial effect on, United States commerce." The essence of their objection is that the offshore conduct is too attenuated from the United States and that the intervening development, manufacture, and sale of the products worldwide resulted in a diffuse effect.

Indeed, the government's expert created some ambiguity regarding "the exact flow of how panels go

from the plants of the Crystal Meeting participants into a product, to a—what are called an 'OEM'—the computer maker—and get to the United States." Admitting that there was "not good data" on how the price-fixed panels wound up in finished consumer goods sold in the United States, the expert explained that "[f]or example, Dell may have someone else put together the monitor," and that assemblers for panels were located in China, Singapore, Taiwan, Japan, and Mexico. Although negotiations took place in the United States, and there is no dispute that customers in the United States purchased finished products containing the price-fixed TFT-LCDs, such as computer monitors and laptop computers, this testimony raises a question regarding whether the effects were sufficiently direct to uphold a verdict based on the domestic effects claim.

Conduct has a "direct" effect for purposes of the domestic effects exception to the FTAIA "if it follows as an immediate consequence of the defendant[s'] activity." *LSL Biotechnologies*, 379 F.3d at 680–81 ("An effect cannot be 'direct' where it depends on such uncertain intervening developments.").[9] The

[9] Both the Second Circuit and the Seventh Circuit disagree with this definition of "direct." *See Lotes*, 753 F.3d at 398 (choosing instead to [i]nterpret[] 'direct' to require only a reasonably proximate causal nexus"); *Minn-Chem*, 683 F.3d at 857 ("Superimposing the idea of 'immediate consequence' on top of the full phrase results in a stricter test than the complete statute can bear."). Whether our circuit should reconsider the stricter standard we impose is not within the province of this panel. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) ("[A] three-judge panel may not overrule a prior decision of the court."). But, in any event, the result is the same and the defendants benefit from our circuit's formulation.

statute also requires that the direct effect "gives rise to" the plaintiff's injury. 15 U.S.C. § 6a. Thus, as we have noted, " 'but for' causation cannot suffice for the FTAIA domestic injury exception to apply and [we] therefore adopt a proximate causation standard." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d at 987; *see also Empagran*, 542 U.S. at 173 ("Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach."); *Lotes*, 753 F.3d at 414 ("[I]n the wake of *Empagran*, three courts of appeals have considered what kind of causal connection is necessary for a domestic effect to 'give[ ] rise to' a plaintiff's claim * * * . Agreeing with our sister circuits, we adopt that standard here." (citing *In re Dynamic Random Access Memory*, 546 F.3d at 987)).

Looking at the conspiracy as a whole, and recognizing the standard on appeal is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson*, 443 U.S. at 319, we conclude that the conduct was sufficiently "direct, substantial and reasonably foreseeable" with respect to the effect on United States commerce. 15 U.S.C. § 6a.

The constellation of events that surrounded the conspiracy leads to one conclusion—the impact on the United States market was direct and followed "as an immediate consequence" of the price fixing. To begin, the TFT-LCDs are a substantial cost component of the finished products—70–80 percent in the case of monitors and 30–40 percent for notebook computers. One of the trial witnesses explained the correlation: "[I]f the panel price goes

up, then it will directly impact the monitor set price." The "price stabilization" meetings, where the price fixing initially occurred, led to direct negotiations with United States companies, both domestically and overseas, on pricing decisions. As noted before, some of the panels were imported directly into the United States. Other panels were sold overseas, often to foreign subsidiaries of American companies or to systems integrators, and then incorporated into finished products. It was well understood that substantial numbers of finished products were destined for the United States and that the practical upshot of the conspiracy would be and was increased prices to customers in the United States.

There were a variety of arrangements in terms of incorporating the panels into finished products. For example, Dell had a factory in Malaysia where 100% of the products were destined for the American market. In other situations, overseas systems integrators purchased the panels for integration into finished products, often with direct oversight of TFT-LCD panel pricing by United States manufacturers. In yet other circumstances, a global product arm of a United States company purchased the panels directly from one of the co-conspirators and then sold to system integrators. It was not uncommon that the orders placed with system integrators were based on custom orders from United States customers for direct shipment to that customer. By one estimate, $23.5 billion in price-fixed panels were imported into the United States as part of finished products, such as notebook computers and computer monitors. The testimony underscored the integrated, close and direct connection between the purchase of the price-

fixed panels, the United States as the destination for the products, and the ultimate inflation of prices in finished products imported to the United States. The direct connection was neither speculative nor insulated by multiple disconnected layers of transactions.

