Nos. 15-3353, 15-3354, 15-3355

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE VEHICLE CARRIER SERVICES ANTITRUST LITIGATION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(JUDGE ESTHER SALAS)

BRIEF FOR THE FEDERAL MARITIME COMMISSION AND UNITED STATES AS AMICI CURIAE

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MISCELLANEOUS

This brief is submitted in response to the Court's order inviting the Federal Maritime Commission ("FMC") to express its views. The FMC is the independent federal agency responsible for regulating the U.S. international ocean transportation system and administering the Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67 (the "Shipping Act"). The United States enforces the federal antitrust laws and has a strong interest in the proper application of the Shipping Act's antitrust exemptions. In the view of the FMC and the United States (collectively, the "government"), this Court should affirm the district court's judgment against the Direct Purchasers in No. 15-3353 because the Shipping Act exempts the challenged price-fixing conduct from the Clayton Act. This Court should affirm in part, and vacate in part the judgment against the Indirect Purchasers (collectively with Direct Purchasers, "Appellants") in Nos. 15-3354 and 15-3355 because the Shipping Act does not preempt their actions challenging those agreements under state law.

STATEMENT

This case lies at the intersection of the Shipping Act's regulation of international shipping and the federal and state antitrust laws' prohibitions on anticompetitive collusion among competitors.

1. Section 1 of the Sherman Act outlaws "[e]very contract, combination . . . or conspiracy" that unreasonably restrains "trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Naked agreements among competitors to fix prices, rig bids, or allocate customers or capacity are automatically deemed unreasonable and thus *per se* unlawful without further inquiry into their effects or justifications. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1192 (3d Cir. 1984). The United States views such agreements as hardcore cartels and prosecutes them criminally. *See* Bill Baer, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium: Prosecuting Antitrust Crimes (Sept. 10, 2014). Those who engage in cartels can be punished with terms of imprisonment up to ten years and criminal fines up to the greater of

$100,000,000 for corporations ($1,000,000 for individuals) or twice the pecuniary loss or gain from the offense. 15 U.S.C. § 1; 18 U.S.C. § 3571(d). The Sherman Act also authorizes the United States "to institute proceedings in equity to prevent and restrain" violations of the Sherman Act. 15 U.S.C. § 4.

The federal antitrust laws also permit private enforcement. Section 4 of the Clayton Act authorizes persons injured in their business or property by a Sherman Act violation to recover treble damages for that injury, 15 U.S.C. § 15, although the *Illinois Brick* doctrine ordinarily bars indirect purchasers from recovering damages under the federal antitrust laws, *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977). Section 16 of the Clayton Act authorizes persons "to sue for and have injunctive relief . . . against threatened loss or damage by a violation of" the Sherman Act. 15 U.S.C. § 26.

State antitrust laws also prohibit price-fixing, bid-rigging, and customer- or capacity-allocation agreements, *see, e.g.*, N.Y. Gen. Bus. Law § 340, and authorize private actions to recover damages for violations, *see, e.g*, Cal. Bus. & Prof. Code § 16750(a). And many states have rejected the *Illinois Brick* doctrine and thus ordinarily permit

indirect purchasers to recover damages under state law. *See* 14 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 2412(d)(1).

2. The Shipping Act regulates the carriage of goods by water in the foreign commerce of the United States. The Act reflects Congress's determination that allowing ocean carriers to cooperate, subject to government regulation and oversight, is the best way to ensure a stable, efficient, and competitive international ocean transportation system.[1] *See generally* S. Rep. No. 98-3, at 2-6 (1983); H.R. Rep. No. 98-53, pt. 1, at 4-10 (1983).

Congress enacted the Shipping Act's predecessor, the Shipping Act of 1916, Pub. L. No. 64-259, 39 Stat. 728, after a 1912 investigation into abuses in the liner shipping industry revealed the prevalence of international price-fixing carrier cartels, called "conferences." S. Rep. No. 98-3, at 2. The resulting "Alexander Report" suggested that "[i]n the face of the unusual characteristics of international economic competition . . . some degree of immunity from the antitrust laws should

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[1] For the purposes of this brief, the government uses the term "ocean carrier" to mean "ocean common carrier" as defined in 46 U.S.C. §§ 40102(17) and (6), as opposed to contract or private carriage, which is not subject to the filing and immunity provisions of the Shipping Act.

be granted to liner operators in our foreign commerce." *Id.* at 3. Congress "accepted the conferences as a key feature of the international shipping marketplace" but subjected them to regulatory oversight to prevent abuse. H.R. Rep. No. 98-53, at 6.

