No. 03-724

IN THE
Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD., *et al.*,
Petitioners,
v.
EMPAGRAN, S.A., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMICUS CURIAE THE BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae The Business Roundtable is an association of the chief executive officers of approximately 150 leading corporations with a combined workforce of more than ten million employees in the United States and about $3.7 trillion in revenues.[1] The executives who created The Business Roundtable believed that one way business could play a more constructive role in policymaking was to bring the chief executive officers of major corporations more directly into

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and its members, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

public debate. Therefore, The Business Roundtable's members examine public policy issues that affect the economy and develop positions that seek to reflect sound economic and social principles.

The Business Roundtable has a strong interest in ensuring that the FTAIA is properly applied to limit the scope of U.S. antitrust laws, consistent with their primary purpose of protecting U.S. consumers. The Roundtable was actively involved in working with Congress in the development and enactment of the FTAIA, and can therefore knowledgeably address the D.C. Circuit's misunderstanding of Congress' intent. The legislative history—including testimony from the Business Roundtable cited favorably in the committee report—evinces an intent that is directly opposite from the one surmised by the D.C. Circuit. Moreover, because The Business Roundtable's members include some of the largest multinational corporations in the world, it has a significant interest in ensuring that international antitrust enforcement works in an efficient and effective manner. It is thus in a position to discuss the practical difficulties that will result from the Court of Appeals' misinterpretation of the FTAIA.

Petitioners have explained in detail why the D.C. Circuit's decision is at odds with the plain language of the FTAIA. As explained below, the court likewise misinterpreted the statute's legislative history—which evinces an intent to *narrow* the scope of U.S. antitrust laws—as instead reflecting an expansion of that scope to cover plaintiffs whose alleged claims have no connection whatsoever to this country. That decision was error and should be reversed.

STATEMENT OF THE CASE

1. Pre-FTAIA Application of the Sherman Act. Although Section 1 of the Sherman Act declares illegal "[e]very contract, combination * * * or conspiracy, in restraint of trade or commerce * * * with foreign nations," 15 U.S.C. § 1, this Court has long recognized that "American antitrust laws

do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986).

Despite early uncertainty as to whether the Sherman Act had *any* extraterritorial effect, *see American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357 (1909) (Holmes, J.), this Court eventually determined that some conduct occurring outside of the U.S. can run afoul of the Sherman Act. *See United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 276 (1927). The Second Circuit thereafter articulated what would become the dominant test for determining jurisdiction—the "effects test"—which asks whether extraterritorial conduct was "intended to affect imports [into the United States] and did affect them." *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) ("*Alcoa*").

Although most federal courts after *Alcoa* adopted some form of the "effects test," courts disagreed on the quantum and nature of the effects required to trigger U.S. antitrust jurisdiction. For example, some courts required that conduct have a "direct[] and substantial[]" effect on domestic commerce, *see*, *e.g.*, *United States* v. *General Electric Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949), while others stated that "it is probably not necessary for the effect on [U.S.] foreign commerce to be both substantial and direct as long as it is not de minimus." *Dominicus Americana Bohio* v. *Gulf & Western Indus.*, *Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979).

In addition to the uncertainty resulting from these competing formulations, the expansive reach of U.S. antitrust law resulting from the "effects test" prompted criticism both within the U.S. and abroad:

> Two fronts of opposition formed against the expansive reach of American antitrust law. American businesses feared exposure to liability for anticompetitive conduct in foreign commerce and complained that their ability to compete abroad was severely hindered due to the confu-

> sion surrounding the application of these tests. Additionally, countries such as Canada, Britain, Australia, France, the Netherlands, and South Africa responded to this "unilateral extraterritorial application of competition laws" with their own legislation permitting a foreign defendant's non-compliance with discovery requests, payment of treble damage awards, and even recovery of paid damages by actions in their own courts. [Karen O'Brien, *Giving Rise to a Claim: Is FTAIA's Section 6a(2) an Antitrust Plaintiff's Key to the Courthouse Door?*, 9 Sw. J. L. & Trade Am. 421, 425 (2002-2003) (citations and footnotes omitted).]

2. The FTAIA. Businesses and legal scholars alike urged Congress to adopt legislation to resolve the uncertainty concerning jurisdictional standards and to *restrict* the reach of U.S. antitrust laws to claims involving direct effects on U.S. commerce and markets. Congress responded by enacting the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"). This Act added a new section to the Sherman Act, which provides:

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

> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States. [15 U.S.C. § 6a.]

Although the text of the FTAIA is "cumbersome and inelegant," Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272(h)(2), at 359 (2d ed. 2000), careful parsing makes its meaning clear: "By its terms, the statute limits the subject matter jurisdiction of the antitrust laws by providing that the Sherman Act shall not apply to trade or commerce with foreign nations unless (1) that conduct has a 'direct, substantial and reasonably foreseeable effect' on domestic or export commerce of the United States and (2) 'such effect gives rise to a claim' under the Sherman Act." Edward D. Cavanaugh, *The FTAIA and Subject Matter Jurisdiction over Foreign Transactions under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 S.M.U. L. Rev. 2151, 2157 (Fall 2003) (quoting 15 U.S.C. § 6a).[2]

3. This Case. This case began in July 2000 when the respondents filed a putative class action lawsuit on behalf of all foreign purchasers of certain vitamin products, alleging that a worldwide cartel of bulk vitamin distributors conspired to fix prices and allocate markets on a global basis in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[3] *See*

