No. 19-17428

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Indirect Purchaser Plaintiffs, et al.,
Appellees,

v.

Irico Group Corp., et al.,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(JUDGE JON S. TIGAR)

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING APPELLEES

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STATEMENT OF INTEREST

The United States enforces the federal antitrust laws. It has a strong interest in the proper interpretation of the jurisdictional limitations in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (FSIA), including the correct interpretation of "organ of a foreign state" in § 1603(b)(2) and of the "direct effect" requirement in the third prong of the commercial-activity exception in § 1605(a)(2).

In the district court, the United States filed a Statement of Interest under 28 U.S.C. § 517 explaining that "[a]n overly broad interpretation of 'organ of a foreign state' combined with an overly narrow reading of the commercial-activity exception's 'direct effect' requirement could harm American interests by immunizing defendants whose anticompetitive conduct has caused substantial harm to U.S. consumers." Doc. 5457, at 1. In denying appellants' motion to dismiss, the district court relied on this Statement. ER2-3, ER9-12.

The United States now files this amicus brief under Federal Rule of Appellate Procedure 29(a) and urges this Court to affirm.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred in concluding that an ordinary profit-seeking company, not engaged in public activity, and owned only in minority part by the Chinese government is not an organ of China under the FSIA.

2. Whether the district court erred in applying the FSIA's commercial-activity exception by finding a direct effect on the United States from a company's conspiratorial acts raising U.S. prices for televisions and computer monitors.

STATEMENT

These private cases follow on the United States' criminal investigation and prosecution of foreign corporations that conspired to fix the prices of cathode ray tubes (CRTs) used in televisions and computer monitors sold in the United States and elsewhere in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[1] Although the United States did not prosecute Irico Group Corp. (Group) or Irico Display Devices Co., Ltd. (Display), both companies were named as defendants

[1] The United States intervened in this case for the purpose of limiting discovery, Doc. 80, at 2, but that is not the basis of this filing.

in the private actions and moved to dismiss the actions for lack of jurisdiction under the FSIA. The district court denied the motion, and this appeal followed.

1. Statutory Background

The FSIA is "a comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'" *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004). The FSIA codifies the "restrictive theory of sovereign immunity," under which "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1983). Foreign states are "normally immune from the jurisdiction of federal and state courts, 28 U.S.C. § 1604, subject to a set of exceptions specified in §§ 1605 and 1607" for certain "commercial activities of [a] foreign sovereign" and other types of conduct. *Id.* at 488. When an exception applies, the foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

The FSIA defines "foreign state" to include its political subdivisions as well as its agencies and instrumentalities. *Id.* § 1603(a). The FSIA further defines "agency or instrumentality" to include any entity "(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States" nor "created under the laws of any third country." *Id.* § 1603(b). An entity's status under Section 1603(b) is determined as of the time the complaint was filed. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003).

The commercial-activity exception is the FSIA's "most significant" exception to immunity. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). A foreign state is not immune from jurisdiction "in any case" in which "the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the

foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

2. Factual and Procedural Background

This action involves a conspiracy to fix prices, allocate customers, and restrict output of products containing CRTs (CRT Products) in the United States and elsewhere. *E.g.*, Direct Purchaser Pfs. Consol. Am. Compl., Doc. 436, ¶¶ 5, 218, 220. Specifically, appellees alleged that appellants participated in at least several dozen meetings in which the conspirators agreed on price, output, and customer and market allocations of CRT Products sold in the United States and other countries, *id.* ¶ 159, and that appellants "manufactured, sold, and distributed CRT Products either directly or through its subsidiaries or affiliates throughout the United States," *id.* ¶¶ 37-39.

Between May 2009 and October 2017, appellants ceased participating in the action believing themselves immune under the FSIA, and the clerk entered a default. ER273-74. The district court vacated the default in February 2018. ER14-33.

The court first determined that it had jurisdiction over appellants. ER16-24. The court held that Display failed to show that it "is an organ

of the state," ER21, and that "the commercial activities exception" negates Group's immunity because appellees "sufficiently alleged facts showing that the anticompetitive behavior of the Irico Defendants, as part of the broader conspiracy, had a direct effect on prices of CRTs in the United States," ER24. Appellees presented evidence that "Irico participated in a conspiracy" and attended "over 70 conspiratorial meetings"; that "the U.S. was the second largest market for CRTs at 18% of the [worldwide] market"; and "the conspiracy resulted in higher prices, including in the United States, because CRT accounted for up to 50 percent of the cost of manufacturing a television or computer monitor." *Id.* "These facts support a finding that the Irico Defendant's commercial activities had a direct effect in the United States." *Id.* Having jurisdiction, the court nonetheless vacated the default because appellants could possibly establish immunity under the FSIA after discovery and further briefing. ER30, ER32-33.

