No. 14-1121

In the Supreme Court of the United States

HUI HSIUNG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly sustained petitioners' convictions for conspiring to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, on the ground that the conspiracy involved "import trade or import commerce" within the meaning of Section 6a of the Sherman Act, 15 U.S.C. 6a.

2. Whether the court of appeals correctly sustained petitioners' convictions on the additional ground that their price-fixing conspiracy had "a direct, substantial, and reasonably foreseeable effect" on U.S. domestic or import commerce within the meaning of Section 6a(1) of the Sherman Act, 15 U.S.C. 6a(1).

3. Whether the Sherman Act's *per se* rule against price fixing applies to a conspiracy, carried out in part in the United States, to fix the price of products sold to customers in the United States and elsewhere.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-45a) is reported at 778 F.3d 738. An earlier opinion of the court of appeals is reported at 758 F.3d 1074. The opinion of the district court denying petitioners' motions for judgment of acquittal and for a new trial (Pet. App. 46a-58a) is not published in the *Federal Supplement* but is available at 2012 WL 2120452.

JURISDICTION

The amended judgment of the court of appeals was entered on January 30, 2015. Petitions for rehearing were denied that same day (Pet. App. 2a). The petition for a writ of certiorari was filed on March 16, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioners were convicted of combining and conspiring to fix prices in the United States and elsewhere, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 3a-4a. The district court ordered petitioner AU Optronics (AUO) to pay a fine of $500 million, and sentenced both AUO and AU Optronics Corporation America, Inc. (AUOA) to three years of probation. *Id.* at 8a-9a. The court sentenced petitioners Hui Hsiung and Hsuan Bin Chen each to 36 months of imprisonment and a $200,000 fine. *Id.* at 9a. The court of appeals affirmed. *Id.* at 1a-45a.

1. Section 1 of the Sherman Act prohibits agreements "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. 1. In passing the Sherman Act, Congress "wanted to go to the utmost extent of its Constitutional power" to preserve competition in or affecting U.S. commerce. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 194-195 (1974) (citation omitted). Congress became concerned, however, that U.S. exports would suffer as courts applied the Sherman Act to anticompetitive conduct involving only export commerce or wholly foreign commerce with no adverse impact in the United States. See H.R. Rep. No. 686, 97th Cong., 2d. Sess. 9-10 (1982). Congress therefore enacted the Foreign Trade Antitrust Improvements Act (FTAIA), as part of the Export Trading Company Act of 1982, Pub. L. No. 97-290, §§ 102(b), 401, 96 Stat. 1234, 1246.

The FTAIA added Section 6a to the Sherman Act, which provides in relevant part:

> Sections 1 to 7 of [Title 15 of the United States Code] 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.

Section 6a "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 (2004). To that end, Section 6a initially places outside the Sherman Act's reach all conduct involving foreign commerce, except conduct involving "import trade or import commerce." 15 U.S.C. 6a; see *Empagran*, 542 U.S. at 162. In other words, Section 6a leaves the Sherman Act applicable to all conduct involving import commerce. Courts refer to this as the "import commerce exclusion." See, *e.g.*, *Minn-Chem, Inc.* v. *Agrium Inc.*, 683 F.3d 845,

855 (7th Cir. 2012) (en banc), cert. dismissed, 134 S. Ct. 23 (2013). Section 6a then brings conduct involving non-import foreign commerce "back within the Sherman Act's reach" if that conduct "sufficiently affects American commerce, *i.e.*, it has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce." *Empagran*, 542 U.S. at 162 (citation omitted). Courts refer to this as the "effects exception." See, *e.g.*, *Animal Sci. Prods., Inc.* v. *China Minmetals Corp.*, 654 F.3d 462, 466 (3d Cir. 2011), cert. denied, 132 S. Ct. 1744 (2012).

2. From 2001 to 2006, petitioner AUO and five other manufacturers of thin-film transistor, liquid-crystal display (TFT-LCD) panels conspired to fix and raise panel prices. TFT-LCD is a display technology used in flat-panel desktop monitors, notebook computers, and other devices. Pet. App. 3a n.1, 5a. The panels are manufactured in Asia and sold to customers around the world.

During the conspiracy, price-fixed TFT-LCD panels reached the United States in two ways. First, raw panels were shipped from the conspiring manufacturers to purchasing companies in the United States. Pet. App. 33a, 40a, 42a. Second, panels were incorporated abroad into finished products—such as notebook computers and desktop monitors—that were later imported into the United States. *Id.* at 40a. The conspiring manufacturers negotiated the sales of these panels with U.S. computer manufacturers. *Ibid.* The panels were then shipped either to the U.S. computer company's own factory or to contract manufacturers abroad, where they were incorporated into the finished products bound for the United States. *Ibid.*

Beginning in the fall of 2001, representatives of the conspiring firms met on a monthly basis to agree on target prices for TFT-LCD panels used in laptop computers and desktop monitors and to supervise compliance with their price-fixing agreement. Pet. App. 5a; Gov't C.A. Br. 9-14. The participants called these meetings "Crystal Meetings" after the product that was the subject of their conspiracy. Pet. App. 5a. Petitioners Chen and Hsiung, AUO's President and Executive Vice President, respectively, participated in some high-level Crystal Meetings at which agreements were reached, and then passed the day-to-day operation of the conspiracy to subordinates. Gov't C.A. Br. 11-12. Those subordinates attended conspiracy meetings, took detailed notes, and reported back to Chen, Hsiung, and other AUO executives on the price agreements reached. *Id.* at 12; C.A. E.R. 1028-1037.

Participants in the meetings recognized the need to keep their conspiracy secret. Gov't C.A. Br. 15-17. They varied the location of their meetings and staggered their entrances and exits so as not to be seen together. *Id.* at 15. Crystal Meeting reports circulated within AUO were marked "Extremely Confidential —Must NOT Distribute." C.A. E.R. 1004-1006. In some cases, recipients were directed to "delete the mail right after you retrieve the file." Supp. C.A. E.R. 1930.