In the early 1980s, concerns that courts had eroded the Shipping Act of 1916's antitrust protections prompted Congressional action. H.R. Rep. No. 98-53, pt. 1, at 9; *see, e.g.*, *Fed. Mar. Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213(1966) (holding that unfiled joint rate-making agreements were subject to suit for treble damages under the federal antitrust laws). As a result, Congress enacted the Shipping Act of 1984, overhauling the FMC's agreement review process and bolstering the antitrust protections provided under the Act.

The Shipping Act requires certain agreements among ocean carriers to be filed with the FMC and exempts operating under those agreements from the federal antitrust laws once they have become effective under the regulatory regime administered by the FMC. In contrast, operating under an agreement that has not become effective is exempt only from suit under the Clayton Act.

Specifically, as relevant here, Section 40302 commands that "every agreement referred to in section 40301(a) . . . shall be filed with the Federal Maritime Commission." 46 U.S.C. § 40302. Section 40301(a) refers to agreements between or among ocean carriers to:

- "discuss, fix, or regulate transportation rates,"
- "pool or apportion traffic," or
- "regulate the volume or character of cargo or passenger traffic to be carried."

Id. § 40301. Section 40301(a) also includes a catch-all category—agreements to "control, regulate, or prevent competition in international ocean transportation," which Congress intended to be "coextensive with the scope of the antitrust laws." S. Rep. No. 98-3, at 22. Section 40303 restricts what ocean carriers can agree to; for example, their agreements cannot prohibit or restrict a member of the agreement from negotiating a service contract with a shipper. *Id.* § 40303.

The FMC reviews filed agreements, notifies the Federal Register of the filing for publication, and can request additional information it considers necessary. *Id.* § 40304(a), (d). The FMC must reject

agreements that do not comply with Sections 40302 and 40303. *Id.* § 40304(b). In addition, as part of its review, the FMC assesses filed agreements under the standard set out in Section 41307(b)(1), that is, whether an agreement is "likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost." *Id.* § 41307(b)(1). "Unless rejected" by the FMC, "an agreement . . . is effective" after specified time has passed, usually 45 days after filing. *Id.* § 40304(c). After an agreement becomes effective, members of certain types of agreements, including agreements to restrict capacity, must submit quarterly monitoring reports to the FMC. 46 C.F.R. §§ 535.702, 535.703. The FMC may seek to enjoin an agreement if at any time it determines that it no longer meets the Section 41307(b)(1) standard.

Section 41102(b)(1), the codification of section 10(a)(2) of the Shipping Act, prohibits ocean carriers from operating "under an[y] agreement required to be filed under section 40302" if it "has not become effective under section 40304 . . . or has been rejected, disapproved, or canceled." *Id.* § 41102(b); *see also Compania Sud Americana de Vapores S.A. v. Inter-American Freight Conference*, 28

S.R.R. 137, 143 (FMC 1998).[2] On its own motion, or in response to the filing of a sworn complaint by a member of the public, the FMC may investigate, adjudicate, and remediate violations of the Act. *Id.* §§ 41301-309. Not only may the FMC assess civil penalties, it may also order violators to pay reparations to complainants; certain violations of the Act—including operation under an ineffective agreement—may be punished by reparations of up to "twice the amount of the actual injury" incurred. *Id.* § 41305(b), (c).

Section 40307(a) provides that the "antitrust laws," which for purposes of the Shipping Act include only federal antitrust laws,[3] "do

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[2] The FMC's official opinions and orders are published in the Pike & Fischer Shipping Regulation Report (Bloomberg BNA), which the FMC abbreviates as "S.R.R." Because FMC opinions and orders as paginated in the S.R.R. are not available in a publicly accessible electronic database, cited FMC materials are contained in an Addendum. *Cf.* Fed. R. App. P. 28(f), 32.1(b).