Appellants moved to dismiss the Section 1 claims against them for lack of jurisdiction under the FSIA. *See* Doc. 5410 (Group Mot.), 5412 (Display Mot.). Group argued that it was "wholly owned by the State Council" of China, and thus immune under the majority-share prong of

Section 1603(b)(2), Group Mot. 1, 3. Unlike Group, however, Display was not majority owned by the Chinese government, as "the share capital of Display was owned 41.36% by [another corporation], which was in turn 75% owned by Irico Group." Display Mot. 1, 3 & n.1. Display thus argued it was immune as an "organ" of China. *Id.* at 4-17.

Appellants also argued that the FSIA's commercial-activity exception was inapplicable. *See* Group Mot. 10-16; Display Mot. 17-23. They claimed that "[t]he first and second prongs of the exception cannot apply to [them] because [they] carried on no 'commercial activity' in the United States and performed no 'acts' in the United States, let alone one upon which this action is based." Group Mot. 11; Display Mot. 19. They also argued that the third prong of the exception could not be satisfied, as a matter of law, because they never made direct sales of CRTs or CRT-containing products in the United States. Group Mot. 13-14; Display Mot. 20-21.

Appellees disputed these arguments on numerous factual and legal grounds, Doc. 5419,[2] and the district court denied the motion to dismiss. ER1-13. The court held that Group qualified as an "agency or instrumentality" of China under the majority-share prong, but Display did not since China only indirectly owned a minority share of Display. ER7-8. The court further held that Display was not an "organ" of China, because Display did not "show that it was 'engage[d] in a public activity on behalf of [a] foreign government,' as necessary to render it an organ of the Chinese state." ER10 (citations omitted). The court found that "Display was established as a form of privately held corporation under Chinese law"; "the Chinese government did not exercise direct control over Display" instead "interacting with Display in a typical investor role"; and Display "functioned as an ordinary profit-making entity that happened to partially make profits for the Chinese government." *Id.* Moreover, the government "did not appoint Display's executives [or] pay their salaries, discrediting Display's

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[2] For example, appellees disputed the factual proposition that appellants never made direct U.S. sales and challenged their proposed legal rule. Doc. 5419, at 12-14, 35-38.

contention that its corporate officers were civil servants," and there was no evidence that Display "exercised regulatory authority or other special sovereign privileges." *Id.* Although Display "receive[d] some financial support from the Chinese government, that support was not so significant as to outweigh the many factors counting against organ status." ER10-11.

The district court then "maintain[ed] its earlier conclusion" that the commercial-activity exception "neutraliz[ed] Group's FSIA immunity." ER11. The court summarized the evidence (discussed *supra* p. 6) that "support[s] a finding that the Irico Defendants' commercial activities had a direct effect in the United States," and held that "[n]othing the parties have presented in the current round of briefing changes these underlying facts or, by extension, the Court's conclusion." ER12. Because Group "failed to rebut" appellees' factual showing of a direct effect in the United States, the court declined to consider Group's additional arguments. ER12-13.

Appellants filed an interlocutory appeal under the collateral order doctrine. ER34-35.

ARGUMENT

Both the definition of "organ" of a foreign state in Section 1603(b)(2) and the commercial-activity exception in Section 1605(a)(2) play an important role in implementing the restrictive theory of sovereign immunity codified by the FSIA. The definition of organ is sufficiently expansive to ensure that entities serving a public function on behalf of a foreign state are eligible for immunity, while the commercial-activity exception ensures that foreign states, including such organs, remain subject to U.S. jurisdiction for their commercial activities that cause a direct effect in the United States (and for other types of specified commercial conduct). The ruling below upholds the careful balance set forth in the FSIA and should be affirmed.