The conspirators focused particular attention on major U.S. customers, specifically agreeing on TFT-LCD panel prices for companies such as Dell and Hewlett Packard (HP). Gov't C.A. Br. 13-15. Those companies "were particularly important because they were bellwether companies—if they accepted a price

increase, 'the entire market could also accept the price increase.'" Pet. App. 6a (citation omitted). AUO thus established a wholly owned subsidiary in the United States (AUOA), which acted as "a tentacle" or an "extension of AUO," to sell to AUO's major U.S. customers. C.A. E.R. 1416; Supp. C.A. E.R. 2377, 2391. AUOA and its co-conspirators also strategically located offices and employees near major U.S. computer companies, including Dell, HP, and Apple. C.A. E.R. 1419-1420; Supp. C.A. E.R. 2367-2369, 2381.

From those offices, AUOA account managers negotiated prices and volumes of panel sales to major U.S. customers on a monthly basis through in-person meetings at the customers' headquarters, phone calls, and emails. Pet. App. 5a; Gov't C.A. Br. 18-21. They did so while receiving reports of the agreements that petitioner Hsiung—who served as AUOA's President, Supp. C.A. E.R. 1918—and other AUO executives had made with co-conspirators at Crystal Meetings and elsewhere. Gov't C.A. Br. 19. In addition to implementing the price agreements reached by their supervisors at AUO, AUOA employees met one-on-one in the United States with their counterparts at conspiring TFT-LCD panel makers to coordinate prices to major U.S. customers. *Id.* at 19-21.

The conspiracy was very successful. The conspirators increased their margins an average of $53 per panel—on an average panel price of $205—through the group Crystal Meetings. Gov't C.A. Br. 57; Supp. C.A. E.R. 2064-2065. All told, conspirators fixed the price of at least $71.8 billion in TFT-LCD panels sold worldwide, Supp. C.A. E.R. 2074-2082, with tens of billions of dollars in price-fixed panels coming to the

United States, which was the largest country customer for the conspirators' products. Gov't C.A. Br. 8.

3. a. A grand jury in the Northern District of California returned a single-count indictment charging petitioners with conspiring to fix prices for TFT-LCD panels, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 6a. The indictment also alleged that AUO, AUOA, and their co-conspirators "derived gross gains of at least $500,000,000." *Ibid.*

At trial, the government's expert economist testified that 2.6 million of the conspirators' price-fixed raw panels—priced at more than $638 million—were shipped into the United States between 2001 and 2006. C.A. E.R. 617; Supp. C.A. E.R. 2075-2076. The economist also testified that price-fixed panels, sold for $23.5 billion, entered the United States as components in notebook computers and desktop monitors. Supp. C.A. E.R. 2075-2081. Witnesses from Dell and HP testified that, because TFT-LCD panels are the single largest cost component of those finished products, the panel prices affected prices of finished products in the United States. Gov't C.A. Br. 23; Pet. App. 39a-40a (co-conspirator's testimony that "if the panel price goes up, then it will directly impact the monitor set price" (brackets and citation omitted)).

b. At the close of the evidence, the district court instructed the jury that, in order to convict, it must find that the government proved beyond a reasonable doubt that 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.

Pet. App. 26a-27a. Part A of this instruction corresponded with the government's theory that Section 6a's import-commerce exclusion applied, and part B to its theory that Section 6a's effects exception applied.

The district court sustained petitioners' only objection to part A of the instruction, inserting the word "targeted" at petitioners' request. C.A. E.R. 1159-1160, 1217-1218. The court overruled petitioners' only objection to part B of the instruction—*viz.*, that the instruction should not be given at all because the "effects" theory had not been alleged in the indictment. *Id.* at 27, 1218. Petitioners did not otherwise object to the language of the instruction, contend that it misstated the law, or request any further explanation.

The jury found petitioners guilty and also found that the participants in the conspiracy had derived $500 million or more in gross gains. Pet. App. 8a. After denying petitioners' post-verdict motions for a judgment of acquittal or a new trial, *id.* at 46a-58a, the district court ordered AUO to pay a $500 million fine, and sentenced both AUO and AUOA to three years of probation. The court sentenced petitioners Chen and Hsiung to 36 months of imprisonment and a $200,000 fine. *Id.* at 8a-9a.

4. The court of appeals affirmed. Pet. App 1a-45a.

As relevant here, petitioners contended on appeal that the price-fixing conspiracy neither involved U.S. import commerce nor directly affected U.S. commerce within the meaning of Section 6a, and that the conspiracy was not *per se* illegal under the antitrust laws because it involved foreign conduct. AUO C.A. Br. 19-40; Hsiung & Chen C.A. Br. 20-34. The court of appeals rejected each of those contentions.[1]

a. The court of appeals held that "[t]he government sufficiently pleaded and proved that the conspirators engaged in import commerce with the United States and that the price-fixing conspiracy violated § 1 of the Sherman Act." Pet. App. 33a-34a. The court stated that "not much imagination is required to say that" the relevant phrase in Section 6a—"import trade or import commerce"—"means precisely what it says." *Id.* at 30a. That plain meaning, the court explained, encompasses the foreign conspirators' sales of TFT-LCD panels to "purchasers located in the United States." *Ibid.* The court described the proof on that "aspect of the conspiracy" as "ample," *id.* at 32a, citing trial evidence that the conspiracy participants "earned over $600 million from the importation of TFT-LCDs into the United States" as raw panels. *Id.* at 33a. The court stressed that the evidence that participants in the conspiracy "engaged in import trade was overwhelming," that it established that the conspirators "sold hundreds of millions of dollars of