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[2] "The FTAIA also provides an exception to the exception by specifically asserting jurisdiction over matters involving import trade or commerce." *Id.*

[3] The underlying activities giving rise to this action have prompted a flurry of criminal and civil antitrust actions around the world. Some of the petitioners have pled guilty to criminal antitrust violations in this country and have paid collectively $900 million in fines. Pet. 5. In addition, more than 75 federal antitrust cases, including class actions, were consolidated for pretrial proceedings in the district court, and most of the claims in those

Empagran S.A. v. *F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 340 (D.C. Cir. 2003). The respondents are foreign corporations that are domiciled in various foreign countries and that purchased vitamins abroad for delivery outside of the United States. *Id*. at 342. The petitioners filed a motion to dismiss for lack of subject matter jurisdiction under the FTAIA, on the ground that the transactions giving rise to their alleged injuries had absolutely no connection to the United States.

After reviewing the FTAIA and its legislative history—and in light of the conceded fact that up until that time "no court ha[d] ever interpreted the federal antitrust laws to reach wholly foreign transactions such as those alleged in this case"—the district court agreed and concluded that it lacked jurisdiction. *Empagran S.A.* v. *F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360, at *2-*4 (D.D.C. June 7, 2001).

On appeal, a split panel of the D.C. Circuit reversed. The majority concluded that U.S. antitrust laws provide a remedy for injuries sustained by foreign purchasers in wholly foreign transactions, provided that "someone, even if not the foreign plaintiff who is before the court," has "a claim" based on the effects of the defendants' conduct on domestic commerce. *Empagran*, 315 F.3d at 341.

SUMMARY OF ARGUMENT

As the legislative history of the Act shows, Congress enacted the FTAIA in 1982 in order to *narrow* the scope of U.S. antitrust jurisdiction, by providing that such jurisdiction does not extend to claims not predicated on anticompetitive effects in the U.S. domestic markets. The Court of Appeals

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actions have now been settled for amounts totaling in excess of $2 billion. *Id.* The European Union, Canada, Australia and Korea also have assessed civil penalties exceeding €855 million, and private civil suits, including class actions, have been filed in at least seven foreign countries. *Id.* Thus, this is a case in which there has been substantial U.S. and foreign antitrust enforcement.

turned the Act on its head, interpreting it in a manner that *expands* the reach of the U.S. antitrust laws to claims predicated on wholly foreign transactions. When the legislative history relied on by the D.C. Circuit is properly read in full context, the legislative record shows Congress' intent *not* to apply U.S. antitrust laws to claims like those at issue here. The D.C. Circuit's interpretation opens United States courts to persons with no vested interest in the laws of the United States or their enforcement, in contravention of Congress' intent.

The Court of Appeals' decision undermines Congress' objectives in enacting the FTAIA, and takes U.S. antitrust law beyond the limits Congress intended. The result will be unnecessary intrusion into markets regulated by other enforcement authorities, and application of U.S. law to transactions with no substantial connection to U.S. markets or consumers—the intended focus of our antitrust laws. If allowed to stand, the decision will open the doors of the federal courts to antitrust plaintiffs from around the world and subject multinational corporations to overlapping and conflicting antitrust regulation, while diminishing the effectiveness of international antitrust enforcement. These results could not be further from Congress' intent in enacting the FTAIA.

ARGUMENT

I. THE D.C. CIRCUIT'S EXPANSIVE INTERPRETATION OF U.S. ANTITRUST JURISDICTION CONFLICTS WITH CONGRESS' INTENT.

Congress' purpose in passing the FTAIA was to create a clear standard for determining when U.S. antitrust law applies to a transaction and to *limit* that jurisdiction to claims based on transactions that affect U.S. markets and consumers. The legislative history consistently describes the FTAIA as legislation intended to restrict, not expand, jurisdiction over foreign transactions. This history is entirely inconsistent with the expansive jurisdiction exercised by the D.C.

Circuit below. While that court upheld jurisdiction whenever a hypothetical domestic plaintiff would have "a claim" based on some conception of a defendant's conduct, the FTAIA requires that "the [domestic] 'effect' providing the jurisdictional nexus *must also be the basis for the injury alleged under the antitrust laws*." H.R. Rep. No. 97-686, at 12 (emphasis added) ("House Report").

A. The Concerns Prompting the FTAIA Were the Expansive Reach of U.S. Law and the Uncertainty of Application.

In testimony cited favorably by the House Judiciary Committee, The Business Roundtable explained to Congress the need for legislation to clarify the standards for U.S. antitrust jurisdiction, in part to provide certainty so that potential business transactions would not "die on the drawing board." House Report at 6. The House Judiciary Committee agreed, citing the following as its two primary concerns underlying the FTAIA:

> First is the apparent perception among businessmen that American antitrust laws are a barrier to joint export activities that promote efficiencies in the export of American goods and services. Second, courts differ in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists. [House Report at 2.]

Again quoting The Business Roundtable, the House Judiciary Committee agreed that " 'no legitimate purpose is served by perpetuating uncertainty on th[e] fundamental question' " of the scope of U.S. antitrust jurisdiction. *Id*. at 6.