I. The District Court Properly Determined That Irico Display Is Not An Organ Of China

A. Companies Are Not Organs of a Foreign State Unless They Serve a Public Function on Behalf of the Government

Section 1603(b)(2) defines an "agency or instrumentality" of a foreign state to include any entity "[1] which is an organ of a foreign state or political subdivision thereof, or [2] a majority of whose shares or other ownership interest is owned by a foreign state or political

subdivision thereof." 28 U.S.C. § 1603(b)(2). In *Dole Food*, the Supreme Court held "that only direct ownership of a majority of shares by the foreign state [itself] satisfies" the majority-share prong. 538 U.S. at 474, 477. Because the two prongs are disjunctive—"*[e]ither* the entity can be an 'organ of a foreign state,' *or* the entity can have a majority of its shares or other ownership interest owned by a 'foreign state or a political subdivision thereof,'" *see Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654 (9th Cir. 1996)—an entity can be an "organ of a foreign state" when the state does not directly own a majority of it. *Id.*

The critical inquiry for determining whether an entity is an "organ" of a foreign state under this Court's precedents is whether it "engages in a public activity on behalf of the foreign government." *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), *aff'd on other grounds*, 538 U.S. 468 (2003). Typically, organs of a foreign state are "quasi-public entities [such as] national banks, state universities, and public television networks." *Id.* at 808. While "commercial enterprises" can qualify as organs in certain circumstances, they do not constitute

organs when they are "acting to maximize profits rather than pursue public objectives." *Id.*

In considering whether an entity is an organ of a foreign state, courts in this Circuit examine factors such as whether the entity was created by the foreign state's law; is controlled by government appointees; employs public servants; and has exclusive responsibility over an important public function. *Corporacion Mexicana*, 89 F.3d at 655; *see also Patrickson*, 251 F.3d at 807 (identifying level of government financial support and obligations and privileges under state law as additional considerations). Courts also consider the entity's "ownership structure." *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003). These factors inform the ultimate inquiry of whether the entity "engag[es] in a public activity on behalf of the foreign government." *Cal. Dep't of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1098 (9th Cir. 2008).

Ninth Circuit courts take a "holistic view" of the evidence, *id.* at 1102, and no single factor is dispositive. For instance, "a company may be an organ of a foreign state for purposes of the FSIA even if its employees are not civil servants" if the evidence otherwise

demonstrates its public purpose. *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 641 (9th Cir. 2003). Likewise, a foreign state's ownership and control are typically relevant because an entity is unlikely to carry out a public function if those factors are absent. *See USX*, 345 F.3d at 209 ("different ownership structures might influence the degree to which an entity is performing a function 'on behalf of the foreign government'"). A foreign state's ownership and control of an entity, however, are not sufficient for organ status. As such, an ordinary commercial enterprise without a public purpose will not be considered an organ even when it is wholly owned and controlled by a government agency or instrumentality. *See Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461 (9th Cir. 1995) (holding that an "ordinary pork processing plant[] cannot be considered an 'organ' of the Province of Alberta'" even though it was wholly owned and controlled by a state agency).

A valid public purpose can take a wide variety of forms but must be something more than just making money for the state as a shareholder. *See Patrickson*, 251 F.3d at 808; *Alperin v. Vatican Bank*, 2007 WL 4570674, at *3 (N.D. Cal. Dec. 27, 2007) (distinguishing circumstances

where "the entity serves a public purpose" from where "it acts as an independent commercial enterprise to maximize its own profits"), *aff'd* 365 Fed. App'x 74 (9th Cir. 2010).

B. The Percentage of a Company Owned Directly or Indirectly by a Foreign State Can Be Significant to Whether It Is an Organ

In analyzing whether a company is an organ, courts often examine the percentage owned directly or indirectly by the foreign state and other details showing the nature and extent of state involvement and control over the company. While there may be a variety of ways in which foreign governments organize functions carried out on their behalf, courts readily deem a company to be an organ of a foreign state when the state creates it as a wholly owned subsidiary of a state agency to advance a public objective, and the company engages in sovereign functions on the state's behalf.

For instance, in *Powerex*, the British Columbian government directed a state agency to establish a wholly owned subsidiary "to market the export of power." 533 F.3d at 1099. The exporting subsidiary was an organ of British Columbia because it "owes its very existence to the Province," which used it to further "public policies"

concerning a natural resource of the foreign state; it "played a role in treaty formation and implementation"; and "[m]ost importantly," the Province had "sole beneficial ownership and control" of it through the state agency. *Id.* at 1099-1101 (citations omitted).[3]

Where the state's direct and indirect ownership share of a company is 50% or less, however, courts have demanded more evidence that it serves a public function. When a foreign state owns 50% or less of a profit-seeking company, organ status has been routinely denied.