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[1] The court of appeals also held that petitioners had waived any argument against extraterritorial application of the Sherman Act, that the indictment was not flawed for failing to cite the FTAIA, and that petitioners' venue and sentencing challenges lacked merit. Pet. App. 9a-17a, 27a-28a, 41a-45a. Petitioners do not renew any of those arguments in this Court.

price-fixed panels directly into the United States," and that this evidence "alone was sufficient to convict [petitioners] of price-fixing in violation of the Sherman Act." *Id.* at 42a.

b. The court of appeals further concluded that the government had pleaded and proved Section 6a(1)'s effects exception. Pet. App. 34a-42a. The court noted that the government's evidence had focused on "foreign sales of panels that were incorporated into finished consumer products ultimately sold in the United States" and that the parties agreed that those sales were "both substantial and had a reasonably foreseeable impact on United States commerce." *Id.* at 37a. The court therefore addressed only whether the effect on U.S. commerce was "sufficiently 'direct' under the FTAIA." *Ibid.* Concluding that it was, the court cited evidence establishing 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." *Id.* at 40a-41a.

c. The court of appeals rejected petitioners' contention that the district court had erred in "not adopting the rule of reason as the benchmark" and instead subjecting this price-fixing scheme "to *per se* analysis under the Sherman Act." Pet. App. 18a. The court explained that "courts have treated horizontal price-fixing as a *per se* violation of the Sherman Act" for over a century, *id.* at 17a (citing *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940)), and that this Court had reiterated as recently as 2007 that horizontal price-fixing cartels are "and ought to be, *per se* unlawful." *Id.* at 18a (quoting *Leegin Creative*

Leather Prods., Inc. v. *PSKS, Inc.*, 551 U.S. 877, 893 (2007)). Although petitioners contended that the Ninth Circuit's prior decision in *Metro Industries, Inc.* v. *Sammi Corp.*, 82 F.3d 839, cert. denied, 519 U.S. 868 (1996), barred application of the *per se* rule to foreign conduct, the court of appeals distinguished the "unusual" anticompetitive conduct alleged in that case from the conduct in this prosecution, which "centers on a classic horizontal price-fixing scheme." Pet. App. 18a-20a. The court was "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." *Id.* at 20a.

ARGUMENT

Petitioners contend (Pet. 2-4, 9-29) that the court of appeals erred in three respects: in sustaining their convictions under Section 6a's import-commerce exclusion; in its alternative holding sustaining their convictions under Section 6a's effects exception; and in holding petitioners' price-fixing conspiracy *per se* unlawful under the Sherman Act. The court of appeals' conclusions on all three issues are correct and do not conflict with the decisions of this Court or of any other court of appeals. In particular, the court of appeals' application of Section 6a is consistent with a recent Seventh Circuit decision addressing a private damages action against some of the same manufacturers for fixing the price of TFT-LCD panels used in cellphones. *Motorola Mobility LLC* v. *AU Optronics Corp.*, 775 F.3d 816 (2015), petition for cert. pending, No. 14-1122 (filed Mar. 16, 2015) (*Motorola*). Both decisions recognize that sales of goods into the United States fall within the import-commerce exclusion; and both recognize that, depending on the facts, fixing the

price of goods sold abroad but used as components in products bound for the United States can have a "direct" effect on U.S. commerce within the meaning of Section 6a(1). The evidence supporting petitioners' conspiracy convictions would therefore be sufficient to satisfy the applicable Section 6a requirements in any circuit. Further review is unwarranted.

1. The court of appeals correctly concluded that evidence that petitioners and their co-conspirators sold more than $600 million in price-fixed TFT-LCD panels for shipment to the United States was sufficient to prove that the conspiracy involved "import trade or import commerce" within the meaning of Section 6a. Pet. App. 33a. That conclusion does not conflict with any decision of this Court or any other court of appeals, and it does not warrant this Court's review.

a. The FTAIA's import-commerce exclusion preserves the Sherman Act's application to anticompetitive "conduct involving * * * import trade or import commerce." 15 U.S.C. 6a; see *Minn-Chem, Inc.* v. *Agrium Inc.*, 683 F.3d 845, 854 (7th Cir. 2012) (en banc) (explaining that such conduct is "excluded at the outset from the coverage of the FTAIA in the same way that domestic interstate commerce is excluded"), cert. dismissed, 134 S. Ct. 23 (2013). The FTAIA does not define the phrase "import trade or import commerce." As the court of appeals explained, however, "not much imagination is required to say that this phrase means precisely what it says." Pet. App. 30a. In particular, courts and commentators agree that the phrase encompasses a foreign producer's sales of its products for shipment to purchasers in the United States. See *id.* at 30a-31a & n.8, 33a; *Minn-Chem*, 683

F.3d at 855 (sales by conspirators located outside the United States to purchasers inside the United States are import commerce); *Carrier Corp.* v. *Outokumpu Oyj*, 673 F.3d 430, 438 n.3, 440 (6th Cir. 2012) (conspiracy to raise the price of copper tubing manufactured abroad and sold into the United States involved import commerce); *Animal Sci. Prods, Inc.* v. *China Minmetals Corp.*, 654 F.3d 462, 471 n.11 (3d Cir. 2011) (allegations of "direct sales of magnesite for delivery in the United States" are relevant to determining whether conduct involves import commerce), cert. denied, 132 S. Ct. 1744 (2012); see also 1B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272i1, at 304 (4th ed. 2013) (*Antitrust Law*) ("Foreign import commerce involves transactions in which the seller is located abroad while the buyer is domestic and the goods flow into the United States.").