This case is unlike *LSL Biotechnologies*, where the effect of an agreement between United States and foreign firms rested on speculation as to future innovation in tomato seeds and lacked an existing effect on American tomato consumers. 379 F.3d at 681. Nor does this conspiracy fall into the category in which "action in a foreign country filters through many layers and finally causes a few ripples in the United States." *Minn-Chem*, 683 F.3d at 860.

In a closely related civil case brought by Motorola Mobility LLC against AU Optronics Corporation and other defendants, the Seventh Circuit addressed the direct effect issue vis-a-vis Motorola's claim. It noted that the arrangement "doesn't seem like 'many layers,' resulting in just 'a few ripples' in the United States cellphone market, though * * * the ripple effect probably was modest." *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003, 2015 WL 137907, at *3 (7th Cir. Jan. 12, 2015). Ultimately the private antitrust claim failed because of the indirect-purchaser doctrine of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), but, as the court explained, "[i]f price fixing by the component manufacturers had the requisite statutory effect on cellphone prices in the United States, the Act would not block the Department of Justice from seeking criminal or injunctive remedies." *Id.* at *10.

The jury instruction agreed to by defendants required the government to prove that the price fixing of panels that were incorporated into finished products "had a direct, substantial, and reasonably fore-seeable effect on trade or commerce in those finished products sold in the United States, or for delivery to the United States." On this record, the conviction on the domestic effects prong must be upheld under *Jackson*.

Finally, we note that even disregarding the domestic effects exception, the evidence that the defendants engaged in import trade was overwhelming and demonstrated that the defendants sold hundreds of millions of dollars of price-fixed panels directly into the United States. *See* 15 U.S.C. § 6a. The evidence offered in support of the import trade theory alone was sufficient to convict the defendants of price-fixing in violation of the Sherman Act.[10]

V. THE ALTERNATIVE FINE STATUTE

The final basis for the defendants' appeal is the $500 million fine the district court imposed on AUO

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[10] Reversal is not required when the jury returns a general guilty verdict and "one of the possible bases of conviction was * * * merely unsupported by sufficient evidence." *Griffin v. United States*, 502 U.S. 46, 55–56, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991); *see Sochor v. Florida*, 504 U.S. 527, 538, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (explaining that in *Griffin* the Court "held it was no violation of due process that a trial court instructed a jury on two different legal theories, one supported by the evidence, the other not * * * [because] although a jury is un-likely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by evidence"); *see also United States v. Barona*, 56 F.3d 1087, 1098 (9th Cir. 1995).

pursuant to the Alternative Fine Statute, 18 U.S.C. § 3571(d). The Alternative Fine Statute provides: "If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss * * * ." 18 U.S.C. § 3571(d). The jury found that the collective gain to the conspiracy members was over $500 million. We analyze the fine from two perspectives: (i) whether the fine was improper because it was based on the collective gains to all members of the conspiracy rather than the gains to AUO alone, and (ii) whether the district court, in not imposing joint and several liability, erred by failing to adhere to the "one recovery" rule and failing to take into account any fines paid by AUO's coconspirators. These are issues of first impression.

A. COLLECTIVE GAINS

Whether "gross gains" under § 3571 means gross gains to the individual defendant or to the conspiracy as a whole is an issue of statutory interpretation that we review de novo. *United States v. Marbella*, 73 F.3d 1508, 1515 (9th Cir. 1996). The district court instructed the jury as follows:

> In determining the gross gain from the conspiracy, [the jury] should total the gross gains to the defendants and the other participants in the conspiracy from affected sales of (1) TFT-LCD panels that were manufactured abroad and sold in the United States or for delivery to the United States; or (2) TFT-LCD panels incorporated into finished products such as notebook computers and

> desktop computer monitors that were sold in the United States or for delivery to the United States. Gross gain is the additional revenue to the conspirators from the conspiracy.

This instruction was proper because the statute unambiguously permits a "gross gains" calculation based on the gain attributable to the entire conspiracy.