For instance, in *Patrickson*, the Israeli government privatized its holdings so that it did not own a majority share of two chemical companies (Companies). 251 F.3d at 805. This Court held that the Companies were not organs of Israel although the government had "to approve the appointment of directors and officers, as well as any changes in the capital structure of the Companies," and the Companies had to present "an annual budget and financial statement to various

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[3] *Accord EIE Guam*, 322 F.3d at 639-41 (wholly owned subsidiary of a state agency created "expressly to perform a public function" was an organ of Japan); *Corporacion Mexicana*, 89 F.3d at 655 (wholly owned subsidiary of a state-owned petroleum corporation was an organ of Mexico).

government ministries." *Id.* at 808. Rather, the Companies were best viewed "as independent commercial enterprises, heavily regulated, but acting to maximize profits rather than pursue public objectives." *Id.*

Similarly, in *Board of Regents v. Nippon Telephone & Telegraph Corp.*, the Fifth Circuit held that a television broadcaster in which the government of Japan indirectly owned 46% was not an organ of Japan. 478 F.3d 274, 279 (5th Cir. 2007). The firm "operate[d] as one of several commercial interests in a competitive telecommunications market" with its ownership structure designed to encourage competition in this market. *Id.* While "Government authorization [was] required for numerous [firm] transactions," the government "merely provide[d] passive oversight" similar to "the requirements of other governments' regulatory bodies, such as the United States' Securities and Exchange Commission (SEC)." *Id.* at 279-80.[4]

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[4] In appropriate circumstances, a company can be an organ of a foreign state although the state does not directly or indirectly own a majority share. For example, in *Kelly v. Syria Shell Petroleum Dev. B.V.*, a company that was 50% owned by a state-owned corporation made *a prima facie* showing of organ status because it was created for a "national purpose"; half of its board members were "high-level Syrian government officials"; and it "has the exclusive right to explore and develop Syria's identified petroleum reserves." 213 F.3d 841, 847-48

Organ status is reserved for entities serving public purposes, because otherwise courts "would open the door to situations in which a party only tangentially related to a foreign state could claim foreign state status and avail itself" of the FSIA's protections and "be unfair to plaintiffs." *USX*, 345 F.3d at 208.

C. The District Court's Non-Clearly-Erroneous Factual Findings Establish That Display Is Not an Organ of China

The district court considered the *Patrickson* factors and found numerous facts that weighed against organ status for Display:

- China only indirectly owned a minority share of Display;
- Display was "established as a form of privately held corporation";
- The government "did not exercise direct control over Display" instead "interacting with Display in a typical investor role";
- Display "functioned as an ordinary profit-making entity that happened to partially make profits for [China]";

(5th Cir. 2000). Unlike in *Patrickson*, however, that company was a "non-profit-making entity." 251 F.3d at 808 n.12.

- The government "did not appoint Display's executives, [or] pay their salaries, discrediting Display's contention that its corporate officers were civil servants"; and
- Display did not "exercise[] regulatory authority or other special sovereign privileges."

ER8-10. While Display received some financial support from China, that did not "outweigh the many factors counting against organ status." ER10-11.

Based on its factual findings, the district court properly concluded that Display is not an organ of China—rather it is just an ordinary profit-making company that benefits the state as a partial shareholder. Display's argument to the contrary is unavailing, as it does not show clear error in the court's factual findings or that the court misweighed the relevant factors. *See EIE Guam*, 322 F.3d at 639 (reviewing factual findings "for clear error" and legal issues, including "organ" status, "de novo").

Display is wrong that its showing surpasses that in *Powerex*. *See* Appellants' Opening Br., 9th Cir. Doc. 14, at 33 (Appellants' Br.). In *Powerex*, the exporter performed public functions, including treaty

formulation and implementation, and was wholly-owned and controlled by a state agency. 533 F.3d at 1099-1101. Here, by contrast, the district court found that Display is an ordinary profit-making company indirectly owned only in minority-part by China serving no public function for the government.

While Display is correct that an organ can be profitable, Appellants' Br. 22, 36, Display is wrong to suggest that a company is an organ *because* the state profits as a partial shareholder, *id.* at 26-27. If that sufficed, China could make all Chinese companies organs by taking an ownership share instead of taxing profits. That would expand the concept of organ of a foreign state beyond its proper bounds.

Display acknowledges that it might not be seen as having a public function in a "capitalist economic system," *see* Appellants' Br. 22, 27-28, but argues that its profit-making for the state should be viewed differently because of China's "distinctly socialist economy," *id.* at 36. The FSIA, however, does not give greater protection to ordinary profit-making entities owned by socialist governments than by capitalist ones. *See Ocean Line Holdings Ltd. v. China Nat'l Chartering Corp.*, 578 F. Supp. 2d 621, 626 (S.D.N.Y. 2008) (rejecting argument that ordinary

shipping enterprise is an organ of China); *Edlow Int'l Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 831-32 (D.D.C. 1977) (rejecting argument that would characterize "every enterprise operated under a socialist system as an instrumentality of the state" because "there is no suggestion [in the FSIA's legislative history] that a foreign state's system of property ownership, without more, should be determinative on the question whether an entity" is an "agency or instrumentality under the Act").

