No. 05-541

IN THE

Supreme Court of the United States

EMPAGRAN, S.A., *et al.*,
Petitioners,

v.

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHONE-POULENC ANIMAL NUTRITION INC., RHONE-POULENC INC., *et al.*,
Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

This Court previously held in this case that petitioners, four foreign entities that purchased goods outside the United States from foreign sellers, could not assert claims under the Sherman Act unless an anticompetitive effect on U.S. commerce gave rise to their injuries. The Court remanded the case to the court of appeals to consider petitioners' argument that their injuries, although incurred in foreign countries in transactions with foreign sellers, actually arose from an effect on U.S. commerce. On remand, petitioners conceded that only foreign injuries proximately caused by an effect on U.S. commerce may give rise to a claim under the Sherman Act, and the court of appeals, applying that standard, unanimously affirmed the dismissal of petitioners' claims.

The question presented is:

Whether petitioners' allegation that respondents fixed prices in the United States in order to maintain fixed prices in the foreign countries where petitioners purchased their goods is sufficient to show that an effect on U.S. commerce proximately caused petitioners' foreign injuries.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

F. Hoffmann-La Roche Ltd is a corporation engaged in the manufacture of pharmaceuticals, diagnostic products and bulk vitamins. F. Hoffmann-La Roche Ltd is a wholly-owned subsidiary of Roche Holdings Ltd. Novartis AG, a publicly-held company, owns approximately 32.7% of the voting shares of Roche Holdings Ltd. Novartis AG has no representation on Roche Holdings Ltd's board of directors and does not in any way control Roche Holdings Ltd or any of its subsidiaries. Apart from Roche Holdings Ltd (and, indirectly, Novartis AG), there is no publicly-held company with a 10% or greater ownership interest in F. Hoffmann-La Roche Ltd.

Hoffmann-La Roche Inc. ("HLRI"), a corporation engaged in the manufacture and sale of pharmaceuticals, and Roche Vitamins Inc. ("RVI") are indirect subsidiaries of Roche Holdings Ltd. Apart from Roche Holdings Ltd (and, indirectly, Novartis AG), there is no publicly-held company with a 10% or greater ownership interest in HLRI or RVI.

BASF Aktiengesellschaft ("BASF AG") is a foreign corporation engaged in the production of numerous chemical products including bulk vitamins and is headquartered in Ludwigshafen, Germany. No publicly-held company has notified BASF AG under German Securities Laws that it has a 10% or greater ownership interest in BASF AG.

BASF Corporation is a corporation engaged in the sale of certain vitamin and vitamin-containing products and is an indirect subsidiary of BASF AG. Apart from BASF AG, there is no publicly-held company with a 10% or greater ownership interest in BASF Corporation.

Aventis Animal Nutrition Inc. (f/k/a Rhône-Poulenc Animal Nutrition Inc.) and Hoechst Marion Roussel SA are corporations engaged in the life sciences business, specif-

ically in the manufacture and/or sale of pharmaceutical and nutritional products. Aventis Animal Nutrition Inc. is a wholly-owned indirect subsidiary of sanofi-aventis, a publicly traded company, which is the successor by merger to Aventis, f/k/a Rhône-Poulenc S.A. ("RPSA"). Hoechst Marion Roussel SA is a wholly-owned indirect subsidiary of Hoechst A.G. Sanofi-aventis owns substantially all of the outstanding shares of Hoechst A.G. Apart from sanofi-aventis, there is no publicly-held company with a 10% or greater ownership interest in Aventis Animal Nutrition Inc., Aventis CropScience USA Inc. or Hoechst Marion Roussel SA. Aventis CropScience USA, Inc. was sold by Aventis, Inc. and is now known as Bayer CropScience, Inc. and is no longer owned by sanofi-aventis. Sanofi-aventis, however, has retained the rights and liabilities of Aventis CropScience as they pertain to this litigation.

Takeda Pharmaceutical Company Limited (f/k/a Takeda Chemical Industries, Ltd.) ("TPC") is a corporation engaged, among other things, in the manufacture of certain vitamins. There is no publicly-held company with a 10% or greater ownership interest in TPC.

Takeda Vitamin & Food USA, Inc. ("TVFU") was a corporation engaged in the manufacture and distribution of certain vitamins and was a wholly-owned subsidiary of Takeda America, Inc., now known as Takeda America Holdings, Inc., which in turn is a subsidiary of TPC. TVFU was merged into BASF Corporation as of approximately January 2001.

Daiichi Pharmaceutical Co., Ltd. is a corporation engaged in the manufacture and sale of pharmaceutical products and certain vitamin products. It is the direct parent of Daiichi Pharma Holdings, Inc. (f/k/a Daiichi Pharmaceutical Corporation) and the indirect parent of Daiichi Fine Chemicals, Inc. On September 28, 2005, Daiichi Pharmaceutical Co., Ltd. became a wholly-owned subsidiary of Daiichi Sankyo Com-

pany, Limited, which is publicly traded on the Tokyo, Osaka and Nagoya stock exchanges in Japan.

Daiichi Pharma Holdings, Inc. (f/k/a Daiichi Pharmaceutical Corporation) is a corporation engaged in the clinical development and sale of pharmaceuticals and is a subsidiary of Daiichi Pharmaceutical Co., Ltd. Daiichi Pharma Holdings, Inc. has no outstanding securities in the hands of the public. Daiichi Pharmaceutical Corporation was prior to October 2002 the parent of Daiichi Fine Chemicals, Inc.

Daiichi Fine Chemicals, Inc. is a corporation engaged in sales and intermediary services for fine chemicals and related products and was prior to October 2002 a direct subsidiary of Daiichi Pharmaceutical Corporation, which in turn was a subsidiary of Daiichi Pharmaceutical Co., Ltd. Daiichi Fine Chemicals, Inc. has no outstanding securities in the hands of the public.

Eisai Co., Ltd. is a corporation engaged in the production and sale of ethical pharmaceutical and certain other products. There is no publicly-held company with a 10% or greater ownership interest in Eisai Co., Ltd. Eisai Co., Ltd. is the indirect parent of Eisai Inc. and Eisai U.S.A., Inc.

Eisai U.S.A., Inc. is a corporation that was engaged in the production and sale of bulk vitamin and certain other products. It is an indirect subsidiary of Eisai Co., Ltd.

Eisai Inc. is a corporation engaged in the production and sale of ethical pharmaceutical and certain other products. It is an indirect subsidiary of Eisai Co., Ltd.

Akzo Nobel Chemicals B.V. is a corporation engaged in the manufacture and sale of chemicals and is an indirect, wholly-owned subsidiary of Akzo Nobel N.V. Akzo Nobel Inc. is a holding company which does not manufacture or sell any product and is a direct, wholly-owned subsidiary of Akzo Nobel N.V. Apart from Akzo Nobel N.V., there is no

publicly-held company with a 10% or greater ownership interest in Akzo Nobel Chemicals B.V. or Akzo Nobel Inc.