[3] Specifically, Section 40102(2) defines "antitrust laws" as:

(A) the Sherman Act (15 U.S.C. 1 *et seq*.);
(B) sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8, 9);
(C) the Clayton Act (15 U.S.C. 12 *et seq*.);
(D) the Act of June 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a);
(E) the Federal Trade Commission Act (15 U.S.C. 41 *et seq*.);
(F) the Antitrust Civil Process Act (15 U.S.C. 1311 *et seq*.); and
(G) Acts supplementary to those Acts.

not apply to . . . an agreement . . . that has been filed and is effective under this chapter." *Id.* § 40307(a). Section 40307(d) provides a more limited exemption: "A person may not recover damages under section 4 of the Clayton Act (15 U.S.C. 15), or obtain injunctive relief under section 16 of that Act (15 U.S.C. 26), for conduct prohibited by this part." *Id.* § 40307(d).

3. In February 2014, the United States brought the first of a series of criminal charges against ocean carriers and their executives for conspiring to suppress and eliminate competition by allocating customers and routes, rigging bids, and fixing prices for international ocean shipping services for roll-on, roll-off cargo, such as cars and trucks, to and from the United States and elsewhere, in violation of Section 1 of the Sherman Act. *United States v. Compania Sud Americana de Vapores S.A.*, No. 14-cr-100 (D. Md. Feb. 27, 2014). To

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46 U.S.C. § 40102(2).

date, four ocean carriers[4] and four executives[5] have pleaded guilty. The district court has sentenced the ocean carriers to pay fines totaling $234.9 million and the individuals to serve prison sentences ranging from 14 to 18 months. In addition, four other individuals are under indictment.[6] The United States' criminal investigation is ongoing.

The FMC has entered into settlements with seven ocean carriers, resolving allegations that they had engaged in concerted action related to the provision of shipping services for roll-on, roll-off cargo under agreements that had not been filed with the FMC or become effective

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[4] *United States v. Wallenius Wilhelmsen Logistics AS*, No. 16-cr-362 (D. Md. Sep. 13, 2016); *United States v. Nippon Yusen Kabushiki Kaisha*, No. 14-cr-612 (D. Md. Mar. 11, 2015); *United States v. Kawasaki Kisen Kaisha, Ltd.*, No. 14-cr-449 (D. Md. Nov. 5, 2014); *United States v. Compania Sud Americana de Vapores S.A.*, No. 14-cr-100 (D. Md. Apr. 24, 2014).

[5] *United States v. Otoda*, No. 15-cr-34 (D. Md. Mar. 26, 2015); *United States v. Tanaka*, No. 15-cr-22 (D. Md. Mar. 10, 2015); *United States v. Yamaguchi*, No. 14-cr-613 (D. Md. Feb. 6, 2015); *United States v. Tanioka*, No. 14-cr-610 (D. Md. Feb. 2, 2015).

[6] *See United States v. Garrido Garcia*, No. 16-cr-283 (D. Md. June 7, 2016); *United States v. Aoki, et al.*, No. 15-cr-524 (D. Md. Oct. 6, 2015).

under the Shipping Act, in violation of 46 U.S.C. § 41102(b).[7] The FMC has collected nearly $6 million in penalties, although no carrier admitted to violating the Shipping Act. *See, e.g.*, Press Release, Wallenius Wilhelmsen Logistics and Affiliate Pay $1.5 Million Penalty (Oct. 11, 2016), *available at* http://www.fmc.gov/NR16-22/. In addition, purchasers of ocean shipping services for roll-on, roll-off cargo have filed complaints with the FMC seeking reparations in connection with the ocean carriers' price-fixing conspiracy. DA 201-418.

4. Appellants comprise multiple putative classes of plaintiffs alleging that ocean carriers entered into unfiled agreements that had the effect of fixing and increasing prices in the market for ocean vehicle carriage, including: agreements to coordinate on price increases; agreements to not compete; agreements to allocate customers and routes; and agreements to restrict capacities via fleet reduction.[8]

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[7] Specifically, the Commission entered into settlement agreements with Compania Sud Americana de Vapores SA; Eukor Car Carriers, Inc.; Kawasaki Kisen Kaisha Ltd.; Mitsui O.S.K. Lines Ltd.; Nippon Yusen Kaisha; Nissan Motor Car Carrier Co; and Wallenius Wilhelmsen Logistics AS.