II. The District Court Has Jurisdiction Over Group Under The Third Prong Of The Commercial Activity Exception

Under the commercial-activity exception, a foreign state is not immune from jurisdiction when "the action is based":

> [1] upon a commercial activity carried on in the United States by the foreign state; or
>
> [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or
>
> [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

The "action" here is a Sherman Act suit alleging a conspiracy involving Group. In such a case, the relevant acts include joining the

unlawful conspiracy and acts in furtherance of that conspiracy. Acts in furtherance of an antitrust conspiracy can include sales on agreed-upon terms, but they also can include other types of acts such as foregoing sales at particular prices, reducing production, or creating an enforcement mechanism to prevent cheating on the agreement. Each of these acts can contribute to the success of the conspiracy as a whole.

The district court held that the record supported "a finding that the Irico Defendants' commercial activities had a direct effect in the United States" by raising U.S. prices of CRTs and CRT-containing televisions and computer monitors. ER12. Group argues that this determination cannot be sustained because, as a matter of law "[u]nder this Court's FSIA precedents," its conspiratorial acts cannot cause a "direct effect" in the United States without "U.S. sales by Group," yet the district court made no finding of U.S. sales by Group. Appellants' Br. 4; *id.* at 15 ("Group's foreign sales of allegedly price-fixed CRTs cannot possibly cause a 'direct effect' in the United States."), 40 (same).

There is no such legal rule, however, as there are many situations in which a defendant's anticompetitive conspiratorial acts can cause a direct effect in the United States even though the defendant had no

U.S. sales. Indeed, this case is one example. Even if Group sold no price-fixed CRTs in the United States, the record amply supports the district court's finding that Group's conspiratorial acts had a direct effect in the United States. We address Group's flawed legal and factual arguments in turn.

A. Group Is Incorrect That a Foreign State Must Make Direct U.S. Sales To Satisfy the Third Prong of the Commercial-Activity Exception

Group wrongly argues that, as a matter of law, a foreign state must make direct U.S. sales for its conspiratorial acts to have a direct effect in the United States under the FSIA. *See* Appellants' Br. 4, 15, 40. That argument finds no support in the text of the statute or applicable precedent, and could significantly harm antitrust enforcement.

If a foreign state makes direct U.S. sales as part of an antitrust conspiracy, it is engaging in "commercial activity carried on in the United States" that falls within the first prong of the commercial-activity exception. The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," 28 U.S.C. § 1603(d), and further defines "commercial activity carried on in the United States by a foreign state"

as "commercial activity carried on by such state and having substantial contact with the United States," *id.* § 1603(e). Direct U.S. sales are a type of commercial transaction carried on in the United States that satisfies the first prong of the commercial-activity exception. *See, e.g.*, *Altmann v. Republic of Austria*, 317 F.3d 954, 969 (9th Cir. 2002) (holding that Austrian gallery's "publication and sale of [marketing] materials" in the United States were "commercial activities" within the first prong of the commercial activity exception), *amended*, 327 F.3d 1246 (9th Cir. 2003), *aff'd on other grounds*, 541 U.S. 677 (2004); H.R. Rep. No. 94-1487 (1976), reprinted at 1976 U.S.C.C.A.N. 6604, 6615 ("commercial activity carried on in the United States by a foreign state" includes "import-export transactions involving sales to, or purchases from, concerns in the United States").

Group's proposed interpretation of the "direct effect" requirement thus violates the "cardinal principle of statutory construction" that statutes must be construed, if reasonably possible, so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *see also Dole Food*, 538 U.S. at 476-77 (holding that it is improper to construe the FSIA "in a manner that

is strained and, at the same time, would render a statutory term superfluous"). Reading "direct effects" to encompass only "direct sales" robs the third prong of any meaningful function.

Moreover, the Supreme Court has recognized that the third prong reaches beyond direct sales to other types of acts "in connection with" commercial activity abroad, so long as the acts cause a "direct effect" in the United States. *Weltover*, 504 U.S. at 618. The Court "reject[ed] the suggestion that [the FSIA commercial-activity exception] contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Id*. Although jurisdiction cannot be predicated on "purely trivial effects in the United States," the Court explained that an effect is "direct" if it follows "as an immediate consequence of the defendant's . . . activity." *Id*. Such a direct effect existed for Argentina's unilateral rescheduling of maturity dates on bonds, even though that commercial activity was "outside this country," because "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 611, 619.