Petitioners nevertheless contend (Pet. 11) that the court of appeals departed from that widely accepted understanding by holding that evidence that AUO "sold panels to a foreign buyer, who in turn assembled them into finished products," was sufficient to show that "AUO *was* engaged in 'import trade.'" But that is not what the court of appeals held. To establish that the conspiracy involved import commerce, the government relied on evidence that the conspirators sold price-fixed raw panels into the United States, not on evidence of panels incorporated into finished products that were themselves shipped to the United States. Gov't C.A. Br. 55-57; see AUO C.A. Reply Br. 26 (recognizing that the government's import-commerce argument relied on "raw panel shipments into the United States"). The court of appeals, in turn, based its application of the import-commerce exclusion on

that same evidence. The court identified the relevant "import commerce" as "transactions between the foreign defendant producers of TFT-LCDs and purchasers located in the United States." Pet. App. 30a. And it found "ample" evidence that the participants in the conspiracy engaged in import commerce by selling panels "into the United States," sales from which they "earned over $600 million." *Id.* at 32a-33a; see *id.* at 42a (describing the "overwhelming" evidence that the participants "sold hundreds of millions of dollars of price-fixed panels directly into the United States"). That evidence would be sufficient to support petitioners' convictions even under the definition of "import commerce" that they propose. See Pet. 12 (arguing that the "plain meaning" of "'[i]mport trade or import commerce' * * * refers to the transactions between foreign sellers and domestic buyers").

Petitioners also err in suggesting (Pet. 2, 8) that the court of appeals "joined the Third Circuit in holding that the [import-commerce exclusion] covers any conduct consummated within an import market." The court of appeals acknowledged that the Third Circuit's construction of the import-commerce exclusion may additionally reach "commerce directed at, but not consummated within, an import market." Pet. App. 31a n.8 (citing *Animal Sci. Prods.*, 654 F.3d at 471 & n.11). The court of appeals explained, however, that it had no need to determine the potential "outer bounds of import trade * * * because at least a portion of the transactions here involves the heartland situation of the direct importation of foreign goods into the United States." *Ibid.*

b. Petitioners' fact-bound criticisms (Pet. 19) of the evidence on which the court of appeals relied in find-

ing the import-commerce exclusion satisfied are equally unavailing. Petitioners dispute that AUOA employee Michael Wong's testimony established "that AUO imported over one million price-fixed panels per month into the United States," Pet. App. 33a, contending that Wong was describing overall sales "to U.S.-*headquartered* companies, * * * not direct sales into the United States." Pet. 19. The court of appeals, however, relied not on Wong's testimony, but on uncontroverted data summarized by a government expert, in stating that the conspirators collectively sold more than $600 million in price-fixed raw panels for delivery to the United States. Pet. App. 6a, 33a; see C.A. E.R. 617; Supp. C.A. E.R. 2075-2076.

Petitioners further assert (Pet. 19) that "there was no evidence that any of those direct sales were made by *petitioners*, as opposed to the several *other* Crystal Meeting participants." But there was no need to consider separately the import sales by individual conspirators, or to parse out the percentage of sales undertaken by petitioners. The Sherman Act applies to "conduct involving * * * import trade or import commerce." 15 U.S.C. 6a. The term "conduct" refers to activity that might violate the Sherman Act—in this case, a single antitrust conspiracy among AUO and other manufacturers to fix the price of TFT-LCD panels. Accordingly, whether the charged conspiracy involved import commerce turns not on the acts of any particular defendant, but on whether the price-fixing agreement and acts of any conspirator furthering that agreement involved import commerce. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-254 (1940) (explaining that a price-fixing conspiracy is "a partnership in crime; and an overt act of one part-

ner may be the act of all" (citation and internal quotation marks omitted)).

The jury was instructed in accordance with these principles. It was told, without objection, to consider whether members of the conspiracy fixed the price of panels "targeted by the *participants*" for sale in or delivery to the United States, Pet. App. 26a (emphasis added), and instructed as well on principles of co-conspirator responsibility. C.A. E.R. 601, 604 (explaining that a conspirator "is liable for all acts and statements of the other members" for the conspiracy's duration and that a defendant who knowingly joins a conspiracy "is responsible for all actions taken in furtherance of the conspiracy"); see *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013) ("[A] defendant who has joined a conspiracy * * * becomes responsible for the acts of his co-conspirators in pursuit of their common plot."). Petitioners' arguments provide no basis for disturbing the jury's determination under those settled principles.[2]

c. Contrary to petitioners' contention (Pet. 2-3, 9-12), the court of appeals' decision in this case does not conflict with the Seventh Circuit's decision in *Motorola*, *supra*, an antitrust damages suit arising from a conspiracy among some of the same manufacturers to

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[2] Petitioners' argument also overlooks testimony from the government's expert that his calculations (and an accompanying chart) were based on the ship-to locations provided by AUO and four of the other five companies that participated in the conspiracy. Supp. C.A. E.R. 2075-2076; C.A. E.R. 617. Accordingly, had the jury been required to find that AUO was among the participants that sold raw panels into the United States, the expert's testimony would have allowed it to do so. Cf. *Evans* v. *United States*, 504 U.S. 255, 257 (1992) (stating that evidence is viewed "in the light most favorable to the Government" after jury's guilty verdict).

fix the price of TFT-LCD panels used in cellphones. Because the suit was a private damages action, Motorola's claims against AUO and other foreign manufacturers were divided into three categories based on the TFT-LCD panels at issue. Category One claims were based on panels sold and delivered to Motorola in the United States; Category Two claims on panels sold and delivered to Motorola's foreign subsidiaries and incorporated into cellphones bound for the United States; and Category Three claims on panels sold and delivered to Motorola's foreign subsidiaries and incorporated into cellphones sold abroad. 775 F.3d at 817.