[8] The government takes no position on the merits of Appellants' federal or state law claims. This brief proceeds on the assumptions that

Direct Purchasers—a putative class of customers in the market for the ocean carriage of new, assembled motor vehicles, including automobile manufacturers and freight forwarders—filed suit seeking treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. Indirect Purchasers—namely automobile and equipment dealers and vehicle purchasers—filed suit seeking injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, and treble damages under various state antitrust and consumer protection statutes.

The district court dismissed Appellants' claims. It concluded that operating under an anticompetitive agreement not filed with the FMC constituted a violation of the Shipping Act and, thus, that the Clayton Act claims could not proceed. The court also determined that the Indirect Purchasers' state antitrust law claims were in sufficient tension with the Shipping Act to trigger conflict preemption.

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there exists a sufficient nexus for state antitrust laws to apply to the challenged conduct and that the state antitrust laws, as applied here, prohibit the same conduct as the Sherman Act.

This appeal followed. After merits briefing was completed, Appellees moved that the Court invite the FMC to file a brief as amicus curiae. The court granted the motion and invited this brief from the FMC expressing its views.

ARGUMENT

I. Section 40307(d) bars Appellants' Clayton Act claims.

This case presents a straightforward application of the Shipping Act's bar on private claims under the Clayton Act: Appellants allege that ocean carriers operated under an agreement to restrict competition in the market for vehicle carrier services—including by entering into agreements to fix prices and restrict capacity—in violation of the antitrust laws. DP Br. 6; IP Br. 4.[9] Agreements of this sort must be filed with the FMC, 46 U.S.C. §§ 40301-302, and ocean carriers failed to do so. DP Br. 2; IP Br. 4. The Shipping Act expressly prohibits ocean

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[9] "DP Br." refers to the Brief for Plaintiffs-Appellants Cargo Agents, Inc., International Transport Management Corp. and Manaco International Forwarders Inc., *In re Vehicle Carrier Services Antitrust Litig.*, No. 15-3353 (3d Cir. June 20, 2016). "IP Br." refers to the Joint Brief of Apellants – Indirect Purchasers: End-Payors, Truck and Equipment Dealers, and Automobile Dealers, *In re Vehicle Carrier Services Antitrust Litig.*, Nos. 15-3354, -55 (3d Cir. June 20, 2016).

carriers from operating under "an agreement that is required to be filed under section 40302" if "the agreement has not become effective . . . or has been rejected, disapproved, or cancelled." 46 U.S.C. § 41102(b). And private plaintiffs are explicitly barred from recovering damages or obtaining injunctive relief under the Clayton Act for "conduct prohibited by this part." *Id.* § 40307(d).[10]

1. Direct Purchasers argue that Section 40307(d) does not exempt from the Clayton Act agreements among ocean carriers to restrict capacity because operating under an unfiled, ineffective capacity-restricting agreement is not "conduct prohibited by this part," 46 U.S.C. § 40307(d). DP Br. 22-25. Despite the Act's failure to list capacity-restriction agreements specifically, they are within the scope of Section 40301(a). Thus Section 40302(a) prohibits the ocean carriers' failure to file the agreement with the FMC. And Section 41102(b)(1) prohibits

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[10] The government does not believe that any of the Shipping Act provisions implicated in this case are ambiguous. To the extent that the Court finds ambiguity, however, the interpretation of the FMC, when exercising its authority as the agency tasked with administering the statute, is entitled to deference so long as that interpretation is "based on a permissible construction of the statute," *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984).

operating under an agreement that has not become effective, with filing a necessary prerequisite to it becoming effective.

By its terms, the Shipping Act identifies broad categories of agreements among ocean carriers to which "[t]his part applies." 46 U.S.C. § 40301. An agreement to restrict capacity fits within several of these categories. An agreement to restrict capacity is an agreement to "pool or apportion traffic." *Id.* § 40301(a)(2). It is an agreement to "regulate the number and character of voyages between ports." *Id.* § 40301(a)(3). It is an agreement to "regulate the volume or character of cargo or passenger traffic to be carried." *Id.* § 40301(a)(4). And it falls into the catch-all category of agreements to "control, regulate, or prevent competition in international ocean transportation." *Id.* § 40301(a)(6). That provision was intended to be co-extensive with the antitrust laws, S. Rep. No.98-3, at 22,[11] which prohibit agreements to