During hearings on the legislation, Congressman Rodino, the Chairman of the House Judiciary Committee and co-sponsor of the FTAIA, voiced these and other concerns regarding the extraterritorial application of U.S. antitrust law:

> There is discontent with and uncertainty about the international reach of present antitrust law on the part of many potential American exporters. * * * In addition, many of our closest allies and trading partners resent the extraterritorial reach of our antitrust laws. Some have enacted laws to block our enforcement efforts.
>
> This suggests that we should consider proposals that would provide greater certainty regarding the international scope of these laws. [*Hearings on H.R. 2326 Before the House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 97th Cong. 1 (1981) ("*House Hearings*").]

Testimony before both the House and Senate Judiciary Committees by antitrust scholars, practitioners, government officials, and businesspeople (including a representative of The Business Roundtable) substantiated these concerns. For example, former Assistant Attorney General John Shenefield testified that "it is an article of orthodoxy in the business community that the antitrust laws stand as an impediment to the international competitive performance of the United States." *House Hearings* at 70.

Likewise, Martin Connor testified on behalf of The Business Roundtable:

> The Roundtable agrees with the sponsors of H.R. 2326 that there is uncertainty today about the actual reach of our antitrust laws in foreign commerce.
>
> This uncertainty adversely affects the ability of American businesses to enter into international transactions that would be highly beneficial and to compete effectively with foreign companies for a share of world markets. [*Id.* at 105.]

Other witnesses expressed similar concerns. Former FTC Commissioner Robert Pitofsky (who later became Chair of the Commission) testified about the need to distinguish

between transactions having domestic impact and purely foreign transactions. He pointed out that foreign governments were in the process of increasing their antitrust enforcement (a trend that was to grow markedly in the 1990s), and that U.S. law should respect and encourage that development:

> [I]t strikes me as a general matter that we need to rethink antitrust enforcement involving foreign transactions. *There are a number of commentators, judges, and enforcement officials who take the position that the antitrust laws ought to apply in exactly the same way when a foreign transaction is involved as a domestic transaction, and I think that is just not right.* There are too many differences with respect to foreign trade. * * *
>
> I know of no country which has applied its antitrust laws with the extraterritorial reach that we have applied our antitrust laws in previous years. * * * *There is no reason why French antitrust law or Common Market antitrust law will not apply*. We have seen developments in foreign antitrust law in the last 10 or 15 years, and we know that those laws are being enforced more vigorously. [*Hearings on S. 795 Before the Senate Committee on the Judiciary*, 97th Cong. 24-26 (1981) ("*Senate Hearings*") (emphasis added).]

Likewise, James R. Atwood, the author of *Antitrust and American Business Abroad*, stated:

> *The effects and consequences in foreign markets ought to be primarily a responsibility of foreign law and not American law.*
>
> I think there are two basic reasons for this. First, for U.S. law to intercede on the question of foreign-market effects can impose in some cases a self-inflicting wound on U.S. export competitiveness and provide disincentives to exporters that are unnecessary from the standpoint of our national interests and which may, in fact, conflict with

> the interests of the governments abroad most directly affected.
>
> Similarly, the political difficulties which U.S. antitrust enforcement have caused from time to time have been exacerbated by the foreign market effects application of U.S. law. To redefine and clarify our law so that *foreign market effects are carved out and made the responsibility of foreign law* is, I think, a positive development in ameliorating the international political tension that now exists in the area of antitrust enforcement. [*House Hearings* at 84 (emphasis added).]

Mr. Atwood emphasized that "if a challenged restraint has its primary impact abroad, if foreign markets are the concern rather than domestic markets, then the matter should be left to foreign law." *Id*. at 85.

B. The Intent to Limit Jurisdiction Is Clear.

Congress made clear not only the problems it was addressing, but also the method by which it would answer these concerns—to establish clear standards that would limit the reach of U.S. antitrust law to claims that involve domestic effects.

1. The Sponsors Intended for the FTAIA to Limit the Reach of U.S. Antitrust Law.

On the day that the FTAIA was introduced in the House, the co-sponsors of the legislation were clear about this intent. Congressman Rodino explained that the bill would "modif[y] the Sherman Act to more clearly establish when antitrust liability attaches to international business activities." 127 Cong. Rec. 3538 (Mar. 4, 1981) (statement of Rep. Rodino). The focus would be on domestic effects in order to "allow[] American firms greater freedom when dealing internationally while reinforcing the fundamental commitment of the United States to a competitive domestic marketplace." *Id*.

Similarly, Congressman McClory, the bill's co-author, emphasized that the law was intended to limit, not expand, the scope of the U.S. antitrust laws:

> It is important to note that H.R. 5235 circumscribes the antitrust laws. In graphic terms, it draws a circle around the antitrust laws and states that nothing outside the circle is covered. * * * *We are establishing a rule for noncoverage, not a rule for coverage*. *It is, in a sense, a tool for defendants but not for plaintiffs.* * * * [128 Cong. Rec. 18952, 18953 (Aug. 3, 1982) (statement of Rep. McClory) (emphasis added).]

Senator Thurmond, a co-sponsor of the Senate version of the legislation, expressed a similar understanding during the Senate's hearings: "The bill is designed to relieve the antitrust concerns of American businessmen over their conduct which primarily affects foreign, rather than domestic markets." *Senate Hearings* at 1. Senator Thurmond noted that the FTAIA, rather than establishing jurisdiction over foreign effects, "insures the proper focus and direction for our antitrust laws"—namely, "to protect our domestic markets and our consumers." *Id*.