The type of commerce on which the government relied in this case to satisfy the import-commerce exclusion corresponds to Motorola's Category One—price-fixed panels sold and delivered to customers in the United States. But the Category One claims were "not involved in the appeal" in *Motorola*. 775 F.3d at 818. That is because AUO and its co-defendants had not sought summary judgment on those claims, instead conceding in the district court that "for the Category One sales made directly into the U.S. market, Motorola may maintain an antitrust claim." Reply in Supp. of Mot. for Recons. at 9, *Motorola Mobility, Inc.* v. *AU Optronics Corp.*, No. 1:09-cv-06610 (N.D. Ill. Nov. 5, 2013) (D. Ct. Doc. 155); see Reply in Supp. of Mot. For Summ. J. at 17, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827 (N.D. Cal. July 2, 2012) (D. Ct. Doc. 6050) ("The goods sold for delivery to the United States are the *Category One transactions that Defendants do not contend are barred by the FTAIA, and which are not the subject of this motion*."). The Seventh Circuit agreed with that

concession, explaining that, "[h]ad the defendants conspired to sell LCD panels to Motorola in the United States at inflated prices, they would be subject to the Sherman Act because of the exception in the [FTAIA] for importing." *Motorola*, 775 F.3d at 818; see *id.* at 817 (stating that Motorola had "a solid claim" as to those panels "bought by, and delivered to, Motorola in the United States for assembly here").

The Seventh Circuit did reject Motorola's argument that its Category Two claims also satisfied the import-commerce exclusion. *Motorola*, 775 F.3d at 818. Petitioners suggest (Pet. 11) that, in doing so, the Seventh Circuit held that the exclusion applies only to defendants that act as "importers." But neither the *Motorola* court nor any other court of appeals has taken such a narrow view of the exclusion. See *Animal Sci. Prods*, 654 F.3d at 470 ("Functioning as a physical importer may satisfy the import trade or commerce exception, but it is not a necessary prerequisite."). Instead, the Seventh Circuit explained that the Category Two claims did not involve import commerce because they concerned panels imported 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. Therefore, Motorola had to show that the price fixing on those Category Two panels had the requisite effect on U.S. commerce. *Ibid.*

That is the same showing the government had to make to satisfy part B of the Section 6a instruction in this case. For the panels sold abroad and incorporated into finished products, which correspond to Category Two in *Motorola*, the jury in this case was instructed to determine if fixing the price of those panels had a

"direct, substantial, and reasonably foreseeable effect" on commerce in the finished products. Pet. App. 26a-27a. The government did not argue in this case that fixing the price of panels incorporated abroad into finished products satisfied the import-commerce exclusion. See pp. 13-14, *supra*. As a result, the court of appeals did not address or endorse such an argument.

In short, no conflict exists among the courts of appeals on whether the conspiracy conduct in this case satisfies the import-commerce exclusion. The Seventh and Ninth Circuits agree that conspiring to fix the price of TFT-LCD panels sold for delivery to the United States falls within Section 6a's import-commerce exclusion, and thus that petitioners' conspiracy is subject to the Sherman Act.

2. The court of appeals also correctly held (Pet. App. 37a-42a) that the evidence was sufficient to satisfy Section 6a's effects exception. Its decision does not conflict with any decision of this Court or any other court of appeals. And this case would be an unsuitable vehicle to consider the effects exception because petitioners' convictions can be affirmed solely on the basis of the import-commerce exclusion.

a. The effects exception provides that conduct involving only non-import foreign commerce is subject to the Sherman Act if it has a "'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce," *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 162 (2004) (quoting 15 U.S.C. 6a(1)), and if that effect "gives rise to a claim." 15 U.S.C. 6a(2). The first statutory phrase "dictates the kinds of effects that truly foreign commerce must have in the U.S. mar-

ket," *Minn-Chem*, 683 F.3d at 854, before the conduct at issue can be brought "back within the Sherman Act's reach." *Empagran*, 542 U.S. at 162. The second ensures that the particular claim is predicated on adverse effects in the United States, rather than on "foreign injury" that the "anticompetitive conduct * * * independently caused." *Id.* at 175.

The court of appeals in this case addressed only Section 6a(1)'s effects inquiry, and only one aspect of that inquiry. As explained above, p. 8, *supra*, while petitioners argued that the jury should not be instructed on the effects exception at all, see Pet. 36a-37a (rejecting this argument), they did not dispute that the instructions given accurately reflected the requirements of the effects exception. See *id.* at 26a-27a (jury instructed that it could convict if it found that conspiracy's participants fixed the price of TFT-LCD panels incorporated into finished products 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"). On appeal, moreover, petitioners agreed that the effect of their price-fixing scheme on U.S. commerce "was both substantial and * * * reasonably foreseeable." *Id.* at 37a. The only question for the court of appeals was thus whether the effect was "sufficiently 'direct.'" *Ibid.*

The court of appeals correctly answered that question "yes." As the court explained, the evidence at trial showed that the price-fixing agreement enabled the conspirators to raise panel prices substantially, Pet. App. 40a, increasing their margins by an average of $53 per panel. Supp. C.A. E.R. 2064-2065. The price-fixed panels were the single largest cost compo-

nent in desktop monitors and notebook computers, and representatives from Dell and HP testified that increased panel prices led to increased prices for monitors and notebook computers sold in import commerce. As one conspirator put it: "[I]f the panel price goes up, then it will directly impact the monitor set price." Pet. App. 39a-40a (brackets in original; citation omitted). "[T]he impact on the United States market," therefore, "was direct and followed 'as an immediate consequence' of the price fixing." *Id.* at 39a (citation omitted).[3]

b. Petitioners contend (Pet. 3, 15) that the Seventh Circuit in *Motorola* reached a different result on similar facts, but no conflict exists. Motorola's Category Two claims concerned price-fixed TFT-LCD panels sold to Motorola's foreign subsidiaries abroad and then incorporated into finished products bound for the United States. 775 F.3d at 819. As to these panels, the Seventh Circuit observed that "[i]f the prices of the components were indeed fixed, there would be an