Bioproducts Incorporated is a Delaware corporation formerly engaged in the business of manufacturing animal grade choline chloride and is a subsidiary of Mitsui & Co. (U.S.A.), Inc. Mitsui & Co., Ltd., a publicly-held company, owns a 20% interest in Bioproducts Incorporated.

Chinook Group Limited, now doing business as Chinook Global Limited, is a corporation organized and existing under the laws of Ontario, Canada and is a wholly-owned subsidiary of Cope Investments Limited. Chinook Group Limited, through its affiliates, is engaged in the manufacturing and selling of animal-grade choline chloride. There is no publicly-held company with a 10% or greater ownership interest in Chinook Group Limited.

Cope Investments Limited is a corporation organized and existing under the laws of Ontario, Canada. As a holding company, it does not manufacture or sell any product. There is no publicly-held company with a 10% or greater ownership interest in Cope Investments Limited.

Degussa AG (f/k/a Degussa-Hüls AG) is a corporation engaged in the manufacture of specialty chemicals and is headquartered in Dusseldorf, Germany. Two publicly-held German corporations, E.On AG and RAG AG, indirectly own more than 90% of Degussa AG's stock. There is no other publicly-held company with a 10% or greater ownership interest in Degussa AG.

Degussa Corporation (f/k/a Degussa-Hüls Corporation) is a corporation engaged in the manufacture of specialty chemicals and is a subsidiary of Degussa AG. Apart from Degussa AG, there is no publicly-held company with a 10% or greater ownership interest in Degussa Corporation.

DuCoa, L.P. is a Delaware limited partnership and formerly was engaged in the manufacture of animal grade choline chloride. There is no publicly-held company with a 10% or greater ownership interest in DuCoa, L.P.

DCV, Inc. is a Delaware corporation and is the general partner of DuCoa, L.P. DCV Holdings, Inc. is the parent company of DCV, Inc. Metropolitan Life Insurance has over a 10% interest in DCV, Inc.'s parent company.

E. Merck is a general partnership organized under German law and is engaged in the pharmaceutical, chemicals and other lines of business.

Merck KGaA is a corporation with general partners limited by shares organized under German law and is engaged in the pharmaceutical, chemicals and other lines of business. There is no publicly-held company with a 10% or greater ownership interest in Merck KGaA.

EM Industries, Inc., now known as EMD Chemicals Inc., is a New York corporation engaged in the specialty chemicals business. E. Merck and Merck KGaA together directly or indirectly own 100% of the shares of EM Industries, Inc.

Alusuisse-Lonza Group Ltd, a former affiliate of Lonza Inc. and Lonza AG, is a corporation with interests in various businesses including alumina and bauxite. It is now known as Alcan (Switzerland) Ltd and is a wholly-owned subsidiary of Alcan Inc.

Lonza AG is a business corporation engaged in several lines of business including the sale and manufacturing of niacin and niacinamide and is a direct, wholly-owned subsidiary of Lonza Group Ltd. Apart from Lonza Group Ltd, there is no publicly-held company with a 10% or greater ownership interest in Lonza AG.

Lonza Inc. is a business corporation engaged in several lines of business including the sale of niacin and niacinamide.

Lonza Inc. is an indirect, wholly-owned subsidiary of Lonza Group Ltd. Apart from Lonza Group Ltd, there is no publicly-held company with a 10% or greater ownership interest in Lonza Inc.

Mitsui & Co., Ltd. is a Japanese corporation engaged in business as a trading company. There is no publicly-held company with a 10% or greater ownership interest in Mitsui & Co., Ltd. and it has no parent company.

Nepera, Inc. is a corporation engaged in the manufacture, sale and distribution of specialty chemicals, including niacinamide. It is a wholly-owned subsidiary of Cambrex Corporation.

Reilly Industries, Inc. is an Indianapolis, Indiana-based corporation engaged in the business of manufacturing bulk chemicals. Reilly Industries, Inc. has no parent corporations and there is no publicly-held company with a 10% or greater ownership interest in Reilly Industries, Inc.

Reilly Chemicals, S.A. is a Belgian corporation engaged in the business of manufacturing bulk chemicals and is a subsidiary of Reilly Industries, Inc. There is no publicly-held company with a 10% or greater ownership interest in Reilly Chemicals, S.A.

Sumitomo Chemical Company, Ltd. is a Japanese publicly-traded corporation engaged in the manufacture, sale and distribution of chemicals, including biotin. There is no publicly-held company with a 10% or greater interest in Sumitomo Chemical Company, Ltd.

Sumitomo Chemical America, Inc. is a New York corporation engaged in the sale and distribution of certain chemical products in the United States, including biotin. It is a wholly-owned subsidiary of Sumitomo Chemical Company, Ltd.

Tanabe U.S.A., Inc. is a Delaware corporation that distributes and sells certain vitamins. Tanabe U.S.A., Inc. is an

indirectly owned subsidiary of Tanabe Seiyaku Co., Ltd. Apart from Tanabe Seiyaku Co., Ltd., there is no publicly-held company with a 10% or greater ownership interest in Tanabe U.S.A., Inc.

UCB Service Specialties, Inc., f/k/a UCB Chemicals Corporation, a corporation that did business in the specialty chemicals and flexible films industry, was wholly-owned by UCB, Inc. On March 29, 2005, UCB, Inc. sold its stock in Surface Specialties, Inc. to Cytec Industries, Inc. and the company was renamed Cytec Surface Specialties, Inc. UCB, Inc., however, retained any liability associated with this litigation. UCB, Inc. is wholly-owned by UCB S.A. UCB S.A., a corporation doing business in the pharmaceutical industry, is aware of one publicly traded company, Financiere d'Obourg S.A., that owns more than 10% of UCB S.A.'s stock.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Petitioners advance no reason that would justify this Court's review of the court of appeals' decision. They do not claim that there is a conflict in the courts of appeals, nor do they identify any extraordinary circumstance that might justify review in the absence of such a conflict. The court of appeals' unanimous opinion faithfully followed this Court's precedents, in particular this Court's prior unanimous ruling in this case. The decision below correctly weighed considerations of comity and longstanding antitrust precedents in holding that the Sherman Act's limited extraterritorial scope does not

permit claims by foreign plaintiffs whose injuries are caused by anticompetitive conditions in foreign countries and do not directly arise from anticompetitive conditions in the United States.

Less than two years ago, this Court reviewed an earlier decision in this case to resolve a conflict in the courts of appeals as to a critically important question: whether the Sherman Act applies to price-fixing claims by foreign entities whose injuries did not arise from effects of the defendants' conduct on U.S. commerce but rather arose from effects on foreign countries. In *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155 (2004), this Court unanimously held that it did not. Pet. App. 28a. The Court determined that, under the Foreign Trade Antitrust Improvements Act of 1982 (the "FTAIA"), 15 U.S.C. § 6a, Sherman Act claims based on conduct "involving trade or commerce * * * with foreign nations" can be asserted by foreign plaintiffs only if an effect on U.S. commerce "gives rise to" the foreign plaintiffs' claims.