2. The Witnesses Well-Understood the Jurisdiction-Limiting Effects of the FTAIA.

Not surprisingly, witnesses both for and against the FTAIA expressed the view that the Act would circumscribe, rather than expand, the reach of U.S. antitrust law. For example, Professor Eleanor Fox told the House Judiciary Committee that she understood that the legislation would make clear that "U.S. antitrust laws do not protect foreign consumers against breakdown of competitive conditions in foreign countries." *House Hearings* at 29.[4] And Professor James A. Rahl, one of

[4] Other proponents of the legislation shared this understanding. *See*, *e.g.*, *Senate Hearings* at 24, 44 (statement of Robert Pitofsky) (noting that with the FTAIA, the United States would be "with-

the most ardent opponents of the legislation, complained to the Committee that the FTAIA "really repeals the whole 'foreign commerce' clause of the Sherman Act." *Id*. at 46. Thus, regardless of whether they supported or opposed the legislation, all involved were aware that the FTAIA *restricted* U.S. antitrust jurisdiction.

3. The D.C. Circuit Misconstrued the Committee Reports As Evincing an Intent to Expand Rather Than Narrow U.S. Antitrust Jurisdiction.

The legislation that finally emerged deprived the U.S. courts of jurisdiction over claims based on foreign transactions that have no effect on U.S. commerce. Both the House Report and the Conference Report make this clear.[5] The House Report explained that the FTAIA would allow " 'American firms *greater freedom* when dealing internationally while reinforcing the fundamental commitment of the United States to a competitive *domestic marketplace*.' " House Report at 7 (quoting 127 Cong. Rec. H779 (daily ed. Mar. 4, 1981)) (emphasis added).

The FTAIA would accomplish these goals by providing a "single, clear standard"—the "direct, substantial, and reasonably foreseeable effect" standard—to guide the parties and the courts concerning the applicability of U.S. antitrust law. *Id*. at 2. This "single, objective test" would "make explicit" that the Sherman Act and other antitrust laws "appl[y] *only* to conduct having a 'direct, substantial, and reasonably foreseeable effect' on *domestic* commerce or domestic exports." *Id*. (emphasis added).[6]

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drawing [its] hand from transactions which exhaust all market consequences abroad").

[5] The Senate Judiciary Committee did not issue a report to accompany its version of the legislation.

[6] The Conference Report, while providing less substantive discussion of the legislation, plainly embraced the same view

The House Report's detailed discussion of the application of this standard further supports what the D.C. Circuit referred to as the "restrictive" view of the statute. As is clear when the statements in the House Report are viewed in context and as a whole, Congress intended to exclude from U.S. antitrust jurisdiction claims not based on domestic anticompetitive effects—like those in this case.

Purely Foreign Transactions. Significantly for this case, the House Report makes clear that Congress did not intend for U.S. antitrust jurisdiction to extend to "purely foreign" transactions. *Id*. at 9-10. The Committee clarified that, by explicitly exempting export transactions from jurisdiction and explicitly recognizing jurisdiction over import transactions, it did not intend to suggest that "transactions that were neither import nor export, *i.e.*, transactions within, between, or among other nations" were within U.S. antitrust jurisdiction. *Id*. at 9. The respondents' claims in this case involve the kind of purely foreign transactions that the FTAIA was intended to exclude from the ambit of U.S. antitrust laws.

The Foreign Impact of Participation in the Domestic Market. The House Report also addresses the particular issue of effects abroad resulting from anticompetitive conduct in the domestic market. After reiterating that Congress' intent was to "exempt from the antitrust laws *conduct* that does not have the requisite domestic effects," the House Report states that this test is not intended to "exclude all persons injured abroad from recovering under the antitrust laws of the United States." *Id*. at 10.

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concerning the scope of U.S. antitrust jurisdiction and the jurisdiction-limiting nature of the legislation. That report stated: "The[] [FTAIA] modif[ies] the Sherman Act * * * to require a 'direct, substantial, and reasonable [sic] foreseeable' effect on commerce in the United States, or on the export commerce of a U.S. resident, *as a jurisdictional threshold* for enforcement." H.R. Conf. Rep. No. 97-924, at 29-30 (1982) (emphasis added).

In a passage much trumpeted by the respondents and by the majority below, the Report goes on to state:

> A *course of conduct in the United States—e.g.* price fixing not limited to the export market—would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. [*Id*. (first emphasis added).]

The panel majority's reliance on brief quotations from this discussion is misplaced. The meaning, in context, is clear: foreign purchasers who are injured as a result of purchases *involving their participation in the U.S. domestic market* are protected by U.S. antitrust law just like domestic purchasers. This is a far cry from concluding that purely foreign transactions may trigger jurisdiction—a result antithetical to the purposes of the FTAIA. That this anti-discrimination principle is the meaning of the section is clear both from the reference to a "course of conduct *in the United States*," and from the sentences that immediately follow:

> Foreign purchasers should enjoy the protection of our antitrust laws *in the domestic marketplace*, just as our citizens do. Indeed, to deny them this protection could violate the Friendship, Commerce, and Navigation treaties this country has entered into with a number of foreign nations. [*Id*. (emphasis added).]