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[3] In reaching its conclusion, the court of appeals applied prior Ninth Circuit precedent holding 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 defendant[s'] activity.'" Pet. App. 38a (quoting *United States* v. *LSL Biotechnologies*, 379 F.3d 672, 680-681 (2004)). The Second and Seventh Circuits interpret Section 6a's direct-effect language to require only a reasonably proximate causal nexus, concluding that the Ninth Circuit's standard "results in a stricter test than the complete text of the statute can bear." *Minn-Chem*, 683 F.3d at 857; see *Lotes Co.* v. *Hon Hai Precision Indus. Co.*, 753 F.3d 395, 411 (2d Cir. 2014). Petitioners do not ask this Court to resolve that difference, and this case presents no occasion to do so because, as the court below explained, the result would be the same under either standard and petitioners "benefit from [the Ninth C]ircuit's formulation." Pet. App. 38a n.9.

effect on domestic U.S. commerce," and "that effect would be foreseeable * * *, could be substantial, and might well be direct rather than 'remote.'" *Ibid.* (quoting *Minn-Chem*, 683 F.3d at 856-857). "This doesn't seem like 'many layers,' resulting in just 'a few ripples' in the United States cellphone market." *Ibid.* (quoting *Minn-Chem*, 683 F.3d at 860). Accordingly, and as petitioners here acknowledge (Pet. 16), the Seventh Circuit "assume[d] that the requirement of a direct, substantial, and reasonably foreseeable effect on domestic commerce has been satisfied." *Motorola*, 775 F.3d at 819.

The Second Circuit also has recognized that anti-competitive conduct involving foreign sales of a component part can have a direct effect on import commerce in finished products incorporating the component. *Lotes Co.* v. *Hon Hai Precision Indus. Co.*, 753 F.3d 395, 412-413 (2014). As that court explained, "[t]here is nothing inherent in the nature of outsourcing or international supply chains that necessarily prevents the transmission of anticompetitive harms or renders any and all domestic effects impermissibly remote and indirect." *Id.* at 413; see also *Antitrust Law* ¶ 272i1, at 309 ("Many, perhaps most, restraints are on 'intermediate' goods," but effects "in upstream markets quickly filter into consumer markets as well.").

The Second, Seventh, and Ninth Circuits thus agree—and no court of appeals disagrees—that price fixing of a component can have a direct effect on U.S. commerce in finished products incorporating the price-fixed component. Indeed, the court of appeals in this case cited the Seventh Circuit's analysis with approval in finding sufficient evidence that the con-

spiratorial conduct had a "direct" effect on U.S. commerce. Pet. App. 41a. "Whether the causal nexus between foreign conduct and a domestic effect is sufficiently 'direct' under the FTAIA in a particular case will depend on many factors, including the structure of the market and the nature of the commercial relationships at each link in the causal chain." *Lotes*, 753 F.3d at 413. As explained above, the court of appeals' conclusion that a "direct" effect was established in this case is well supported by the evidence, and petitioners have not shown that any other circuit reviewing this record would reach a different result.

c. Petitioners err in suggesting (Pet. 16) that the court of appeals' decision conflicts with *Motorola* on Section 6a(2)'s requirement that the effect on U.S. commerce "give[] rise to" a claim under the Sherman Act. Their contention fails at the outset because petitioners did not press at any level, and the court of appeals did not address, any argument that their prosecution failed to satisfy the gives-rise-to requirement. Petitioners point to one passage in which the court of appeals mentioned that requirement. Pet. App. 38a-39a. But this single mention of the requirement shows not that the court of appeals treated it as "overlapping" with Section 6a(1)'s directness inquiry, Pet. 16, but that the Ninth Circuit applies *different* standards to the two statutory inquiries. Pet. App. 38a-39a (separately reciting standard for showing a "direct" effect and the proximate-cause standard governing Section 6a(2)). Because no challenge based on Section 6a(2)'s gives-rise-to requirement was "pressed or passed upon below," this Court's "traditional rule * * * precludes a grant of certiorari" on

that issue. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted).

In any event, no conflict exists between the result in this case and the Seventh Circuit's holding on the gives-rise-to requirement in *Motorola*, 775 F.3d at 819. Motorola asserted damages claims assigned to it by foreign subsidiaries that had purchased TFT-LCD panels in foreign commerce. While the Seventh Circuit acknowledged that the defendants' price fixing of those panels could directly affect U.S. commerce by increasing the price of cellphones incorporating those panels and sold in the United States, it held that this effect did not give rise to the claims of Motorola's foreign subsidiaries. *Id.* at 819-820.[4]

The *Motorola* court's analysis casts no doubt on the validity of petitioners' criminal convictions. Unlike a private antitrust suit, which arises only when the private plaintiff is "injured in his business or property by reason of" the Sherman Act violation, 15 U.S.C. 15, government enforcement actions—whether a criminal prosecution or "proceedings in equity to prevent and restrain [Sherman Act] violations," 15 U.S.C. 4—do not require any private injury. Instead, the government sues in its sovereign capacity to redress a violation of its laws. See *Empagran*, 542 U.S. at 170; cf. *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384, 398 (2d Cir. 2002) ("[T]he Sherman Act contains its own en-

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[4] The Seventh Circuit concluded that any damages claim by Motorola on its own behalf arising from "the effect of the cartel's pricing of components on the cost to Motorola of cellphones incorporating those components" had been waived in the district court and, in any event, was barred by "the indirect-purchaser doctrine of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977)." *Motorola*, 775 F.3d at 820-823.

forcement provision that can be invoked by the United States even when no plaintiff has suffered an injury."), cert. dismissed, 539 U.S. 978 (2003), abrogated on other grounds, 542 U.S. 155 (2004). As the *Motorola* court itself 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." 775 F.3d at 825; see Pet. App. 41a (same).