The statute does not require that the gain derive from the defendant's "own individual conduct," as AUO reads it. Indeed, AUO's interpretation reads additional provisions into the statute. AUO relies on *United States v. Pfaff*, 619 F.3d 172, 175 (2d Cir. 2010) (per curiam), which held that the jury must find the gain or loss amount to impose a fine beyond the limits set by § 3571. *Id.* *Pfaff* is not instructive because it was not a conspiracy case; it did not address whether gross gains could include gains to all coconspirators. *Id.* at 173. Nor has AUO pointed to any case that supports its suggested interpretation, which is contrary to the plain text of the statute.[11]

AUO's offense is the conspiracy to fix prices for TFT-LCDs. The jury found $500 million in gross gains from that offense. The unambiguous language of the statute permitted the district court to impose the $500 million fine based on the gross gains to all the coconspirators.

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[11] AUO also points to the legislative history, a comment from the Sentencing Guidelines, and the rule of lenity. Because the text of the statute is unambiguous, we stop with the text and do not refer to extrinsic sources to divine its meaning. *See O'Donnell*, 608 F.3d at 555.

B. JOINT AND SEVERAL LIABILITY

AUO also argues that the district court erred by failing to follow principles of joint and several liability in imposing the fine, an approach that would have required a reduction from the fine amount of the portion already paid by AUO's coconspirators. However, AUO offers no support for the proposition that § 3571(d) incorporates principles of joint and several liability. The cases it cites do not address whether the "one recovery" rule of joint and several liability applies to § 3571(d), nor do they even discuss § 3571(d). At best, two of the cited cases establish that joint and several liability is an option available to a sentencing court. *See United States v. Pruett*, 681 F.3d 232, 249 (5th Cir. 2012); *United States v. Radtke*, 415 F.3d 826, 836 (8th Cir. 2005). The other cases, which address the imposition of civil penalties in RICO prosecutions and civil asset forfeiture, are similarly inapposite because the purpose of criminal fines is to punish the offender, not to compensate a victim or disgorge ill-gotten gains. *See Schachter v. Comm'r.*, 255 F.3d 1031, 1034–35 (9th Cir. 2001). No statutory authority or precedent supports AUO's interpretation of the Alternative Fine Statute as requiring joint and several liability and imposing a "one recovery" rule.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 09-cr-0110 SI

UNITED STATES OF AMERICA,
Plaintiff,

v.

AU OPTRONICS CORPORATION, *et al.*,
Defendants.

June 11, 2012

CORRECTED ORDER DENYING MOTIONS FOR JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL

SUSAN ILLSTON, District Judge:

On May 25, 2012, the Court heard argument on Defendants' motions for acquittal or, in the alternative, a new trial. Dkt. Nos. 878 and 879.[1] Having considered the arguments of counsel and the papers

[1] AUO and AUOA filed a joint motion (Dkt. No. 879); Hui Hsiung filed a separate motion (Dkt. No. 878), which raises issues substantially similar to those raised in the joint motion. Hsuan Bin Chen and Shiu Lung Leung joined the Hsiung Motion. *See* Dkt. Nos. 881 and 904. The Court considers these motions together.

submitted, the Court hereby DENIES Defendants' motions.

BACKGROUND

In June 2010, the Antitrust Division of the Department of Justice indicted AU Optronics Corporation ("AUO"), its wholly-owned subsidiary, AU Optronics Corporation of America ("AUOA"), and nine individuals on charges of price-fixing in violation of the Sherman Act, 15 U.S.C. § 1. AUO is a major manufacturer of thin-film transistor liquid crystal display ("TFT-LCD") panels, electronic components that are used in computer monitors, televisions, and other consumer electronics. Superseding Indictment, ¶¶ 3–4. The Superseding Indictment charged that AUO, in concert with other TFT-LCD manufacturers, conspired to fix worldwide prices of TFT-LCD panels.

On March 13, 2012, following an eight-week trial, a jury returned a verdict convicting Defendants AUO, AUOA, Hsuan Bin Chen, and Hui Hsiung (collectively, "Defendants") for their roles in the charged conspiracy. See Special Verdict Form, Dkt. No. 851. The jury further found that the conspirators derived gains of at least $500 million from the conspiracy. *Id.*

LEGAL STANDARD

1. Rule 29

Rule 29 of the Federal Rules of Criminal Procedure requires the Court, on a defendant's motion, to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). "A defendant is not required to move for a judgment of acquittal before the court

submits the case to the jury as a prerequisite for making such a motion after jury discharge." *Id.* at 29(c)(3). "If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination." *Id.* at 29(d)(1).