The House Report again makes this point later in the section when it states that the FTAIA "preserve[s] antitrust protections *in the domestic marketplace* for all purchasers regardless of nationality or the situs of the business." *Id*. (emphasis added). The Report thus cannot reasonably be read to suggest that foreign effects unrelated to participation in the U.S. domestic market may provide a basis for jurisdiction over a foreign plaintiff's claim. As one district court noted while interpreting this piece of legislative history, "[i]t

does not say that jurisdiction exists if the plaintiff actually makes a purchase abroad and does not otherwise participate in the U.S. market." *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001). "Nothing is said about protecting foreign purchasers in foreign markets." *Id*. *Accord Den Norske Stats Oljeselkap As* v. *HeereMac Vof*, 241 F.3d 420, 429 n.28 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002) ("*Statoil*").[7]

Given Congress' repeated intent to safeguard domestic markets, it makes sense that Congress would intend to protect anyone, including foreign purchasers, if they are participating *in the U.S. market*. Any more expansive interpretation of this section—to cover foreign purchasers engaging in wholly foreign transactions—is impossible to square with the text of the statute and with the full legislative history. Indeed, the fact that Congress felt the need to clarify that foreign purchasers *are* protected if in the U.S. market is further evidence that it did *not* intend to protect those purchasers with respect to foreign transactions.

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[7] That this portion of the Report goes on to address this Court's decision in *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978), and its deterrence rationale proves the point. The Report notes that the interest in ensuring adequate deterrence under U.S. law, as discussed in *Pfizer*, supports "preserving the rights of foreign persons to sue under our laws *when the conduct in question has substantial nexus to this country.*" *Id.* (emphasis added).

Pfizer was on all fours with the situation addressed by this language—foreign plaintiffs injured as a result of purchases in the domestic market. *Pfizer*, however, was limited to addressing whether foreign sovereigns so injured were "persons" entitled to sue under Section 4 of the Clayton Act, 15 U.S.C. § 4, *see Pfizer*, 434 U.S. at 314-320, and *Pfizer* did not speak to the subject-matter jurisdiction of federal courts over foreign transactions or the expansion of U.S. antitrust jurisdiction to reach claims based on wholly foreign transactions. *See Statoil*, 241 F.3d at 430 (noting limited nature of *Pfizer* holding).

Domestic Impact, and the "Give Rise to A Claim" Requirement. In explaining the type of "domestic impact" that will trigger U.S. jurisdiction, the House Report contradicts the D.C. Circuit's interpretation of the meaning of Section 6a(2). The Report explains that the Committee not only wanted to ensure that the domestic effects required for jurisdiction were anticompetitive, but also that those effects were the basis for a foreign plaintiff's claim. House Report at 11-12.[8]

In response to a suggestion from the American Bar Association that might have supported a contrary interpretation, the House Committee stated:

> The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language to the Sherman and FTC Act amendments to *require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws*. [*Id*. (emphasis added).]

Therefore, precisely in order to avoid the result urged by the respondents in this case—where the alleged jurisdiction-triggering domestic effect is unrelated to a foreign plaintiff's claim—the Committee added the requirement that the domestic effect be "the basis for the injury alleged." *Id*. at 12.

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[8] The House Report reiterates that the FTAIA only addresses "the subject matter jurisdiction of United States antitrust law," and does not otherwise alter "current antitrust law." *Id.* at 13. Therefore, the FTAIA was not intended to "alter existing concepts of antitrust injury or antitrust standing." *Id.* at 11. Nor did Congress intend to change the "legal standards for determining whether conduct violates the antitrust laws." *Id.* at 13.

Although this straightforward language employed by the Committee did not appear in the final version of the statute, the intent of the legislators did not vary. As finally enacted, Section 6(a)(2) provides that jurisdiction exists only where the domestic effect "gives rise to a claim" under the Sherman and Clayton Acts. As explained by Chairman Rodino in his statement attached to the House Report, however, the intended result was the same. *Id*. at 18.

Chairman Rodino's explanation for this substitution provides the only insight in the legislative history into the meaning of the "gives rise to a claim" requirement. He explained that this phrase was added as a "minor clarification" to the legislation reported from Committee and was intended only to "improve the language of the Committee's [reported] version" of the bill. *Id*. He explained:

> The reported version requires that the effect upon domestic commerce or a domestic export opportunity be "the basis of *the* violation alleged * * *." As explained more fully in the Committee's Report, the Committee added this language to make it *absolutely clear that the basis for American antitrust jurisdiction* has to be a domestic *anticompetitive* effect. [*Id*. (first emphasis added).]

Chairman Rodino explained that he "believe[d] that it [was] possible to improve the language of the Committee's version by substituting the phrase 'such effect gives rise to a claim' under the provisions of the Sherman Act." *Id*.

Therefore, the "give rise to a claim" language, which the Second and D.C. Circuits interpret as greatly expanding U.S. antitrust jurisdiction, was intended to do exactly the opposite. Chairman Rodino explained that "[t]he substituted language accomplishes the *same result* as the Committee version and is better, in my view, because the Committee language may suggest that an effect, rather than conduct, is the basis for a violation." *Id*. (emphasis added). In light of this explanation, the exceedingly fine line drawn by some between the

use of the indefinite article "a" rather than the definite article "the," *see*, *e.g.*, *Statoil*, 241 F.3d at 432-433 (Higginbotham, J., dissenting), is truly a distinction that was intended to be without a difference. The framers of the legislation quite clearly intended to limit U.S. antitrust jurisdiction to those instances where the specific violation alleged by the plaintiff involved a domestic effect.