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[11] S. Rep. No.98-3 and H.R. Rep. No. 98-53 relate to the proposed but not passed Shipping Act of 1983, S. 504, H.R. 1878, 98th Cong., 1st Sess., which was considered by the same Congress that ultimately passed the Shipping Act of 1984 and is, in all relevant respects, substantively identical to the passed Shipping Act. *Compare, e.g.*, H.R. 1878, 98th Cong., 1st Sess., §§7(c)(2), 10(a)(2), *with* 46 U.S.C. §§ 40307(d), 41102(b)(1). *See also United States v. Gosselin World Wide*

restrict capacity as a kind of *per se* unlawful price fixing. *See United States v. Andreas*, 216 F.3d 645, 666-68 (7th Cir. 2000).

The FMC itself treats agreements to restrict capacity as covered by the Shipping Act and within its regulatory jurisdiction.[12] The Commission's regulations treat capacity-restriction agreements as particularly pernicious conduct covered by the Act. While 46 C.F.R. § 535.311 exempts from the 45-day waiting period agreements entered into between ocean carriers with low market shares, capacity rationalization agreements do not qualify for that exemption. 46 C.F.R.

Moving, N.V., 411 F.3d 502, 514 (4th Cir. 2005) (relying on H.R. Rep. No. 98-53 to interpret Congress's aims in passing the Shipping Act).

[12] Direct Purchasers' reliance on remarks by Federal Maritime Commissioner Michael A. Khouri at a symposium entitled "International Trade Symposium: Charting New Horizons" are misplaced. DP Br. 24-25. Direct Purchasers misconstrue Commissioner Khouri's remarks, which were consistent with the analysis contained in this brief. Operating under an unfiled agreement to restrict capacity constitutes a "violation of the Sherman Act" and is not entitled to the Shipping Act's broader grant of immunity from the "antitrust laws." Even if Commissioner Khouri's remarks did support the Direct Purchasers' position, the remarks do not represent the considered views of the FMC as a body.

§§ 535.311(a), 535.502(b).[13] And 46 C.F.R. § 535.702 subjects agreements "that contain[] the authority to discuss or agree on capacity rationalization" as subject to additional monitoring obligations. *Id.* § 535.702. Not only must agreements involving capacity be filed under Section 40301(a), then, the FMC subjects them to additional scrutiny given their potential effect on competition.

2. Appellants also argue that the Shipping Act does not extend antitrust immunity to ocean carriers operating under an unfiled agreement because: (1) only filed agreements are entitled to any antitrust exemption under the Shipping Act, DP Br. 15-17; IP Br. 15-17; and (2) operating under an unfiled agreement is not conduct prohibited by the Shipping Act, DP Br. 18-22; IP Br. 22-23. Both of Appellants' arguments are unavailing.

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[13] FMC rules define "capacity rationalization" as a "a concerted reduction, stabilization, withholding, or other limitation in any manner whatsoever by ocean carriers on the size or number of vessels or available space offered collectively or individually to shippers in any trade or service." 46 C.F.R. § 535.104(e). *See also* 69 Fed. Reg. 64398 (Nov. 4. 2004) (final rule adopting definition of "capacity rationalization" and noting that one purpose of rule was to ensure that capacity restriction agreements "receive the degree of scrutiny on initial filing that the Commission deems appropriate").

First, Appellants are correct that unfiled agreements are not entitled to an exemption from the "antitrust laws" under Section 40307(a). But Appellants' Clayton Act claims were dismissed under Section 40307(d)—barring damages or injunctive relief under the Clayton Act for violations of the Shipping Act—not under Section 40307(a). JA 44-45.

And second, the Shipping Act makes clear that ocean carriers violate the Act when operating under any agreement covered by the Act that has not "become effective under [S]ection 40304 . . . or has been rejected, disapproved or canceled." 46 U.S.C. § 41102(b). An agreement that is never filed cannot "become effective under section 40304." *Id.* And the Section 40307(d) exemption contains no requirement that the agreement-in-question actually has been filed, as Appellants suggest. DP Br. 19-20.