The Court's review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court to determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis original); *see also McDaniel v. Brown*, —— U.S. ——, 130 S.Ct. 665, 673, 175 L.Ed.2d 582 (2010) (reaffirming this standard). *Accord United States v. Nevils*, 598 F.3d 1158, 1163–64 (9th Cir. 2010) (en banc). This rule establishes a two-step inquiry:

> First, a * * * court must consider the evidence presented at trial in the light most favorable to the prosecution * * * . [And s]econd, after viewing the evidence in the light most favorable to the prosecution, the * * * court must determine whether this evidence, so viewed, is adequate to allow "any rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt."

Nevils, 598 F.3d at 1164 (quoting *Jackson*, 443 U.S. at 319) (emphasis in *Jackson*, final alteration in *Nevils*).

2. Rule 33

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The Ninth Circuit described the standard for granting a new trial in *United States. v. A. Lanoy Alston*, D.M.D., P.C., 974 F.2d 1206 (9th Cir. 1992), which it reaffirmed in *United States v. Kellington*, 217 F.3d 1084 (9th Cir. 2000):

> [A] district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal. The court is not obliged to view the evidence in the light most favorable to the verdict, and it is free to weigh the evidence and evaluate for itself the credibility of the witnesses * * * . If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

Kellington, 217 F.3d at 1097 (internal quotation marks and citations omitted).

DISCUSSION

Defendants give five general reasons why the Court should grant their motions for acquittal, or in the alternative, for a new trial: (1) the government

failed to establish venue in the Northern District of California; (2) the government failed to prove both of the required exceptions under the Foreign Trade Antitrust Improvements Act of 1982; (3) the evidence did not support the "gross gains" of $500 million alleged in the Indictment; (4) on statutory and constitutional grounds, the government was required to allege and present its case under the rule of reason rather than as a *per se* violation of the Sherman Act; and (5) the evidence at trial was insufficient to sustain AUOA's conviction.

The Court addresses each issue in turn.

1. Venue

Defendants contend that the government failed to establish venue in the Northern District of California.

"Venue, which may be waived, is not an essential fact constituting the offense charged." *United States v. Powell*, 498 F.2d 890, 891 (9th Cir. 1974) (citing *Carbo v. United States*, 314 F.2d 718, 733 (9th Cir. 1963)). Further, the government bears the burden of establishing venue by a preponderance of evidence. *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002) (internal citation omitted). "[D]irect proof of venue is not necessary where circumstantial evidence in the record as a whole supports the inference that the crime was committed in the district where venue was laid." *Id.* (citing *United States v. Childs*, 5 F.3d 1328, 1332 (9th Cir. 1993)); *see also Powell*, 498 F.2d at 891 (concluding that "[a] consideration of the circumstantial evidence * * * supports the conclusion of the trial court that venue was established.").

In conspiracy cases, venue is appropriate in any district where an overt act in furtherance of the conspiracy occurred. *See Hyde v. United States*, 225 U.S. 347, 367, 32 S.Ct. 793, 56 L.Ed. 1114 (1912); *United States v. Myers*, 847 F.2d 1408, 1411 (9th Cir. 1988); *United States v. Schoor*, 587 F.2d 1303, 1308 (9th Cir. 1979); *see also* 18 U.S.C. § 3237(a) (permitting prosecution "in any district in which such offense was begun, continued, or completed"). Each defendant need not have entered or otherwise committed an overt act within the district. *Myers*, 847 F.2d at 1411. Rather, since "a conspiracy is a partnership in crime * * * [an] overt act of one partner may be the act of all without any new agreement specifically directed to that act." *United States v. Socony-Vaccum Oil Co.*, 310 U.S. 150, 253–54, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (citation omitted).

Guided by the parties' stipulated jury instructions regarding venue, [2] the jury concluded that the conspiracy, while born abroad, extended into this district. The government presented evidence from which this finding could be made, including the fact that employees of Defendants were located in this

[2] The jury was instructed in advance of closing argument: "[b]efore you can find a defendant guilty of committing the crime charged in the indictment, you must find by a preponderance of evidence that, between September 14, 2001, and December 1, 2006, the conspiratorial agreement or some act in furtherance of the conspiracy occurred in the Northern District of California" and that "[t]o prove something by a preponderance is to prove it is more likely true than not true." Final Jury Instructions at 8–9, Dkt. No. 829; Stipulated and Party-Proposed Jury Instructions, Stipulated Instruction at 18, Dkt. No. 807.