When taken together, the full Judiciary Committee's explanation for adding a requirement that domestic effect must be the "basis for the injury alleged," *see* House Report at 12, and Congressman Rodino's explanation for changing that language in order to require that the domestic effect "give rise to a claim," *see id*. at 18, reveals the error in the respondents' arguments and in the Court of Appeals' decision in this case. The "gives rise to a claim" requirement of Section 6a(2) was intended to make "*absolutely clear* that the *basis* of American antitrust jurisdiction has to be a domestic anticompetitive effect." *Id*. at 18 (first emphasis added). Indeed, this language was intended to require that "the jurisdictional nexus must also be the *basis* for the injury alleged" by the foreign plaintiff. *Id*. at 12 (emphasis added).

This interpretation of the House Report's "domestic impact" discussion is entirely consistent with the jurisdiction-limiting purposes for the FTAIA. And this conclusion is not undermined by the remaining sentences in the Committee's discussion of the requisite "domestic impact." *Id*. The Committee stated that its requirement that the jurisdiction-triggering domestic effect be the basis for a foreign plaintiff's claim "does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States." *Id*. at 12. The House Report continues:

> *As previously set forth*, it is sufficient that *the conduct providing the basis of the claim* has had the requisite impact on the domestic or import commerce of the United States, or, in the case of conduct lacking such an impact,

> on an export opportunity of a person doing business in the United States. [*Id*. (emphasis added).]

Rather than create an exception that swallows the previously-announced rule that a foreign plaintiff's claim must be based on the jurisdiction-triggering domestic effect, the Committee merely referred back to the immediately preceding section concerning the protections offered to foreign purchasers, regardless of the location of injury, while they are participating in the domestic market. *See id*. at 10-11. In other words, where a foreign entity engages in purchases in the United States, it will not be deprived of an antitrust remedy in this country simply because the financial loss may have been experienced abroad. By contrast, the framers of the FTAIA consistently made clear that where, as here, a foreign entity has engaged in wholly foreign transactions, U.S. antitrust jurisdiction will not extend to such conduct.

The House Report's discussion of the requisite "domestic impact," together with Congressman Rodino's explanation for his substitution of the language in Section 6a(2) for that employed by the full Committee, reveals that Congress intended to *limit* jurisdiction over foreign plaintiffs' claims to those *based* on domestic, anticompetitive effects. Because the foreign injuries forming the basis of the respondents' claims in this case are unrelated to any domestic effects, the Court of Appeals erred in upholding U.S. jurisdiction.

International Cartels. Finally, and significantly, the House Report addresses the concern that the restrictions imposed on the exercise of U.S. antitrust jurisdiction might encourage the creation of international cartels. *Id*. at 13. Although the Committee considered this "[p]robably the most important criticism" of the legislation, it explained that "after weighing this and similar arguments carefully," it concluded that it did "not believe the legislation [would] result in rejuvenation of international cartels." *Id*. The Committee continued:

> Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a "spillover" effect on commerce within this country * * * the cartel's conduct would fall within the reach of our antitrust laws. Such an impact would, at least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce. [*Id.*]

The Committee further explained that its concerns in this regard were alleviated by the "increased sensitivity of other nations to antitrust considerations and cartel activity," and noted that "[b]y more precisely defining the subject matter jurisdiction of U.S. antitrust law, [the FTAIA] *in no way limits ability of a foreign sovereign to act under its own laws against an American-based export cartel having unlawful effects in its territory*." *Id*. at 13-14 (emphasis added).

In this section, the Committee clearly revealed that it did not intend for global cartels—like the one alleged in this case—to automatically fall within U.S. antitrust jurisdiction. Instead, unless such cartels give rise to a plaintiff's claim that is based on the U.S. effects of the anticompetitive conduct, such cartels are not the concern of U.S. law.

* * *

When viewed as a whole, the FTAIA's legislative history contradicts the D.C. Circuit's "less restrictive" interpretation of this statute, *Empagran*, 315 F.3d at 355, which would expand U.S. law beyond previously recognized limits to cover the claims of foreign plaintiffs injured as a result of the foreign effects of foreign transactions with no connection to the United States. This history paints a clear picture of Congress' intent to curb the reach of U.S. antitrust law, to remove from U.S. antitrust scrutiny claims not based on domestic market effects, and to aid businesses engaged in foreign trade by providing clear and predictable standards for

determining when particular transactions will be subject to U.S. antitrust jurisdiction. The Court of Appeals' decision undermines each of these objectives.

II. THE DECISION BELOW THREATENS THE ALLOCATION OF ANTITRUST JURISDICTION INTENDED BY CONGRESS.

When it enacted the FTAIA, Congress contemplated a truly international antitrust regime, under which U.S. courts and authorities would limit their focus to claims based on effects within domestic markets, and foreign nations would police their own markets. By allocating authority in this way, and drawing clear lines concerning the scope of U.S. jurisdiction, Congress intended to encourage other nations to develop effective antitrust laws, to alleviate hostility and replace it with greater cooperation between U.S. and foreign antitrust authorities, and to decrease uncertainty and the risk of overlapping and inconsistent standards for the foreign transactions of multinational corporations. The notable successes in each of these areas following passage of the FTAIA are threatened by the D.C. Circuit's decision, which would effectively install the U.S. as the world's antitrust court. *See* Patti Waldmeir, *Should America Be the World's Price-Fixing Policeman?*, Fin. Times, Dec. 22, 2003, at 7. This approach will harm global competition by interfering with the cooperative international enforcement of international antitrust laws encouraged by the FTAIA. Moreover, the decision will reintroduce uncertainty for multinational businesses with respect to applicable law, and create the possibility that transactions will be subject to overlapping and conflicting antitrust standards. The FTAIA was intended to avoid these problems.