Petitioners claim (Pet. 16) that these two decisions—one finding them guilty of fixing prices for TFT-LCD panels and the other finding them not liable for certain damages claims brought by certain private plaintiffs arising from the same kind of price fixing—"cannot be reconciled." But as this Court explained when it construed Section 6a's gives-rise-to requirement in *Empagran*, the Sherman Act "can apply and not apply to the same conduct, depending upon other circumstances," including "the nature of the lawsuit (or of the related underlying harm)." 542 U.S. at 174. Although the price-fixing conspiracy in *Empagran* "did have domestic effects, and those effects were harmful enough to give rise to 'a' claim," Section 6a barred the foreign plaintiffs' claims on the assumption that the conduct "independently caused [their] foreign injury." *Id.* at 173-175. As was true in *Empagran*, petitioners' price-fixing conspiracy was subject to criminal prosecution under the Sherman Act, but some private damages claims may fall outside the scope of that statute. Nothing is anomalous about that result, and no reason exists to think that the outcome of this criminal prosecution would be any different in the Seventh Circuit.

d. Petitioners also contend (Pet. 17) that the court of appeals' decision "runs afoul of th[e] basic principle" that antitrust laws do not provide redress for injury to foreign customers. That contention again misapprehends the basis for the decision below. The court of appeals affirmed petitioners' convictions because they participated in a conspiracy that "increased prices to customers in the United States." Pet. App. 40a. It relied not on injury to foreign customers, but on evidence that "$23.5 billion in price-fixed panels were imported into the United States as part of finished products," *ibid.*, and testimony about 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." *Id.* at 40a-41a.

Nor does the court of appeals' decision risk "unreasonable interference with the sovereign authority of other nations." Pet. 17 (quoting *Empagran*, 542 U.S. at 164). Petitioners' claim (Pet. 2) that this case involves "the application of federal antitrust law beyond U.S. borders" omits critical factual context—namely, that petitioners were charged with, and convicted of, joining a price-fixing conspiracy that occurred in part in the United States, restrained U.S. commerce, and ultimately caused billions of dollars of harm to U.S. purchasers. See Pet. App. 5a-6a, 40a.

In enacting Section 6a, Congress reaffirmed that the Sherman Act can apply to conduct involving foreign commerce—including wholly foreign commerce. See *Empagran*, 542 U.S. at 163. As explained in *Empagran*, "[n]o 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," but U.S. "courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Id.* at 165. Where, as here, the charged conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, 15 U.S.C. 6a(1), the resulting interference (if any) would be reasonable.[5]

e. In any event, review of petitioners' claim that the evidence was insufficient to prove that the conspiracy had a direct effect on U.S. commerce is unwarranted because the jury's verdict can be affirmed on the independent basis that the conduct involved import commerce. See pp. 12-19, *supra*. Under *Grif-*

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[5] As the government explained in response to the Seventh Circuit's request for its views on the potential impact on U.S. foreign relations of a decision in *Motorola*, no foreign government has expressed disapproval of the criminal prosecutions of petitioners or other participants in the TFT-LCD panel conspiracy to any U.S. official, despite regular consultations between officials of the U.S. antitrust agencies and their foreign counterparts. U.S. Supp. Amicus Br. at 10, *Motorola*, *supra* (7th Cir. June 27, 2014) (No. 14-8003). Foreign governments have expressed concern about attempts by foreign plaintiffs to recover treble damages in U.S. courts for purchases in foreign markets. *Id.* at 13-14. This Court addressed their concerns in *Empagran*, when it held that a vitamins-sellers cartel's effect in the United States did not give rise to the foreign plaintiffs' damages claims based on purchases abroad. 542 U.S. at 164-169. Likewise, *Motorola* held that the damages claims by the company's subsidiaries for panel purchases in wholly foreign commerce did not arise from the TFT-LCD cartel's effect on U.S. commerce. 775 F.3d at 819.

fin v. *United States*, 502 U.S. 46, 56 (1991), a general verdict need not be set aside when "one of the possible bases of conviction was * * * merely unsupported by sufficient evidence." Petitioners suggest (Pet. 20) that this rule is inapplicable because the government's effects theory was "legally inadequate." But *Griffin* itself makes clear that a claim such as petitioners'—*i.e.*, that the relevant facts do not suffice to prove a statutory requirement, see AUO C.A. Br. 63-65—asserts factual, not legal, error. 502 U.S. at 59 (rejecting the view that "[i]nsufficiency of proof * * * *is* legal error" in the relevant sense).

Even if petitioners' claim were legal in nature, any error would be harmless given the strength of the evidence that petitioners' conspiracy involved import commerce. *Neder* v. *United States*, 527 U.S. 1, 18 (1999) (holding that instructional error is subject to harmless-error analysis); see *Hedgpeth* v. *Pulido*, 555 U.S. 57, 60-61 (2008) (per curiam) (citing *Neder* in clarifying that harmless-error analysis applies to alternative-theory error); see also *Skilling* v. *United States*, 561 U.S. 358, 414 & n.46 (2010). The court of appeals described as "overwhelming" the evidence that participants in the conspiracy "sold hundreds of millions of dollars of price-fixed panels directly into the United States." Pet. App. 42a. It is clear beyond a reasonable doubt that, based on that evidence, a rational jury would have found petitioners guilty under the import-commerce exclusion even absent the effects exception. Any error in submitting the effects exception to the jury was therefore harmless.