The Court remanded the case for consideration of petitioners' alternative argument that a U.S. effect was a "but for" cause of their foreign injuries that thereby "gave rise to" them, even though those injuries were directly caused by higher prices charged in foreign countries by foreign sellers. Petitioners argued that the alleged cartel, in order to raise prices in the foreign countries where petitioners' purchases were made, necessarily had to raise prices in the United States, because lower U.S. prices would have driven down prices abroad. Hence, petitioners argued, an effect on U.S. commerce was a contributing cause of their injuries in foreign countries. On remand, however, petitioners conceded that the FTAIA's requirement that a U.S. effect "give[] rise to" the foreign injury imposes a proximate cause standard.

Applying that standard, the D.C. Circuit unanimously determined that higher U.S. prices were not the proximate cause of petitioners' injuries, which were proximately caused by

higher prices in the foreign countries where petitioners made their purchases. That ruling is entirely consistent with this Court's *Empagran* opinion, with the text and history of the FTAIA and with considerations of international comity, and it comports with the well-established principle that U.S. antitrust law does not regulate "the competitive conditions of other nations' economies," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). It also comports with the views of the United States, the Federal Trade Commission and the governments of our major trading partners. Those foreign governments appeared below and in the earlier proceedings before this Court to defend their sovereign interests in applying their domestic competition policies, including their approved remedies, to transactions occurring in their own countries. Finally, petitioners' concession before the D.C. Circuit that the FTAIA requires that a U.S. effect proximately caused their injuries makes this case a poor vehicle for review, because petitioners allege in substance only a "but for" relationship between U.S. prices and their foreign injuries. See *Empagran*, 542 U.S. at 175 (Pet. App. 45a).

1. In the late 1990s, the Department of Justice began investigating cartel activity among bulk vitamin producers. Several manufacturers and distributors of bulk vitamins subsequently pled guilty to criminal violations of the Sherman Act and paid approximately $900 million in fines. More than 75 private federal antitrust cases, including class actions, were filed, and virtually all have settled, for well more than $2 billion. In addition, more than 20 lawsuits filed by state attorneys general and more than 100 state law private actions have been settled for more than $400 million. Outside the United States, record civil penalties exceeding $1 billion were assessed against some respondents by Australia, Canada, the European Union and Korea, and investigations are ongoing in Brazil and Mexico. Private civil suits for damages have been filed in Australia, Belgium, Canada, France, Germany, the

Netherlands, New Zealand and the United Kingdom (including eight in the past year), including class actions in Australia and Canada.

Petitioners are four foreign companies located in Australia, Ecuador, Panama and Ukraine. They allegedly purchased vitamins in their local markets from foreign sellers in transactions outside U.S. domestic or export commerce. They neither purchased vitamins in the United States nor attempted to do so. Petitioners brought suit in 2000 in federal district court asserting claims under the Sherman Act. Their complaint alleges that bulk vitamins are commodities and that respondents engaged in concerted anticompetitive behavior in the "global market" for bulk vitamins. Compl. ¶ 89. Petitioners purport to represent a worldwide class of foreign entities that purchased vitamins outside the United States, although at least one of the petitioners, Windridge Pig Farm, is also a plaintiff in a class action in Australia.

2. The district court dismissed petitioners' claims, ruling that they fell outside the subject matter jurisdiction of the Sherman Act as amended by the FTAIA. The FTAIA provides in pertinent part that the Sherman Act "shall not apply to conduct involving trade or commerce * * * with foreign nations," unless such conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic trade or commerce and "such effect gives rise to a [Sherman Act] claim." 15 U.S.C. § 6a. The district court held that the FTAIA required petitioners to show that a U.S. effect of respondents' conduct "gives rise to" their own claims, not just any claim. The court also held that petitioners could not satisfy this requirement merely by alleging the existence of a transnational vitamins market. Pet. App. 94a.

The court of appeals reversed in a divided panel ruling. The majority interpreted the FTAIA to permit plaintiffs whose injuries have no connection to U.S. commerce to assert Sherman Act claims so long as the alleged misconduct affected

U.S. commerce and that U.S. effect gave rise to a claim of "someone, even if not the foreign plaintiff who is before the court." Pet. App. 50a. The panel majority believed that imposing liability under U.S. law for purely foreign injuries would enhance deterrence of transnational cartels. Pet. App. 75a–78a.

The D.C. Circuit's divided panel ruling conflicted with an earlier ruling by the Fifth Circuit, which had interpreted the "gives rise to a claim" language of the FTAIA as requiring that the U.S. effect of the defendants' conduct give rise to the Sherman Act claim of the particular plaintiff before the court. *Den Norske Stats Oljeselkap AS v. HeereMac v.o.f.*, 241 F.3d 420, 427 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002). The Second Circuit too had issued an opinion that conflicted with the Fifth Circuit's decision. *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002).

3. This Court granted certiorari to resolve the split among the courts of appeals. In a unanimous decision, it vacated the D.C. Circuit panel's decision, holding that the FTAIA requires plaintiffs to demonstrate that their own injuries arose from an effect on U.S. commerce. Two principles, this Court explained, dictated this conclusion.

First, the Court noted that Congress considers the legitimate sovereign interests of other nations when writing U.S. law, and that U.S. antitrust laws should accordingly be construed, absent a clear statement to the contrary, so as to avoid undue interference with others nations' sovereign prerogative to regulate their own economies. *Empagran*, 542 U.S. at 164 (Pet. App. 34a). The Court concluded that applying U.S. antitrust law to foreign conduct would be unreasonable when the plaintiffs' injuries were not caused by the effect of such conduct on U.S. commerce. *Id*. at 165 (Pet. App. 35a). These comity considerations also dictated that the FTAIA's jurisdictional test should be categorical and readily administrable,

because a fact-intensive inquiry into whether U.S. law conflicts with foreign policy in a particular case would "mean[] lengthier proceedings, appeals, and more proceedings—to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system." *Id*. at 168–69 (Pet. App. 39a).

Second, the Court noted that the FTAIA's purpose had been "to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce," *id*. at 169 (Pet. App. 39a) (emphasis in original), and that when the FTAIA was enacted, there was no meaningful precedent to suggest to Congress that the Sherman Act provides redress for injuries caused by effects on foreign rather than U.S. commerce, *id*. at 169–70 (Pet. App. 40a). Accordingly, the Court concluded that the statute should not be construed to provide recovery for injuries that arose from effects on foreign rather than U.S. commerce. *Id*. at 173 (Pet. App. 43a).