1. Increased International Enforcement. Through the FTAIA, Congress not only clarified the limited reach of U.S. antitrust laws, but also encouraged more effective international antitrust enforcement by assigning to other nations an

implicit role in antitrust enforcement. Congress was aware that expansive application of U.S. antitrust jurisdiction up until that point had resulted in hostility and tension with our trading partners, with negative effects for U.S. enforcement efforts and businesses. For example, Chairman Rodino acknowledged that "many of our closest allies and trading partners resent the extraterritorial reach of our antitrust laws," prompting some to "enact[] laws to block our enforcement efforts." *House Hearings* at 1. Accordingly, one of the intended benefits of the legislation was that "[s]ome foreign animosity toward U.S. antitrust enforcement might also be eliminated, because the domestic-effects standard being proposed would limit the reach of our antitrust laws in a manner consistent with our major trading partners." *Id*. at 2.

Several witnesses agreed on the need for Congress to clearly demarcate the areas within which the U.S. and its trading partners would have authority, both in order to alleviate tensions and to encourage greater regulation abroad. As James Atwood explained to the House Committee:

> [T]he political difficulties which U.S. antitrust enforcement have caused from time to time have been exacerbated by this foreign market effects application of U.S. law. To redefine and clarify our law so that foreign market effects are carved out and made the responsibility of foreign law is, I think, a positive development in ameliorating the international political tension that now exists in the area of antitrust enforcement. * * *
>
> I think over time this allocation of enforcement responsibility would be a very healthy thing, if for no other reason because *it will encourage the development of foreign antitrust programs* that will be similar to ours. It will make more understandable to foreign governments some enforcement actions which the Justice Department properly must take from time to time in international trade, and *will bring about over time a better, clearer, and more*

> *effective regime of antitrust cooperation across borders*. [*Id*. at 84-85 (emphasis added).]

Commissioner Pitofsky expressed similar views to the Senate Judiciary Committee, noting that other countries can regulate transactions no longer within American antitrust jurisdiction and stating that "[w]e have seen developments in foreign antitrust law in the last 10 or 15 years, and we know that those law are being enforced more vigorously." *Senate Hearings* at 25-26.

Accordingly, Congress sought to "clarify" U.S. antitrust laws in order to "make explicit their application only to conduct having a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce," thereby both limiting the extraterritorial reach of U.S. law and providing a "single, objective test" for determining when U.S. antitrust law applies. House Report at 2-3. [9] At the same time, however, Congress emphasized that the more limited role of U.S. antitrust authorities could and should be complemented by antitrust enforcement by foreign authorities.

Congress adopted this allocation of responsibility with the knowledge that other countries were already demonstrating "increased sensitivity * * * to antitrust considerations." *Id*. at 13. The House Judiciary Committee emphasized that "[b]y

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[9] The FTAIA's sponsors likewise endorsed this allocation of authority. Congressman McClory stated that "[i]n graphic terms, [the FTAIA] draws a circle around the antitrust laws and states that nothing outside the circle is covered." 128 Cong. Rec. at 18953. Senator Thurmond likewise explained that "the purpose [of U.S. antitrust laws] is to protect our domestic markets and our consumers * * * [and] there is no good reason to have our antitrust laws applicable to export transactions where direct and substantial domestic anticompetitive effects are nonexistent," but that "this bill does not and should not try to relieve American business from compliance with the antitrust laws of other countries." *Senate Hearings* at 1.

more precisely defining the subject matter jurisdiction of U.S. antitrust law, [the FTAIA] in no way limits the ability of a foreign sovereign to act under its own laws against an American-based export cartel having unlawful effects in its territory," but instead that it hoped that the "the clarified reach of our own laws could *encourage our trading partners* to take more effective steps to protect competition in their markets." *Id*. at 13-14 (emphasis added); *see also id*. at 10 (in discussing the foreign effects of U.S. exports, the House Committee concluded that U.S. antitrust law would not apply, but that "[f]oreign buyers injured by such export conduct would have to seek recourse in their home courts").

Since the FTAIA was enacted in 1982, the international antitrust landscape has changed dramatically with the widespread proliferation of international antitrust laws and enforcement authorities. In 2000, the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust ("ICPAC") issued a final report discussing at length the dramatic increase in international antitrust efforts. In that report, ICPAC noted that over 80 countries then had antitrust laws in place, and that an additional 20 were in the process of drafting such laws. ICPAC Final Report at 33 (Dep't of Justice 2000) <http://www.usdoj.gov/atr/icpac/finalreport.htm>. These nations account for "nearly 80% of world output and 86% of world trade." *Id*. The report notes that approximately 60 percent of other countries' antitrust laws were introduced in the 1990s, after the enactment of the FTAIA. *Id*. Although the emergence of foreign antitrust enforcers "has not meant a uniformity of substantive rules or institutional approaches," *id*., "the international community has made * * * headway in increasing cooperation and networking among the competition agencies of the world." *Id*. at 36.

This has been particularly true in policing international cartels, such as the one alleged in the case, and in reviewing mergers. *Id*. As the ICPAC Report concluded:

> These cooperative efforts are a welcome change from the early years of the postwar period, when U.S. attempts to apply its antitrust laws to address offshore practices seen as harming the U.S. economy led to instances of sharp conflict with other sovereigns. Today, there is far less conflict between jurisdictions, and in the last decade there have been few, if any, instances of countries invoking statutes such as blocking and clawback laws to impede the United States in its efforts to prosecute transnational antitrust cases. [*Id*.]