Appellants are correct that the category of agreements covered by Section 41102(b)(1) includes more than just unfiled agreements, including filed agreements that remain under review by the FMC. *Id.* But that the Shipping Act prohibits conduct in addition to operating under an unfiled agreement does not indicate that Congress intended to

exclude unfiled agreements from the Shipping Act's reach entirely. Quite the opposite: Congress enacted the Shipping Act to curb the proliferation of secret agreements in the market for the ocean carriage of goods. *See supra*.

The FMC interprets the Shipping Act to prohibit operating under an unfiled agreement: it is "the very thing prohibited by the Act." *Compania Sud Americana de Vapores, SA v. Inter-American Freight Conference*, 28 S.R.R. 137, 143(FMC 1998) (respondents violated 46 U.S.C. § 41102(b)(1) by failing to file a winding-up agreement); *see also, e.g.*, *Anchor Shipping Co. v. Alianca Navegacao e Logistica Ltda*., 30 S.R.R. 991, 999 (FMC 2006) (allowing complainant to assert certain Shipping Act allegations, including that the respondents "operated under agreements that had not been filed with the Commission"). The Commission's regulations plainly state that "[a]ny person operating under an agreement . . . that has not been filed and that has not become effective pursuant to the Act . . . is in violation of the Act." 46 C.F.R. § 535.901.

3. Lastly, Appellants argue that applying Section 40307(d)'s bar on private Clayton Act claims in this case impermissibly expands the scope

of the Shipping Act's antitrust exemptions; it "reward[s] carriers for not complying with the Shipping Act," DP Br. 12-13, "entitl[ing] them to the same immunity from antitrust damages whether or not they filed their agreements." DP Br. 18; *see also* IP Br. 17. This argument, however, cannot be squared with Congress's decision to include two, distinct antitrust exemptions into the Act: one exempting application of the antitrust laws to filed and effective agreements, 46 U.S.C. § 40307(a), and a narrower exemption precluding damages and injunctive claims under the Clayton Act for violations of the Shipping Act, *id.* § 40307(d). Moreover, carriers are hardly rewarded for not complying with the Shipping Act. As explained above, they face criminal prosecution by the United States as well as penalties and double reparations by the FMC because their price-fixing agreement was not filed and thus never became effective. *See supra*.

Appellants' proposed construction of Section 40307, *i.e.*, that Section 40307(d)'s Clayton Act bar applies only to activities referred to in Section 40307(a), DP Br. 18; IP Br. 18-19, is untenable. That construction finds no support in the text; Section 40307(d) plainly states that a person "may not recover damages . . . for conduct prohibited *by*

this part," *i.e.*, Part A of Subchapter IV of Title 46 of the U.S. Code, which includes Sections 40101 through 41309. This construction would also render Section 40307(d) duplicative, thus violating the "cardinal principle" that a statute should be interpreted so that, if possible, "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). Section 40307(a) exempts enumerated activities from "the antitrust laws," including the Clayton Act. Congress would not have added Section 40307(d) simply to reiterate that private plaintiffs are barred from filing lawsuits stemming from the enumerated activities. Lastly, Appellants' reliance on *Gosselin*, 411 F.3d 502, *see* IP Br. 19, is unavailing. The Fourth Circuit did not adopt their reading of the statute; it construed only 46 U.S.C. app. § 1706(a)(4)—now Section 40307(a)(4)—not Section 40307(d).

Congress intended Section 40307(d) to provide a limited ability under federal law to punish carriers when they are in violation of the Shipping Act. The FMC can enforce the Act itself, and the United States can enforce the Sherman Act where the carriers are operating under an ineffective agreement to fix prices. Antitrust exposure under federal law

for operating under unfiled agreements is "limited to injunctive and criminal prosecution by the Attorney General, and does not carry with it any private right of action otherwise available under the antitrust laws." H.R. Rep. No. 98-53, pt. 1, at 12. [14]

II. The Shipping Act does not preempt Indirect Purchasers' state antitrust law claims.

The Supremacy Clause, U.S. Const., Art. VI, cl. 2, mandates that state law yield to federal law when the two conflict. Where, as here, Congress has not expressly preempted state law, preemption will nevertheless occur if: (1) "the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively," *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1265-66 (2012) (brackets in original and citation omitted); or (2) state law conflicts with federal law,