Having rejected the court of appeals' expansive construction of the FTAIA, the Court remanded the case for consideration of an alternative argument made by petitioners. Petitioners had also argued that their injuries did arise from an effect on U.S. commerce, because that effect, they asserted, was essential to maintaining inflated prices in the foreign countries where they purchased vitamins. Rather than reach this question in the first instance, the Court directed the D.C. Circuit to decide on remand whether "this 'but for' condition," *id.* at 175 (Pet. App. 45a), could satisfy the FTAIA's requirement that a U.S. effect "give[] rise to" the plaintiff's injury.

4. On remand, after full briefing and argument, the court of appeals unanimously determined that petitioners' injuries did not arise from an effect on U.S. commerce, because the "mere but-for" causal connection to U.S. commerce petitioners alleged was "simply not sufficient" to satisfy the statute.

Pet. App. 7a. The court determined that the FTAIA's requirement that a U.S. effect "give[] rise to" the plaintiff's injury restricts application of the Sherman Act to cases where a U.S. effect is the proximate cause of the plaintiff's injury, a proposition that the court noted petitioners had expressly conceded at argument. *Id.*[1] Against this standard, the court held that even if respondents had raised U.S. prices in order to keep prices high in the foreign countries where petitioners purchased vitamins, that mere "but-for" relationship between the U.S. effect (higher U.S. prices) and petitioners' injuries (payment of higher prices abroad) was too attenuated to satisfy the FTAIA. Pet. App. 7a.

The court of appeals closely followed the reasoning of this Court's *Empagran* opinion. The panel expressly recognized that ambiguous statutes should be construed "to avoid unreasonable interference with the sovereign authority of other nations." Pet. App. 7a (quoting *Empagran*, 542 U.S. at 164 (Pet. App. 34a)). With this touchstone, the court concluded that any standard short of a proximate cause relationship between the U.S. effect and the foreign injury "would open the door to just such interference with other nations' prerogative to safeguard their own citizens from anticompetitive activity within their own borders." Pet. App. 7a.

The court agreed with the United States that the few precedents for applying the Sherman Act to foreign injuries were distinguishable. It noted that in *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978), this Court had not examined the causal relationship between the U.S. effect and the plaintiff's injury (Pet. App. 5a), and that in the others, an effect on U.S. commerce was plainly the direct cause of the plaintiff's injury. Pet. App. 5a–6a (discussing *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, No. 75 Civ.

[1] "As [petitioners] acknowledged at oral argument * * * 'but-for' causation between the domestic effects and the foreign injury claim is simply not sufficient." Pet. App. 6a.

5828-CSH, 1977-1 Trade Cas. (CCH) ¶ 61,256, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977), and *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998)). Petitioners, by contrast, had failed to show "the kind of direct tie to U.S. commerce found in the cited cases." Pet. App. 7a. Their allegations stated "only an indirect connection between the U.S. prices and the prices they paid when they purchased vitamins abroad." Pet. App. 8a. The direct cause, the court explained, was foreign prices: "[I]t was the foreign effects of price-fixing outside the United States that directly caused, or 'gave rise to,' their losses when [petitioners] purchased vitamins abroad at super-competitive prices." *Id.* The "mere but-for" connection petitioners alleged between the U.S. prices and the prices paid in foreign countries was, the court concluded, insufficient to satisfy the FTAIA. Pet. App. 7a.

5. The United States, the Federal Trade Commission and the various foreign governments that have participated in this case since it was previously before this Court all supported this conclusion. The Department of Justice argued that permitting petitioners to recover under U.S. law would impair antitrust enforcement efforts, because the threat of worldwide liability under U.S. law would discourage violators from disclosing misconduct under the Department's corporate leniency program. See, *e.g.*, Brief for the United States and the Federal Trade Commission ("U.S. Br.") at 20 ("Plaintiffs' theory threatens to upset the balance of incentives and disincentives that drives the amnesty program. * * * [T]he massive increase in potential civil liability [proposed by plaintiffs] would radically tilt the scale of incentives for conspirators against seeking amnesty."). The Department also warned of friction with foreign countries if the Sherman Act were applied to claims by persons whose injuries arose from the effects of anticompetitive conduct on foreign countries. See, *e.g.*, *id.* at 5 ("Opening U.S. courts to antitrust class actions from around the world also would interfere with the sovereign decisions of other nations about the appropriate remedies

to offer their consumers, their ability to regulate their commercial affairs, and their antitrust amnesty programs.").

For their part, the Governments of Canada, Germany, Japan, the Netherlands, Switzerland and the United Kingdom all defended their sovereign prerogative to regulate commercial affairs within their own countries and, in particular, to decide for themselves how injuries caused by the effects of anticompetitive conduct on their economies may be remedied.[2]

REASONS FOR DENYING THE PETITION

There is no reason for this Court to review the decision below. Less than two years ago, in a prior ruling in this case, the Court resolved a critically important conflict in the courts of appeals, holding that a foreign plaintiff cannot sue under the Sherman Act for injuries that do not arise from the U.S. effect of the defendants' conduct. Petitioners now seek review of the court of appeals' case-specific determination on remand that the injuries they allege did not arise from any U.S. effect. There is no conflict in the courts of appeals as to either that result or the reasoning behind it. Nor is there any tension between the decision below and this Court's precedents. To the contrary, the D.C. Circuit faithfully followed the reasoning of this Court's opinion in *Empagran*, and the result below is supported by principles of comity and longstanding antitrust precedent. There is, in short, no "unfinished business" for this Court to complete. The D.C. Circuit's ruling is consistent, moreover, with the views of the United States and the Federal Trade Commission and of every foreign nation that has participated in these proceedings, as well as the great weight of academic authority. Indeed, as the leading antitrust treatise has recognized, acceptance of petitioners' arguments would "undermine the en-

[2] Respondents have requested permission to lodge with the Clerk of the Court, for the Court's convenience, copies of the briefs submitted below by the United States and the Federal Trade Commission and by foreign governments.

tirety of the Court's opinion [in *Empagran*], which unambiguously held that foreign plaintiffs injured by a conspiracy that also injured American purchasers could not sue under the Sherman Act." 1A P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 273a (2d ed. spec. supp. 2005).[3]

Finally, even if there were a significant question here, this case is not a proper vehicle to address it, as a result of petitioners' concession below that the FTAIA cannot be satisfied when U.S. effects are merely the "but for" cause of foreign injuries. See *supra* p. 7 & n.1. As this Court recognized when it remanded this case, 542 U.S. at 175 (Pet. App. 45a), the essence of petitioners' argument is that the "but for" relationship they allege between U.S. prices and their foreign