The ICPAC also heralded the increased availability of "positive comity," particularly in connection with the European Commission, "whereby the jurisdiction most closely associated with the alleged anticompetitive conduct assumes primary responsibility for the investigation and possible remedy." *Id*. at 36-37.

Thus, prior to the unwarranted expansion of antitrust jurisdiction recently wrought by the Second and D.C. Circuits, the FTAIA had worked as Congress had hoped. By limiting U.S. antitrust jurisdiction to its properly-circumscribed sphere, the United States encouraged a remarkable proliferation and expansion of competition laws throughout the world, while fostering enhanced cooperation between international antitrust authorities. As the ICPAC Report makes clear, the effect of this increased cooperation is *improved* enforcement of antitrust laws around the world.

The D.C. Circuit's decision in this case threatens the continued development of an international antitrust regime with complementary (though not identical) enforcement authority allocated around the world. The decision threatens to roll back the "welcome change" discussed in the ICPAC report, and to again engender hostility against U.S. antitrust enforcement. Rather than increasing deterrence, the court's

decision will harm global competition by undermining cooperative efforts by the world's antitrust authorities.[10]

2. Reintroduction of Uncertainty. The recalibration of antitrust authority that would result from the D.C. Circuit's decision also has significant practical consequences for multinational businesses, like many of The Business Roundtable's members. As Congress made clear when it passed the FTAIA, one purpose of the Act was to alleviate the uncertainty for businesses and to prevent the application of overlapping and possibly conflicting regulation:

> With these changes, H.R. 5235 achieves an important objective of freeing American-owned firms that operate entirely abroad or in the United States export trade from the possibility of dual and conflicting antitrust regulation. When their activities lack the requisite domestic effects, they can operate on the same terms, and subject to the same antitrust laws that govern their foreign-owned competitors. To be sure, if the foreign state in question has an antitrust regimen, American-owned firms must still comply. But no longer is there any possibility that, because of uncertainty growing out of American ownership, such firms will be subject to a different and perhaps stricter regimen of antitrust than their competitors of foreign ownership. [House Report at 10.]

Despite Congress' belief that, through the FTAIA, it was "freeing" businesses "from the possibility of dual and conflicting antitrust regulation," *id*., the D.C. Circuit's decision clears the way for the exercise of U.S. jurisdiction to claims based solely on the foreign effects of alleged anticompetitive conduct. Therefore, even with respect to purely foreign

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[10] This case is strong evidence of the effectiveness of the current international regime. The petitioners have paid well over $3 billion to governments and private plaintiffs as a result of the alleged conspiracy. The efforts of international authorities and plaintiffs have contributed significantly to this effort.

transactions having no substantial connection to the United States, businesses will be forced to take into account the possibility that U.S. antitrust laws will be applied. And while there undoubtedly has been considerable convergence in the substantive rules applied by U.S. and foreign antitrust authorities, there continue to be differences, for example, in the areas of merger enforcement, and dominant firm conduct. To the extent that unduly broad U.S. antitrust jurisdiction undermines cooperation and comity between U.S. and foreign antitrust enforcers, the result is likely to be inconsistent results in enforcement proceedings and increased delays in merger clearance decisions. *Cf*. William J. Kolasky, *United States and European Competition Policy: Are There More Differences Than We Care to Admit?* <http://www.usdoj.gov/atr/public/speeches/10999.htm>.

Moreover, in light of the jurisdictional test adopted by the D.C. Circuit, uncertainty concerning the applicability of U.S. antitrust law will be the rule and not the exception. Under that court's decision in this case, U.S. jurisdiction will depend not on the foreseeable consequences of any particular transaction, but instead on an unpredictable post hoc assessment by a court of the existence of a hypothetical claim by a hypothetical plaintiff related to some generalized conception of the conduct at issue. This is a recipe for uncertainty.

In adopting this approach, the D.C. Circuit provided no clue as to how the existence of such "a claim" could or should be tested. This hypothetical claim would have to be the subject of a trial within the trial of the defendant—all for the purpose of determining the threshold jurisdictional issue. And even assuming that such a determination might be possible in a case involving a global price fixing conspiracy, it is hard to imagine how that determination could be made in the context of many other, less clear cut Sherman Act claims—for example, rule of reason claims, or claims asserting a breach of duty by a firm with monopoly power, *see Verizon Communications, Inc.* v. *Trinko*, 124 S. Ct. 872, 879

(2004) (discussing difficulty of identifying anticompetitive conduct by a single firm). Surely this is not the type of threshold jurisdictional test that Congress had in mind when it spoke of the "single, objective test" or "clear benchmark" embodied by the FTAIA. House Report at 2-3. The test Congress adopted was to be "simple and straightforward" and was to reduce uncertainty for "businessmen, attorneys and judges." *Id*. The approach taken by the D.C. Circuit, in the name of deterrence, defeats any hope of achieving certainty concerning the scope of U.S. antitrust jurisdiction.

Rather than inviting federal courts to engage in the D.C. Circuit's unworkable approach for determining U.S. jurisdiction over claims based on the foreign effects of foreign transactions, this Court should follow the plain language of the FTAIA and the intent of its drafters, and recognize that federal courts have no business policing wholly foreign transactions under the antitrust laws.

CONCLUSION

For the foregoing reasons and those set forth in the petitioners' brief, the Court should reverse the judgment below.

Respectfully submitted,

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