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[14] Direct Purchasers also contend that Section 40502(b)(2)—providing that service contracts for "new assembled motor vehicles" do not need to be filed with the FMC—somehow inoculates Appellants' claims related to the shipment of newly assembled motor vehicles from dismissal. DP Br. 26-28. The agreements at issue in this case are not Appellants' service contracts with the carriers, but rather price-fixing agreements among carriers. Section 40502(b)(2) does not apply to these agreements, and they are required to be filed with the FMC under Sections 40301 and 40302.

i.e. it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).[15]

1. There is no indication that Congress intended the Shipping Act to exclusively occupy the field governing restraints of trade among ocean carriers.

Section 40307(a)'s antitrust exemption only renders inapplicable the federal antitrust laws listed in Section 40102(2). That exemption does not apply, in any event, because the agreements challenged here were not effective under Section 40302. And Section 40307(d)'s antitrust exemption, which does apply here, only disables damages or injunctive actions under the Clayton Act. Thus, neither exemption reflects an intent to exclude from the field private enforcement under state antitrust laws.

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[15] This Court need not address whether a heightened presumption against preemption applies; the Shipping Act does not preempt Indirect Purchasers' state antitrust law claims regardless. The government, therefore, takes no position on the question.

Contemporaneous enactments stand in contrast and show how Congress exempts conduct from both federal and state law when it so intends. *See, e.g.*, National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815, 15 U.S.C. § 4302 (exempting certain activities by standards-setting organizations from suits alleging that activities are *per se* unlawful "under the antitrust laws, or under any State law similar to the antitrust laws"); Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233, 15 U.S.C. §§ 4016, 4021(6) (providing that "no criminal or civil action may be brought under the antitrust laws" for certain export conduct approved by the Department of Commerce and defining "antitrust laws" to include specified federal laws and "any State antitrust or unfair competition law").

To be sure, the legislative history of the Shipping Act contains broad language regarding the sweeping purposes of the Act. The House Report expresses concerns regarding the "undue extension of antitrust principles into the regulation of international maritime transportation," H.R. Rep. No. 98-53, pt. 1, at 9, and states that "the remedies and sanctions provided in the [Act] will be the exclusive remedies and sanctions for violation[s]," *id.* at 12. Yet, Congress left in place criminal

and civil enforcement of the Sherman Act by the United States against those operating under agreements that have not become effective. *See supra*. State antitrust law has traditionally operated alongside its federal counterpart, *see California v. ARC Am. Corp.,* 490 U.S. 93, 101 n.4 (1989) (noting that "21 states had already adopted their own antitrust laws" when the Sherman Act was enacted); 14 Areeda & Hovenkamp, Antitrust Law ¶ 2401(a). Congress is presumed to have been aware of this background when it passed the Shipping Act. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). It can be inferred, then, that Congress intended for state law to complement the government's criminal prosecutions and civil penalties imposed on ocean carriers that operate under price-fixing agreements that are not exempted by the Shipping Act.

Neither the House Report, nor the Shipping Act itself, mention state antitrust law, which "suggests that when Congress passed [the Shipping Act,] it either did not intend to disturb the existing framework of state law remedies for" indirect purchasers victimized by price-fixing

conspiracies or possibly "was not thinking about [such] remedies at all." *Rosenberg v. DVI Receivables XVII, LLC*, 835 F.3d 414, 419 (3d Cir. 2016). "In either case, field preemption does not apply." *Id.*

2. Nor does conflict preemption apply in this case. The state law antitrust claims challenge price-fixing agreements that are not exempted by Section 40307(a). The United States can (and did) criminally prosecute the agreements' members under the Sherman Act, and the FMC can (and did) obtain penalties under the Shipping Act. Thus, it cannot be said that additional claims challenging those agreements under state antitrust laws would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67.

The district court concluded that allowing Indirect Purchasers' state law claims would frustrate one of the Act's four stated purposes, that is, to "establish a nondiscriminatory regulatory process for the carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs," 46 U.S.C. § 40101(1). JA 57. As the Indirect Purchasers conceded, IP Br. 36-37, this conclusion would be correct for agreements that were filed with the

FMC and have become effective. In the Shipping Act, Congress sought to incentivize ocean carriers to file their agreements and subject themselves to government oversight by "minimiz[ing] government intervention and regulatory costs," 46 U.S.C. § 40101(1), and shielding them from second guessing by courts. H.R. Rep. No. 98-53, pt. 1, at 12. For this reason, Congress subjected activities pursuant to and within the scope of filed and effective agreements to regulation and enforcement by only the FMC and exempted those activities from the "antitrust laws." *See* 46 U.S.C. § 40307(a).