[3] This Court's review of rulings after remand in other cases (cf. Pet. 9 n.2) does not support granting the petition in this case; indeed, the Court frequently declines to review such rulings. See, *e.g.*, *Fellers v. United States*, 74 U.S.L.W. 3228 (U.S. Oct. 11, 2005) (denying petition for review of ruling after remand); *Chavez v. Martinez*, 542 U.S. 953 (2004) (same); *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 541 U.S. 1086 (2004) (same). None of the cases cited by petitioners suggests that the petition should be granted here. In *Johnson v. California*, 125 S. Ct. 2410 (2005), the Court granted review after a jurisdictional defect that had initially required dismissal had been cured. In *Scheidler v. NOW, Inc.*, 537 U.S. 393, 399–400 (2003), the Court granted certiorari a second time on unrelated issues independently worthy of review after extensive proceedings in the lower courts, including a seven-week trial; the Court granted certiorari a third time to address profound confusion by the court of appeals as to whether plaintiffs' claims survived the Court's prior decision, see *Operation Rescue v. NOW, Inc.*, 125 S. Ct. 2991 (2005). In the other cases cited by petitioners, the court of appeals plainly disregarded an earlier decision of this Court. See *Miller-El v. Dretke*, 125 S. Ct. 2317, 2335 (2005) (observing that the court of appeals' opinion on remand rested on an argument "first advanced in dissent when the case was last here"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (reversing ruling that disregarded this Court's prior opinion in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)). None of these cases suggests that the standard for granting review after remand is different than in other cases or supports granting the petition here.

injuries satisfies the FTAIA. Indeed, the Court remanded the case for the D.C. Circuit to consider precisely that argument. Petitioners' litigation choice to abandon that argument below precludes them from making it now (and thus they strain to portray their injuries as the proximate result of higher U.S. prices). Yet the real issue presented here remains whether the "but for" relationship petitioners allege satisfies the FTAIA, a question foreclosed by petitioners' concession below. Accordingly, even if review of that question were warranted (and it is not), this case provides no occasion to reach it.

I. THERE IS NO CONFLICT IN THE COURTS OF APPEALS.

The decision below does not conflict with any decision of any other court of appeals. Only one other court of appeals has addressed the question decided below, and that court determined, like the D.C. Circuit, that the Sherman Act does not permit recovery for foreign injuries unless they were proximately caused by anticompetitive conditions in the United States. Both courts of appeals deemed insufficient foreign plaintiffs' allegations of an international market, a transnational cartel and "interdependence" between the cartel's U.S. effects and the foreign effects that caused the plaintiffs' foreign injuries. No court of appeals has reached a contrary conclusion. The courts of appeals are thus unanimous in the view that the FTAIA cannot be satisfied by allegations that the effect of price-fixing on U.S. commerce was a "but for" cause of foreign injuries. This consensus belies any need for review of the decision below.

In an opinion issued before this Court's ruling in *Empagran*, the Fifth Circuit rejected essentially the same arguments that petitioners make here. *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002). The plaintiff in *Den Norske* was a Norwegian oil company that had purchased heavy-lift barge services in the

North Sea. It alleged that the barge-service providers had engaged in a global conspiracy to fix bids and allocate customers and territories. Like petitioners here, the *Den Norske* plaintiff argued that the cartel's effect on U.S. commerce was a contributing cause of its foreign injury. It alleged that "the market for heavy-lift services in the world is a single, unified, global market" and that, "because the United States is a part of this worldwide market, the effect of the conspiracy, whether in the United States or in the North Sea, 'gives rise' to any claim that is based upon this conspiracy." *Id.* at 425.

The Fifth Circuit rejected that argument. It was not enough, it concluded, that the plaintiff had alleged "a connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea." *Id.* at 427. The court determined that the FTAIA's "gives rise to" language "requires more than a 'close relationship' between the domestic injury and the plaintiff's claim," *id.*, and that the alleged "but for" causal connection was not sufficient. The court noted, moreover, that "[a]ny reading of the FTAIA authorizing jurisdiction over [the plaintiff's] claims would open United States courts to global claims on a scale never intended by Congress." *Id.* at 431.

The Fifth Circuit's reasoning and conclusions are entirely consistent with the D.C. Circuit's, and no other circuit court has reached a contrary result. The only other circuit court to face the question whether a "but for" causal relationship between a U.S. effect and a foreign injury can satisfy the FTAIA disposed of the case without deciding it. See *Sniado v. Bank Austria AG*, 378 F.3d 210, 212–13 (2d Cir. 2004) (holding that jurisdiction was lacking over plaintiff's claim because his assertion that his foreign injury was "not independent" of the conspiracy's effect on U.S. commerce was "too conclusory to avert dismissal"). There is, in short, no confusion or difficulty suggesting that guidance by this Court is needed. To the contrary, like the courts of appeals, the district courts are unanimous in their rejection of argu-

ments that the FTAIA can be satisfied by "worldwide market" allegations that posit a "but for" relationship between U.S. prices and prices charged in foreign countries. This consistency throughout the federal courts demonstrates that review is unnecessary and unwarranted.[4]

II. THE COURT OF APPEALS FOLLOWED THIS COURT'S PRIOR DECISION IN THIS CASE AND CORRECTLY HELD THAT THE SHERMAN ACT DOES NOT APPLY TO PETITIONERS' CLAIMS.

The court of appeals faithfully followed this Court's prior *Empagran* ruling, which sets forth the considerations courts are to weigh in interpreting and applying the FTAIA. As this

[4] Every district court that has addressed the issue has determined that allegations of "worldwide markets" or "international" cartels are inadequate to show that a U.S. effect gave rise to a plaintiff's foreign injury. See *In re Monosodium Glutamate Antitrust Litig.*, No. 00-MDL-1328 (PAM), 2005 WL 2810682, at *1 (D. Minn. Oct. 26, 2005) (dismissing antitrust claims by purchasers of MSG and nucleotides outside the United States despite allegations "that MSG and nucleotides are fungible and globally marketed," and that defendants could "sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States"); *id.* at *3 ("The global price-fixing cartel theory establishes only an indirect relationship between United States prices and the prices paid in foreign markets. As such, Plaintiffs can only show that the foreign effect of price-fixing gave rise to their injuries."); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chems. B.V.*, No. 03 Civ. 10312 (HB)(DF), 2005 U.S. Dist. LEXIS 19788, at *32 (S.D.N.Y. Sept. 7, 2005) (holding that allegations of "an interchangeable commodity" and a "worldwide geographic market where price movements in one geographic sub-market would have a ripple-effect on prices in other geographic sub-markets" are inadequate to show that foreign injuries arose from a U.S. effect); *eMag Solutions, LLC v. Toda Kogyo Corp.*, No. C 02-1611 PJH, 2005 WL 1712084, at *8 (N.D. Cal. July 20, 2005) (to same effect); cf. *MM Global Servs., Inc. v. Dow Chem. Co.*, 329 F. Supp. 2d 337, 339 (D. Conn. 2004) (declining to dismiss antitrust claims because the plaintiffs allegedly "purchased * * * products *in the United States*") (emphasis added).