3. Petitioners contend (Pet. 21-29) that the court of appeals erred in applying a *per se* analysis, rather than the rule of reason, to their price-fixing conspira-

cy. Application of the *per se* rule accords with this Court's settled precedent, and petitioners identify neither a sound basis for departing from that precedent nor a circuit conflict warranting review.

a. "Resort to *per se* rules is confined to restraints * * * 'that would always or almost always tend to restrict competition and decrease output.'" *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 886 (2007) (*Leegin*) (quoting *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). "To justify a *per se* prohibition a restraint must have 'manifestly anticompetitive' effects and 'lack . . . any redeeming virtue.'" *Ibid.* (citation omitted). Price fixing satisfies each of these criteria, and this Court has "not wavered in [its] enforcement of the *per se* rule against price fixing." *Arizona* v. *Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 347 (1982); see *Leegin*, 551 U.S. at 886 ("horizontal agreements among competitors to fix prices" "are *per se* unlawful"); *Socony-Vacuum Oil*, 310 U.S. at 223 ("[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or *foreign* commerce is illegal *per se*." (emphasis added)).

Petitioners urge the Court (Pet. 24) to dispense with the *per se* rule for "*foreign* price-fixing agreements such as this one." They do not explain, however, why a price-fixing conspiracy hatched outside the United States and with effects inside the United States would "merely regulate[] and perhaps thereby promote[] competition" rather than "suppress or even destroy" it. *Board of Trade of City of Chic.* v. *United States*, 246 U.S. 231, 238 (1918). Like their domestic counterparts, foreign price-fixing agreements have

manifestly anticompetitive effects. Petitioners' hypothetical bolt-manufacturers cartel (Pet. 25) illustrates the point. Even when, as petitioners posit, some foreign manufacturers do "not sell directly into the United States," their price-fixing scheme can still "drive the price up of a product that is wanted in the United States" and ultimately sold there to U.S. consumers. *Minn-Chem*, 683 F.3d at 859-860 (describing scheme where "cartel established benchmark prices in [foreign] markets where it was relatively free to operate" and "then applied those prices to its U.S. sales"). And, contrary to petitioners' suggestion (Pet. 26 n.*), "higher prices in the United States" are among the "adverse domestic effect[s]" with which the antitrust laws are concerned. *Empagran*, 542 U.S. at 175.

Petitioners also do not cite the kind of evidence that this Court has consulted in reconsidering its settled precedents, such as scholarship showing that foreign price-fixing agreements are "replete with procompetitive justifications." *Leegin*, 551 U.S. at 889; see *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47-48 (1977) (noting, in overruling precedent applying the *per se* rule, that "[t]he great weight of scholarly opinion ha[d] been critical of the decision"). "[T]he leading antitrust treatise" quoted by petitioners (Pet. 24) rejects the view that rule-of-reason analysis should always apply to restraints abroad. *Antitrust Law* ¶ 273b, at 352-356. And it favors application of the *per se* rule to allegations of "naked price fixing occurring abroad but having the United States as its intended target," *id.* at 358, the factual setting of *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997), cert. denied, 522 U.S. 1044 (1998). See Pet. App. 20a-21a (following

Nippon Paper "[i]n invoking the *per se* rule for horizontal price fixing"). In short, where price fixing occurs could affect whether the Sherman Act applies, but it does not affect how it applies.

b. No "confusion" (Pet. 27) exists among the courts of appeals on application of the *per se* rule to price-fixing agreements entered into abroad. As petitioners acknowledge (Pet. 26), the decision in this case accords with the First Circuit's decision in *Nippon Paper*, *supra*, which reinstated an indictment charging a Japanese manufacturer with participating in a conspiracy to fix the price of fax paper sold in the United States. 109 F.3d at 2, 7. Moreover, the Ninth Circuit here construed its prior decision in *Metro Industries, Inc.* v. *Sammi Corp.*, 82 F.3d 839, cert. denied, 519 U.S. 868 (1996), in a manner contrary to petitioners' reading, making clear that *Metro Industries* "was not a price-fixing case" and that the rule-of-reason analysis it applied does not extend to "a horizontal price-fixing scheme * * * where both part of the conduct and the effects of that conduct occurred in the United States." Pet. App. 18a-20a.

The Fourth Circuit's decision in *Dee-K Enterprises, Inc.* v. *Heveafil Sdn. Bhd*, 299 F.3d 281 (2002), cert. denied, 539 U.S. 969 (2003), also does not establish a circuit conflict on application of the *per se* rule. The language that petitioners quote (Pet. 27) addressed a different issue—U.S. purchasers' argument that they did not have to show that foreign conduct caused "some substantial effect in the United States," *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993), because the conspiracy "involve[d] price-fixed goods sold directly into United States commerce." *Dee-K Enters.*, 299 F.3d at 293. The Fourth Circuit

rejected that argument, concluding that the substantial-effect showing was required to establish that the primarily foreign conduct at issue had a sufficient nexus to U.S. commerce for the Sherman Act to apply. *Id.* at 290-296; see *Minn-Chem*, 683 F.3d at 855 ("Effects on commerce are a part of every Sherman Act case."). Nothing in that analysis suggests that the Fourth Circuit would retreat from the *per se* rule if presented with "a classic horizontal price-fixing scheme" that in fact produced "substantial effects in the United States." Pet. App. 20a; see *Dee-K Enters.*, 299 F.3d at 286 n.2 (explaining that the "foreign-conduct question" affects whether U.S. antitrust law applies, not "the substantive analysis of a particular offense under the antitrust laws").

c. Finally, this case would be a poor vehicle for considering whether to treat some "foreign price-fixing agreements" (Pet. 26) differently than domestic ones. The participants in this price-fixing conspiracy were not, as in *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 4 (2006) (cited at Pet. 25), joint venturers who "agreed to pool their resources and share the risks of and profits from" a single entity's activities. They were competing foreign manufacturers who opened offices and subsidiaries in the United States, carried out their price-fixing agreement in the United States, and sold their price-fixed panels to customers in the United States. Those U.S.-focused and U.S.-based actions went beyond simply posing "danger to American commerce." Pet. 24 (quoting *Antitrust Law* ¶ 273b, at 353). As the court of appeals explained, "[i]t was well understood * * * that the practical upshot of the conspiracy would be and was increased prices to customers in the United States." Pet. App. 40a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2015