District throughout the relevant time period, and that Hewlett-Packard maintained a procurement office in this District from 2001 until mid-2002. The Court finds that the evidence considered by the jury was sufficient to support the jury's conclusion. Further, the Court finds no threat of a serious miscarriage of justice based on the venue finding.

Having stipulated to the jury instructions regarding venue, Defendants waived the remainder of their post-conviction arguments. *See United States v. Williams*, 455 F.2d 361, 365 (9th Cir. 1972) (objections to the form of jury instructions waived where no objections made to the instruction as given and no additional instructions requested); *see also Powell*, 498 F.2d at 892 ("A new trial on venue grounds raised after the jury has convicted gives the [defendant] a second bite at the apple to which he is not entitled * * * ."); Fed. R. Crim. P. 30 ("A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate."). Accordingly, Defendants' argument that the government must prove an act establishing venue within the five-year limitations period must fail; so, too, must Defendants' constructive-amendment and fatal-variance arguments.

2. Foreign Trade Antitrust Improvements Act

Section 1 of the Sherman Act outlaws conspiracies "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Section 7 of the Sherman Act, added by the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), provides that Section 1 "shall not apply to

conduct involving trade or commerce (other than import trade or commerce) with foreign nations unless such conduct has a direct, substantial, and reasonably foreseeable effect" on commerce within the United States, United States import commerce, or export trade of a United States exporter. *See* 15 U.S.C. § 6a.

The jury was instructed accordingly:

> In order to establish the offense of conspiracy to fix prices charged in the indictment, the government must prove each of the following elements beyond a reasonable doubt:
>
> * * *
>
> Third, that the members of the conspiracy engaged in one or both of the following activities:
>
> (A) fixing the price of TFT-LCD panels targeted by the participants to be sold in the United States or for delivery to the United States; or
>
> (B) fixing the price of TFT-LCD panels that were incorporated into finished products such as note-book computers, desktop computer monitors, and televisions, and that this conduct had a direct, substantial, and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States or for delivery in the United States * * * .

Final Jury Instructions at 10, Dkt. No. 829.

Defendants argue that acquittal or a new trial is appropriate because "the evidence at trial was insufficient to prove either exclusion." *See* Joint

Motion at 18. Specifically, Defendants claim that the government failed to prove that AUO or the individual defendants fixed the price of TFT-LCD panels "targeted" for sale or delivery to the United States, or that Defendants' conduct had a "direct, substantial and reasonably foreseeable" effect on United States import commerce. *See id.* at 18–23. But the jury was instructed on both of the FTAIA exceptions and found beyond a reasonable doubt that the government's evidence sufficed.[3]

The Court does not find that the jury erred in its finding. To the contrary, the Court finds that, based on the evidence presented at trial, a reasonable jury could have found that the price-fixing conspiracy involved import commerce and that the conspiracy, which extended to the United States, had a "direct, substantial, and reasonably foreseeable effect" on that import commerce.

3. $500 Million Gross-Gain Finding

The jury was also instructed to determine whether Defendants or other participants derived monetary or economic gain from the conspiracy:

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[3] Defendants also contend that the evidence was insufficient to meet the FTAIA exceptions as a matter of law. Defendants' interpretation of the FTAIA, however, is inconsistent with the case law upon which the jury instructions were based. Moreover, Defendants stipulated to part of those jury instructions and cannot be heard to complain about them now. *See* Stipulated and Party-Proposed Jury Instructions at 28, Dkt. No. 807 (parties agreeing that part B of the instructions "is a correct statement of the *Hartford Fire* requirements for establishing extraterritorial jurisdiction over foreign anti-competitive conduct, and should be given.").

> In determining the gross gain from the conspiracy, you should total the gross gains to the defendants and other participants in the conspiracy from affected sales of (1) TFT-LCD panels that were manufactured abroad and sold in the United States or for delivery to the United States; or (2) TFT-LCD panels incorporated into finished products such as notebook computers and desktop computer monitors that were sold in the United States or for delivery to the United States.

Final Jury Instructions at 15, Dkt. No. 829.