Court had done in *Empagran*, the court of appeals construed the FTAIA in light of international comity concerns and the statute's purpose, as described by this Court, "to clarify, perhaps to limit, but certainly not *to expand*" the extraterritorial reach of U.S. antitrust law. 542 U.S. at 169 (Pet. App. 39a). The court of appeals' decision is entirely consistent with this Court's *Empagran* decision, with considerations of international comity and with the text and purpose of the FTAIA. Not surprisingly, it also is consistent with the views of the United States, the Federal Trade Commission and the various foreign nations that submitted briefs both previously in this Court and in the court of appeals, all of which urged the result reached below. Against this united front, petitioners advance policy arguments that have no basis in the statute's text and are contrary to the unanimous views of every governmental authority that has spoken.

A. The Comity Considerations Cited by This Court in Its Prior Decision Fully Support the Decision Below.

The considerations of international comity on which this Court relied in *Empagran* fully support the court of appeals' construction of the FTAIA. This Court noted in *Empagran* that even foreign countries that agree with the United States' prohibition of price-fixing may "disagree dramatically about appropriate remedies" for violations and, further, that the extension of U.S. antitrust remedies to anticompetitive conduct abroad "has generated considerable controversy." 542 U.S. at 167 (Pet. App. 37a). Indeed, in both the prior proceedings in this Court and in the circuit court below, several foreign nations, including the leading trading partners of the United States, have urged that the Sherman Act not be applied to petitioners' claims, and that those claims should instead be governed by the competition policies, including the remedies, adopted by the countries where petitioners reside or purchased vitamins. In the long history of this case, no

government has supported petitioners or any of the various arguments they have advanced.

In *Empagran*, this Court reaffirmed the interpretive principle that ambiguous statutes should ordinarily be construed "to avoid unreasonable interference with the sovereign authority of other nations." *Id*. at 164 (Pet. App. 34a). This principle derives from the concept of "prescriptive comity," which dictates that nations may reasonably regulate conduct outside their borders to prevent or remedy adverse domestic effects but cannot reasonably regulate foreign conduct absent such a purpose. *Id*. at 164–65 (Pet. App. 34a–36a). In keeping with these principles, the extraterritorial application of U.S. antitrust law has always been justified by the need "to redress *domestic* antitrust injury" caused by anticompetitive conduct outside the United States. *Id*. at 165 (Pet. App. 35a) (emphasis in original). Weighing these considerations, this Court concluded in *Empagran* that U.S. antitrust laws could not reasonably regulate conduct outside the United States that caused foreign injuries unrelated to any effect of anticompetitive conduct on the United States. Regulation of conduct that injures persons in foreign countries by affecting foreign economies is, this Court concluded, properly the province of foreign law. "Why should American law," the Court asked, "supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British of Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?" *Id*. (Pet. App. 35a).

Petitioners' alternative jurisdictional theory fails to answer that question, as the court of appeals correctly concluded. Applying U.S. antitrust law to petitioners' foreign transactions would unreasonably interfere with the prerogative of foreign sovereigns to regulate foreign conduct, because it would not "redress *domestic* antitrust injury." *Id*. (Pet. App. 35a) (emphasis in original). Petitioners' foreign injuries were proximately caused by anticompetitive conditions in foreign

countries. Petitioners argue that the cartel needed to raise U.S. prices to maintain higher prices abroad, but it was the alleged effect of price fixing on Australia, Ecuador, Panama and Ukraine, not on the United States, that directly and primarily caused the injuries petitioners sustained in those countries. Petitioners are not U.S. persons; they did not purchase or even seek to purchase from a U.S. person; and their purchases did not take place in U.S. domestic, export or import commerce. Petitioners' foreign injuries are principally, perhaps even exclusively, a matter of concern for the foreign nations where petitioners reside or where they purchased vitamins from foreign sellers. They are not of sufficient concern to the United States to justify the extraterritorial application of U.S. law to that foreign conduct. See *id*. (Pet. App. 35a).

Having conceded below that the FTAIA requires that a U.S. effect proximately caused their foreign injuries, petitioners strain to assert that fixed prices in the United States proximately caused them to pay higher prices in foreign countries. Pet. 14–17. But their allegations do not support this claim. The relationship they allege is one of "but for" causation, as this Court recognized in remanding the case to the D.C. Circuit. 542 U.S. at 175 (Pet. App. 45a) (describing petitioners' complaint as alleging that the U.S. effect was a "'but for' condition"). Foreign market effects, not any U.S. effect, were the proximate causes of petitioners' injuries, and accordingly foreign law, not U.S. law, should regulate the foreign transactions in which they participated.

Petitioners' various efforts to portray their injuries as the proximate result of the cartel's U.S. effects all fail. Petitioners argue that they were directly injured by the cartel, quoting at length from the circuit court's vacated initial opinion. Pet. 13. But allegations that the *cartel* proximately caused their injuries is irrelevant to the jurisdictional test under the FTAIA; the statute requires petitioners to show that the cartel's *effect* on the United States caused their injuries. That is the holding of *Empagran*. Petitioners cannot collapse the distinction that

the statute draws between conduct and the effect of that conduct on the United States. It is the latter, not the former, that must "give[] rise to" injury under the FTAIA.

Indeed, in related contexts, this Court has rejected the sort of chain-of-effects theory of causation that allegedly connects petitioners' foreign injury to a U.S. cause. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court explained that the antitrust laws do not "provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Id.* at 534 (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972)); see also *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 266–70 (1992) (rejecting a "but for" causation standard in RICO context based on antitrust precedent). Petitioners' argument that the cartel's effect on the United States made it possible to maintain the effect on foreign countries that proximately caused their injuries describes precisely the sort of attenuated chain of causation found insufficient in these cases. Petitioners' attempt to recast this "but for" condition as proximate cause would effectively nullify the fundamental jurisdictional limitations of the FTAIA.