Indeed, numerous examples show that actions of a foreign company to join and act in furtherance of an antitrust conspiracy can cause a

direct effect in the United States even if that company made no direct sales in the United States. For instance, an agreement among foreign manufacturers to boycott U.S. businesses by refusing to supply them with inputs could cause significant harm in the United States despite the lack of any U.S. sales under the conspiracy. Likewise, a foreign firm could forego U.S. sales as part of a market allocation conspiracy, directly raising U.S. prices by carrying out its agreement *not* to sell in the United States. Or a foreign firm could directly harm a U.S. labor market by agreeing with a U.S. firm not to poach its employees.

An agreement among foreign manufacturers to fix the price of a component part sold abroad and incorporated into finished products sold in the United States is no different. A manufacturer participating in such a price-fixing conspiracy could directly harm the United States, even if it never sold the price-fixed component or the finished products in the United States, by raising the U.S. prices of finished products sold by its co-conspirators.

Group's proposed legal rule also is inconsistent with precedent. Although few antitrust cases have applied the FSIA's "direct effect" requirement, a district court in this Circuit recently found direct effects

under the FSIA for conduct other than direct sales by the defendant in the United States. *See Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, No. CV 16-2345-DMG, 2016 WL 8648638, at *3 (C.D. Cal. Aug. 18, 2016). There, a company 51% owned by the Mexican Government (Essa) breached its contract to sell solar sea salt to another Mexican firm, who was supposed "to sell the salt to Sea Breeze," who "in turn, was unable to meet its obligations to sell to various purchasers within the United States." *Id.* at *1. The court exercised jurisdiction over Essa under the third prong of the commercial-activity exception, even though another firm had distribution rights to sell Essa's salt in the United States. The court found a "direct effect" in the United States, because the U.S. was the largest importer of salt, Essa produced 17% of the world's salt, and the alleged price-fixing and granting of exclusive rights to another firm "leads to less variety in the U.S. salt market, as well as less competition and higher prices for United States consumers." *Id.* at 1, 3 & n.3. This Court affirmed, likewise finding the "direct effect" requirement satisfied. 899 F.3d 1064, 1068 n.2 (9th Cir. 2018).

Similarly, applying the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a,[5] this Court recently held that a global conspiracy to fix the price of TFT-LCD panels "sold overseas" and "then incorporated into finished products" sold in the United States had a direct effect in the United States. *See United States v. Hsiung*, 778 F.3d 738, 758-59 (9th Cir. 2015), *cert. denied* 135 S. Ct. 2837 (2015). This Court found sufficient evidence of a direct effect because "[i]t 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."

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[5] 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, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce . . . in the United States; and
>
> (2) such effect gives rise to a claim under [the Sherman Act].

15 U.S.C. § 6a.

Hsiung, 778 F.3d at 759. This Court concluded that there was a direct effect in the United States, even for price-fixed panels sold abroad, because of the "close and direct connection" between those sales "and the ultimate inflation of prices in finished products imported to the United States." *Id*. Because this Court construes "direct" the same under the FSIA and FTAIA, *see Hsiung*, 778 F.3d at 758; *United States v. LSL Biotechs.*, 379 F.3d 672, 680 (9th Cir. 2004), *Hsiung* demonstrates that companies need not make direct U.S. sales for their commercial transactions to directly affect the United States within the meaning of the FSIA's commercial-activity exception.[6]

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[6] The United States has urged a more inclusive definition of direct effects under the FTAIA than under the FSIA, and the Second and Seventh Circuit's FTAIA decisions have rejected this Court's more restrictive approach. *Hsiung*, 778 F.3d at 758 n.9 (citing *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 398 (2d Cir. 2014); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (en banc)). Both Circuits have held that, under the FTAIA, "the term 'direct' means only 'a reasonably proximate causal nexus.'" *Minn-Chem*, 683 F.3d at 857 (quoting Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. Ann. Surv. Am. L. 415, 430 (2005)); *see Lotes*, 753 F.3d at 398. Regardless of whether "direct effect" is interpreted the same under the FTAIA and FSIA, *Hsiung* clarifies that a foreign company's conspiratorial acts can directly affect the United States even if it made no direct U.S. sales.