Claims under state law alleging violations of the antitrust laws for operating under a filed and effective agreement are directly at odds with this purpose. Ocean carriers would have much less incentive to file agreements with the FMC, despite the Shipping Act's requirement, if every agreement served as fodder for an antitrust claim under state law. The conflict analysis can hardly be more straightforward: the regulatory scheme administered by the FMC approves the agreements if they meet certain conditions, but the state antitrust laws would disapprove them by permitting claimants to recover damages from those operating under the agreements.

In contrast, where the agreements have not been filed and become effective under the Shipping Act and thus can be (and have been) the subject of government enforcement of both the Sherman Act and the Shipping Act, there is no conflict. The FMC has a "unique understanding of the statute[it] administer[s] and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (quoting *Hines*, 312 U.S. at 67). The FMC's view, which the United States shares, is that damages claims under state antitrust law challenging unfiled price-fixing agreements between carriers would not contravene the purposes of the Shipping Act, negatively affect the FMC's enforcement of the Shipping Act, or otherwise frustrate its administration of that Act.

It is not dispositive, for purposes of the preemption analysis, that the Shipping Act precludes private lawsuits under the Clayton Act for operation under an unfiled agreement, *see supra*, and that the House Report states that "antitrust exposure for these so-called 'secret' agreements is limited to injunctive and criminal prosecution by the

Attorney General, and does not carry with it any private right of action otherwise available under the antitrust laws." H.R. Rep. No. 98-53, pt. 1, at 12. This statutory and legislative language must be interpreted in light of the Act's and House Report's failure to mention the state antitrust laws whatsoever. *See supra*. With nothing to indicate that Congress meant to preclude the application of state antitrust laws to these sorts of secret agreements, language regarding the impact of the Shipping Act on federal antitrust law is of little persuasive value. *See Wyeth*, 555 U.S. at 575 ("Its silence on the issue, coupled with its certain awareness of the prevalence of state . . . litigation, is powerful evidence that Congress did not intend [Agency] oversight to be the exclusive means" of meeting the Act's purposes.)

Operating under an agreement to fix prices or restrict capacity that has not become effective is prohibited not only by the Shipping Act but is also a felony offense under the Sherman Act, which remains fully applicable until an agreement becomes effective. Congress did not intend to protect ocean carriers operating under unfiled and ineffective agreements. To the contrary, it determined that regulation by only the FMC would be insufficient to deter and punish those who chose to

collude covertly. The Shipping Act, therefore, contemplates robust enforcement of the antitrust laws against those companies and individuals, like many of the ocean carriers here, who enter into secret agreements, including the imposition of substantial criminal fines against ocean carriers and imprisonment of their culpable executives. *See supra*. Additional antitrust scrutiny of unfiled agreements, in the form of damages claims under state law, is perfectly consistent with this robust enforcement. Under Congress's scheme, ocean carriers that covertly violate the antitrust laws can be thrown into the briny deep. This scheme is not frustrated by the possibility that sharks also swim in those waters.

CONCLUSION

In No. 15-3353, this Court should affirm the district court's judgment against the Direct Purchasers. In Nos. 15-3354 and 15-3355, it should affirm in part, permitting to stand the dismissal of the Indirect Purchasers' injunctive claims under the Clayton Act, and vacate in part, allowing consideration on remand of the merits of Indirect Purchasers' damages claims under state law.

Respectfully submitted.

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November 30, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 5,906 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

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November 30, 2016 /s/ Tyler J. Wood

Attorney

CERTIFICATE OF SERVICE

I, Tyler J. Wood, hereby certify that on November 30, 2016, I electronically filed the foregoing Brief for the Federal Maritime Commission and United States as Amici Curiae with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the CM/ECF System. I also sent ten copies to the Clerk of the Court via FedEx next-day delivery.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

November 30, 2016 /s/ Tyler J. Wood

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