Nor does petitioners' allegation that the cartel raised U.S. prices with the intention of injuring petitioners in foreign countries (Pet. 14–17) transform this "but for" condition into a proximate cause. This argument simply paraphrases petitioners' basic allegation that, because there is a "worldwide market" for vitamins, respondents needed to raise prices in the United States in order to raise them abroad. Even if prices had been fixed in the United States to enable foreign injuries, the U.S. pricing was still merely a "but for" cause of those injuries. As this Court has previously held, an action intended to lead to a particular result is not necessarily the proximate cause of that result. See, *e.g.*, *Associated General*, 459 U.S. at 537 ("The availability of the [Clayton Act] § 4 remedy to some person who claims its benefit is not a ques-

tion of the specific intent of the conspirators.") (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982)).[5]

Beyond this, petitioners' proposal to condition the applicability of the Sherman Act on whether products are economically fungible across particular geographic regions (Pet. 15–16), or whether in a particular case a cartel's subjective intent in raising U.S. prices was to maintain higher prices abroad (Pet. 17), is contrary to *Empagran*'s admonition that the FTAIA's jurisdictional rule be applied "simply and expeditiously." 542 U.S. at 169 (Pet. App. 39a). Determining in every case whether injuries to foreign purchasers were "dependent" on U.S. effects, or were an intended consequence of them, would require courts to grapple with the "enormous complexities of market definition," *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430–31 (1990), as a threshold jurisdictional inquiry. In this case, for example, a court considering petitioners' worldwide market theory would have to evaluate cross-elasticities of demand for different vitamin products over ten years, in different countries, each having its own economic features, simply to assess the allegation that higher U.S. prices were essential to maintaining higher prices in each of the foreign countries in which petitioners purchased vitamins. As this Court noted in

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[5] See also *Green Leaf Nursery v. E.I. DuPont de Nemours & Co.*, 341 F.3d 1292, 1307 (11th Cir. 2003) ("This is too remote to satisfy the proximate cause requirements because the directness inquiry is not a question of specific intent."), *cert. denied*, 541 U.S. 1037 (2004); *SEIU Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1074 (D.C. Cir.) ("[T]he circuits have rejected the contention that specific intent is sufficient to demonstrate proximate cause."), *cert. denied sub nom. Guatemala v. Tobacco Inst., Inc.*, 534 U.S. 994 (2001); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 242 (2d Cir. 1999) (noting that "an allegation of specific intent does not overcome the requirement that there must be a direct injury to maintain this action," and that the contrary view has been "specifically rejected" by this Court), *cert. denied*, 528 U.S. 1080 (2000).

Empagran, the "procedural costs and delays" of such fact-intensive, case-by-case inquiries can "themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system." 542 U.S. at 168–69 (Pet. App. 39a). Petitioners' proposal to make jurisdictional determinations turn on case-by-case assessments of the markets for particular products or the violators' subjective intent is simply "too complex to prove workable." *Id*. at 168 (Pet. App. 38a).[6]

In sum, petitioners' argument ignores the sovereign interests of our trading partners and would turn U.S. courts into world courts for competition claims. To apply U.S. law, including U.S. treble-damages remedies, to transactions between foreign buyers and foreign sellers in foreign countries with different antitrust policies, including different liability and damages rules, would be inconsistent with principles of prescriptive comity and would unreasonably threaten the "harmony particularly needed in today's highly interdependent commercial world." *Id*. at 164–65 (Pet. App. 35a).

B. Antitrust Precedent Further Supports the Court of Appeals' Determination That Only Foreign Injuries Proximately Caused by a U.S. Effect Are Actionable.

This Court explained in *Empagran* that Congress enacted the FTAIA in 1982 to "clarify, perhaps to limit, but certainly not *to expand*" the extraterritorial reach of the antitrust laws. 542 U.S. at 169 (Pet. App. 39a). Given this purpose, the Court concluded that the absence of any "significant author-

[6] Petitioners' argument that their "worldwide market" theory is necessarily limited to cases involving the cartelization of commodities (Pet. 23) is refuted by *Den Norske*, where the plaintiff alleged a "single, unified, global market" for "heavy-lift barge services." 241 F.3d at 425. Petitioners' "but for" causation argument cannot be limited to any class of cases; it is the exception that would swallow the rule.

ity" in 1982 for applying the Sherman Act to claims based on injuries unrelated to any U.S. effect weighed heavily against interpreting the FTAIA to permit application of the Sherman Act to such claims. *Id*. at 173 (Pet. App. 43a). This lack of precedent for petitioners' claims further supports the decision below and is further reason to deny the petition.

The D.C. Circuit examined three cases suggesting circumstances when a U.S. effect might "give rise to" a foreign injury. See *supra* pp. 7–8. None of those cases relied on a "worldwide market" theory or "but for" chain of causation to link foreign injury to a U.S. effect; rather, in each case, the plaintiff's injury arose directly from the U.S. effects of a restraint of U.S. commerce. Pet App. 5a–6a. The circuit court correctly concluded, as had the United States, that none of these cases supports the application of the Sherman Act here. Indeed, petitioners cite only one of these cases as support for their petition, this Court's decision in *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978). Pet. 12, 18–19. But *Pfizer* in no way supports petitioners' claims.

Pfizer decided the question whether a foreign state is a "person" entitled to sue under the Clayton Act. 434 U.S. at 312. It answered that question, as the court of appeals correctly noted below, "without addressing the requisite causal relationship between domestic effect and foreign injury." Pet. App. 5a. While the *Pfizer* Court explained that its ruling would advance deterrence, it never suggested that U.S. antitrust law provides a remedy for injuries resulting from the effects of anticompetitive conduct on foreign economies. To the contrary, the Court explained its ruling in part on the ground that U.S. antitrust law should protect a foreign person that "enters *our commercial markets*," 434 U.S. at 318 (emphasis added), as apparently was the case in *Pfizer*.[7] That

[7] As Judge Higgenbotham noted in his dissent from the Fifth Circuit's decision in *Den Norske*, "[u]nlike in this case, in *Pfizer* the sales were made in the United States." 241 F.3d at 434–35.

statement fully supports the court of appeals' conclusion that a U.S. effect must be the proximate cause of the plaintiff's harm. And it fully supports the conclusion that petitioners—who did not enter our markets, did not participate in U.S. domestic or export commerce and did not even attempt to do so—were not proximately injured by any effect on U.S. commerce.

In each of the other two cases that the court of appeals identified as applying the Sherman Act to foreign injury, the foreign plaintiff was a participant (or prospective participant) in U.S. commerce and was proximately injured by the effects of anticompetitive conduct on U.S. commerce. In *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Engineering Co.*, No. 75 Civ. 5828-CSH, 1977-1 Trade Cas. (CCH) ¶ 61,256, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977), the plaintiff was an Italian purchaser of services exported from the United States, and its injuries arose directly from anticompetitive conduct that limited competition among U.S. exporters. Petitioners, by contrast, have not alleged that they purchased or even attempted to purchase vitamins from the United States.[8] In *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998), a post-FTAIA case, the plaintiff was a British Virgin Islands

[8] The plaintiff in *Industria Siciliana* complained that Exxon had conditioned an important oil refining contract on acceptance of another Exxon subsidiary's bid for refinery design services, which was higher than the competing bid of another U.S. company. The allegations showed that Exxon had used its market power as a crude oil supplier to "restrai[n] competition in the United States refinery design and engineering market," *id.* at *3, and that the plaintiff "was injured in its business by reason of an alleged restraint of our domestic trade" involving "the export of services," *id.* at *12. Notably, the legislative history of the FTAIA refers critically to *Industria Siciliana* as one of several lower court cases that reached too far in permitting claims by purchasers of U.S. exports. H.R. Rep. No. 97-686, at 5 (1982). The FTAIA provides particular rules, not implicated here, regarding conduct that affects U.S. export commerce. 15 U.S.C. § 6a.

company that sold radio advertising in the Eastern Caribbean to U.S. purchasers, and its injuries arose directly from anti-competitive conduct by a competitor that interfered with those sales. Petitioners, by contrast, were not excluded from transactions with U.S. market participants, and thus their claims are entirely dissimilar.