Group notes that the defendants in *Hsiung*, in addition to selling price-fixed panels abroad, had also exported "hundreds of millions of dollars of price-fixed panels directly into the United States," and argues that without such exports, this Court might not have found a direct U.S. effect. Appellants' Br. 55. This Court relied on these U.S. imports, however, for its alternative holding that the conspiracy involved "import commerce," 778 F.3d at 756, 760—a separate FTAIA exclusion. The existence of these U.S. imports in no way undermines *Hsuing's* central point on directness: that fixing prices of panels sold abroad directly caused harm in the United States by increasing U.S. import prices for finished goods containing those panels. 778 F.3d at 759 ("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.").

Group argues that a defendant must make U.S. sales to directly affect the United States because otherwise "a multitude of 'intervening object[s], cause[s], [and] agenc[ies]'" would be "necessary to bring about that effect," and the "domestic effects" of foreign price-fixed sales "are too 'remote and attenuated'" to be direct. Appellants' Br. 41-43, 45-47. These same arguments, however, were rejected in *Hsuing*. *See* 778 F.3d at 758-60; AUO Opening Br., No. 12-10500, Doc. 19-1, at 64 (Feb. 4, 2013) (arguing that, "[b]ecause AUO did not import any products or manufacture any consumer end-user products, the effects of its actions [on American consumers] depended entirely on intervening actors," and were indirect);[7] AUO Reply Br., No. 12-10500, Doc. 44-1, at 28 (May 13, 2013) ("Selling raw inputs to upstream finished product manufacturers does not directly and immediately impact the price of the end-user product."), *available* at 2013 WL 2182155. Likewise, *Sea Breeze* involved a "direct effect" in the United States with "no break in the causal chain" even though the foreign state did not directly sell in the United States. 2016 WL 8648638, at *3 n.3 (discussed p. 26, *supra*).

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[7] This page is included as an appendix to this brief.

Group also argues that the direct-effect requirement incorporates "minimum contacts standards" from due process cases, which requires direct U.S. sales. Appellants' Br. 47-48 (quoting *Sec. Pac. Nat'l Bank v. Derderian*, 872 F.2d 281, 286-87 (9th Cir. 1989)). Yet even assuming that the minimum-contacts standard applies to the direct-effect requirement, Group is wrong that direct sales in a forum are necessary for minimum contacts.[8] While sales in a forum can establish minimum contacts, a plaintiff also can "show[] that a defendant purposefully directed his conduct [outside of the forum] toward the forum." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 803 (9th Cir. 2004). Group's proposed legal rule, thus, is incorrect.

B. The District Court Did Not Need To Resolve Whether Group Made U.S. Sales To Find That Its Anticompetitive Conspiratorial Acts Directly Affected the United States

Group also is incorrect that it had to make U.S. sales for jurisdiction here. Whether or not Group made price-fixed sales in the United

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[8] If U.S. sales were required to show sufficient minimum contacts for personal jurisdiction, that rule would have far-reaching consequences. Personal jurisdiction must be established in all cases, so the rule would apply to *all* foreign defendants sued in U.S. courts, not just foreign states subject to the FSIA.

States, the record amply supports the district court's finding that Group's anticompetitive conspiratorial acts had a direct effect in the United States.[9]

The district court found that Group participated in "over 70 conspiratorial meetings" at which the conspirators allegedly agreed to fix prices, allocate customers, and restrict output of CRT Products in the United States and elsewhere. ER1, ER12, ER1482-83. Even if none of Group's price-fixed sales were in the United States, *but see* Appellees' Answering Br., 9th Cir. Doc. 25-1, at 14-17 (disputing this proposition), it would have been apparent to Group that its conspiratorial acts would directly affect the United States. Appellees presented evidence that Group priced its CRTs at the agreed price-fixed levels and reduced output to prop-up those fixed prices, *see* ER1459-68 (collecting evidence); and that during the conspiratorial meetings, Group and its co-conspirators specifically discussed U.S. dollar prices, ER1482-83, ER1504, ER1528-29, ER1544, and U.S. market conditions, *id.* ER1533

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[9] Group is incorrect that the district court found a direct effect "as a matter of law." Appellants' Br. 38. Group made a "factual challenge" to jurisdiction, and the court upheld its prior "finding" of a direct effect (when vacating the default) that Group "failed to rebut." ER11-12.

(Irico and Chunghwa employees were "bearish on Japanese, U.S., and European CRT TV demand"). Moreover, as the district court found, there was a direct causal connection between raising CRT prices and raising U.S. television and monitor prices, because "the U.S. was the second largest market for CRTs at 18% of the [worldwide] market" and "the CRT accounted for up to 50 percent of the cost of manufacturing a television or computer monitor." ER12.