Based on these instructions and the testimony of the government's expert witness, Dr. Leffler, the jury found that the gross gain from the conspiracy was "$500 million or more." *See* Verdict at 3, Dkt. 851. Defendants argue that the jury's finding of gain from the conspiracy is unsupported by the evidence. Defendants challenge the analysis of Dr. Leffler, who testified that the gross gain from the conspiracy was "substantially greater than $500 million." According to Defendants, Dr. Leffler's analysis is flawed because he incorrectly assumed that every TFT-LCD panel made by the crystal-meeting defendants from 2001 to 2006 was affected by the conspiracy. Defendants claim that, because he failed to distinguish between affected and unaffected panels, Dr. Leffler's analysis does not meet the requirement in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that any fact increasing the penalty beyond the $100 million maximum prescribed by the Sherman Act must be proven beyond a reasonable doubt.

Defendants are incorrect. To begin with, Dr. Leffler's multiple regression analysis estimated total overcharges in excess of $2 billion, far more than $500 million. Defendants make no compelling argument as to why the jury's reliance on Dr. Leffler's analysis was unreasonable. Nor did they offer at trial any alternative assessment of gross gains earned by all six crystal-meeting companies. Further, Defendants' *Apprendi* argument is misguided because the jury was charged with finding the total gain from the conspiracy, not the proportion of the panels affected by it. As the government rightly observes, it is the former that increases the maximum fine; the jury found beyond a reasonable doubt that the gain was at least $500 million.

Neither acquittal nor a new trial is appropriate here, where there was sufficient evidence for a reasonable jury to determine a gross gain amount of $500 million.

4. Rule of Reason

Defendants revive an argument that the Court has already fully considered and rejected, *see* Order Denying Defendants' Motion to Dismiss the Indictment and For a Bill of Particulars, Dkt. No. 250; *United States v. Chen*, 2011 WL 332713 (N.D. Cal. 2011): that, pursuant to *Metro Industries Inc. v. Sammi Corporation*, 82 F.3d 839 (9th Cir. 1996), Sherman Act violations based on foreign conduct are subject to a rule-of-reason analysis, and do not constitute a *per se* violation of antitrust laws as alleged in the Indictment. The Court found then that the *Metro Industries* case was factually and

legally distinguishable from this case, and reiterates that finding now.[4]

Defendants further contend they were not afforded fair notice under the due process clause that their conduct was forbidden. Defendants argue that *Metro Industries* is controlling Ninth Circuit law, and, as such, they only had fair warning that their conduct may be subject to a rule-of-reason analysis to determine whether there is a Sherman Act violation, not a *per se* analysis.

The Court is unpersuaded. "The due process clause * * * guarantees individuals the right to fair no-tice whether their conduct is prohibited by law." *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770 (9th Cir. 2008). There is ample evidence in the trial record that Defendants knew they were committing a wrongful act. "Indeed, since 'the punishment imposed is only for an act knowingly done with the purpose of doing that which [the Sherman Act] prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of the law.' " *United States v. Tannenbaum*, 934 F.2d 8, 12 (2d Cir. 1991) (quoting *Screws v. United States*, 325 U.S. 91, 102, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945)).

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[4] The Court also finds that Defendants waived their *Metro Industries* argument by voluntarily abandoning their proposed rule-of-reason jury instructions and stipulating to the price-fixing instructions given to the jury. *See* Stipulated and Party Proposed Jury Instructions at 15, Dkt. 807; *see also United States v. Laurenti*, 611 F.3d 530, 543–44 (9th Cir. 2010) ("waiver occurs when the defendant was aware of the omitted element and yet relinquished his right to have it submitted to the jury") (internal citations and quotation omitted).

5. AUOA's Separate Claims

Defendants also argue that the Court should grant their motions in favor of AUOA because the government failed to prove that "any agent of AUOA knowingly and intentionally participated in the price-fixing agreement." Joint Motion at 55.

The Court disagrees. Viewed in a light most favorable to the government, the Court finds that there is considerable evidence in the record from which a jury could reasonably find beyond a reasonable doubt that Hui Hsiung (AUO), Michael Wong (AUOA), and other AUOA employees participated in the conspiracy on behalf of AUOA and reached illegal pricing agreements.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby DENIES Defendants' motions for acquittal and DENIES Defendants' alternate motions for a new trial. Dkt. Nos. 878 and 879.

IT IS SO ORDERED.

APPENDIX C

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1 provides:

Trusts, etc., in restraint of trade illegal; penalty.

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

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15 U.S.C. § 6a provides:

Conduct involving trade or commerce with foreign nations.

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

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

(A) on trade or commerce which is not trade or commerce with foreign

nations, or on import trade or import commerce with foreign nations; or

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

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

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