Contrary to Group's assertion (Br. 46), it was not a mere "fortuity" that its acts affected the United States. The conspiratorial agreement included the United States, and CRTs were a large cost of televisions and computer monitors sold in the United States. Thus, this is not a case where the conspiracy covered only foreign markets and the component was a minor part in the finished product sold in the United States, where the existence and directness of any U.S. effect from the conspiracy may be less clear.

Group argues that the effect of its acts should be analyzed apart from the rest of the conspiracy—"standing alone"—as if the conspiracy were just a collection of independent sales by different manufacturers. Appellants' Br. 43, 45. Yet in any FSIA case, the foreign state's acts

should be analyzed in "full context." *Weltover*, 504 U.S. at 615. Here, that means that Group's acts should be analyzed "as part of the broader conspiracy." ER24. The Supreme Court has long emphasized that "[t]he character and effect of [an antitrust] conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (quoting *United States v. Patten*, 226 U. S. 525, 544 (1913)). Viewed in full context, Group's price-fixed sales and output-reductions were not isolated incidents, but part of a concerted effort to raise prices in the United States and elsewhere. None of the Ninth Circuit cases finding no direct effect cited by Group (Br. 44) involve remotely comparable facts.[10]

Finally, Group is wrong (Br. 49) that it lacks minimum contacts with the United States. The record shows that Group and its co-conspirators targeted their unlawful conduct at the United States

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[10] *See Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1138 (9th Cir. 2012) (contract breaches); *California v. NRG Energy Inc.*, 391 F.3d 1011, 1024 (9th Cir. 2004) (state agency's credit decisions), *Corzo v. Banco Central de Reserva del Peru*, 243 F.3d 519, 525 (9th Cir. 2001) (no exchange-rate compensation).

(among other countries) because of high U.S. demand for CRT Products. *See* pp. 32-33, *supra*.[11] There is nothing fundamentally unfair about holding Group accountable for its anticompetitive actions raising prices for American consumers.

CONCLUSION

This Court should affirm.

Respectfully submitted.

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[11] Because the federal antitrust laws authorize nationwide service of process, 15 U.S.C. § 22, "national contacts analysis is appropriate." *Go-Video, Inc. v. Akai Electric Co.*, 885 F.2d 1406, 1416 (9th Cir. 1989). Contrary to Group's suggestion (Br. 49), there is no requirement that a conspirator target the United States exclusively or predominantly; it is enough if the United States is one of the targeted jurisdictions. *See In re Western States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 744 (9th Cir. 2013) (finding conduct "expressly aimed" at the forum where defendants "knew and intended that the consequences of their [anticompetitive conduct] would be felt in [the forum]"); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1207 (9th Cir. 2006) ("[T]he 'brunt' of the harm need not be suffered in the forum state.").

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July 8, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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July 8, 2020

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Attorney

APPENDIX

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee-Cross-Appellant,

v.

AU Optronics Corporation,

Defendant-Appellant-Cross-Appellee.

United States of America,

v.

AU Optronics Corporation America,

Defendant-Appellant.

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

OPENING BRIEF FOR DEFENDANTS-APPELLANTS
AU OPTRONICS CORPORATION AND
AU OPTRONICS CORPORATION AMERICA

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cannot be 'direct' where it depends on . . . uncertain intervening developments." *Id*. at 681. Because the government could not allege with certainty that the defendants' conduct had limited domestic competition and adversely affected domestic consumers, the government's complaint was dismissed.

Those principles mandate acquittal in this case as well. Because AUO did not import any products or manufacture any consumer end-user products, the effects of its actions depended entirely on intervening actors—namely, the OEMs who integrated and imported the end-user products. Even assuming that AUO's conduct resulted in higher prices for OEMs, there was no evidence presented that those higher prices were passed on, through the manufacturing chain, to consumers. Moreover, any effects on American consumers were merely the "secondary and indirect effects that are also the by-product of numerous factors relevant to market conditions and the like." *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 561 (D. Del. 2006); *see also In re Intel Corp. Microprocessor Antitrust Litig*., 476 F. Supp. 2d 452, 456 (D. Del. 2007) ("[T]his speculative chain of events is insufficient to create the direct, substantial and foreseeable effects on commerce required by the FTAIA . . . .").

Simply put, under this Court's interpretation of "direct" for the FTAIA, the Sherman Act does not cover "antitrust actions alleging restraints in foreign markets for inputs . . . that are used abroad to manufacture downstream products . . . that