There is no precedent for petitioners' novel jurisdictional theory. No decision accepts their "worldwide market" theory of jurisdiction; nor is there any support in the case law for applying the Sherman Act to claims where a foreign injury was an indirect, albeit "intended," result of a restraint of U.S. commerce. The one case they do cite, *Pfizer*, does not support their position, given the narrow ruling in that case. Petitioners accordingly have failed to identify the "significant authority" that this Court said in *Empagran* would be required to conclude that their claims satisfy the FTAIA. 542 U.S. at 173 (Pet. App. 43a). To the contrary, the case law supports the court of appeals' determinations that the FTAIA's "gives rise to" standard requires a showing that a U.S. effect proximately caused a foreign injury, and that petitioners' allegations show, at most, a "but for" causal relationship that fails to meet the FTAIA's proximate cause test.

C. Petitioners' Policy Arguments Are Contrary to the Views of the United States and Every Foreign Government That Has Participated in These Proceedings.

Much of the petition is devoted to a policy argument, based almost entirely on allegations outside the record, that applying the Sherman Act to claims by petitioners and others in analogous circumstances will deter global cartel behavior or vindicate important economic interests. Pet. 18–24. These policy claims, which petitioners also made unsuccessfully in *Empagran*, are refuted by the United States, the Federal Trade Commission and the foreign governments that submitted briefs in the prior proceedings in this Court and in the

court of appeals. They provide no basis for review of the decision below.

The United States and the various foreign governments that have participated in these proceedings as *amici* in support of respondents (despite, in some cases, having prosecuted some of them) have unanimously disputed petitioners' argument that applying the Sherman Act to their claims is essential to deter global cartels. Indeed, they explain that petitioners' proposed construction of the FTAIA would discourage cooperation by violators and thus ultimately make it harder for antitrust enforcement authorities to detect illegal activity.

The Department of Justice and the Federal Trade Commission have stressed that the Corporate Leniency Program, which permits a cartel member to avoid criminal prosecution by being the first to cooperate with an investigation of the cartel, is one of the strongest tools in the fight against illegal anticompetitive conduct. U.S. Br. at 19. Cooperation secured through the program has been an important factor in investigations of anticompetitive conduct, including the price-fixing of vitamins that underlies petitioners' complaint. *Id.* at 1, 20.

According to the United States, increased liability under the Sherman Act for worldwide injuries would seriously impair the effectiveness of such programs by raising the costs of cooperation for potential cooperating witnesses, who remain exposed to civil claims. As *amici* noted below, "[i]n the government's experience, potential amnesty applicants weigh their civil liability exposure when deciding whether to come forward and seek amnesty." *Id.* at 20. "If consumers from around the world suddenly could bring class action suits in U.S. courts against international cartels * * * the massive increase in potential civil liability would radically tilt the scale of incentives for conspirators against seeking amnesty." *Id.* Without these informers, more illegal activity will go un-

detected, harming consumers in the United States and worldwide.

Petitioners' premise that they "are the only available enforcers of antitrust laws in the circumstances of this case" (Pet. 19) is simply untrue. Numerous foreign governmental authorities have prosecuted the vitamins cartel in foreign countries, and in some jurisdictions private plaintiffs have brought suit as well (in actions that include at least one of the petitioners as a party). *See supra* pp. 3–4. Nor does it help petitioners that some nations' laws do not provide private damages remedies or that trebled damages are not available outside U.S. law. Cf. Pet. 21 n.6. It is precisely because other nations have adopted different policies regarding the regulation of competition, in particular different damages remedies, that the application of U.S. law would offend international comity. See *Empagran*, 542 U.S. at 169 (Pet. App. 39a) ("[I]f America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat."). The "harm done to, and the unlawful profits gained from, overseas consumers" (Pet. 19) are not proper considerations of U.S. law when those harms arise from the effects of anticompetitive conduct on foreign markets. They are matters to be addressed under the laws of the jurisdictions where those overseas consumers were injured.

Nor is it persuasive for petitioners to argue that, if they are unable to sue, "harm to * * * U.S. indirect purchasers who buy from them would go unremedied." Pet. 20. In *Empagran*, this Court held that the Sherman Act does not apply to claims based on foreign injuries that do not arise from a U.S. effect. Neither *Empagran* nor the FTAIA permits any exception to this rule based on the mere presence of U.S. indirect or downstream purchasers. Such an exception would impermissibly "swallow" a fundamental jurisdictional limitation

whole, something this Court warned against in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 702–03 (2004). See also *id.* at 758–60 (Ginsburg, J., concurring). More generally, Congress has already determined that indirect effects of foreign anticompetitive conduct on the United States fall outside the scope of U.S. antitrust concern. The FTAIA expressly limits the Sherman Act's extraterritorial reach to foreign conduct that has a "*direct*, substantial, and reasonably foreseeable" effect on U.S. commerce. 15 U.S.C. § 6a(1) (emphasis added).[9]

Faced with essentially the same arguments in *Empagran*, this Court explained that it was unable to weigh the competing policy considerations, which turned on questions of empirical fact. It also deemed them largely beside the point. Whatever the merits of the policy debate, the Court explained, the paramount considerations for purposes of construing the FTAIA are principles of prescriptive comity and Congress' intent "to clarify, perhaps to limit, but not *to expand*" the extraterritorial reach of the Sherman Act:

> "We cannot say whether, on balance, [petitioners'] side of this empirically based argument or the enforcement agencies' side is correct. But we can say that the answer to the dispute is neither clear enough, nor of such likely empirical significance, that it could overcome the considerations we have previously discussed and change our conclusion." 542 U.S. at 174–75 (Pet. App. 44a–45a).

None of the policy arguments advanced by petitioners supports a different view here. The court of appeals correctly determined that the considerations of comity and congres-

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[9] Petitioners' argument that they should be entitled to assert Sherman Act claims in order to vindicate harms to U.S. export commerce (Pet. 20) is incompatible with the FTAIA's express limitation of claims based on effects on U.S. export commerce to claims of injury by U.S. exporters. 15 U.S.C. § 6a(1)(B).

sional intent that guided this Court's decision in *Empagran* dictated the conclusion that petitioners' injuries lack the causal connection to the United States that is necessary for the Sherman Act to apply.

Finally, there is no merit to petitioners' alarmist claims about the scope of the ruling below. The court below appropriately applied the FTAIA, informed by important comity considerations emphasized by this Court and antitrust precedent, to limit claims based on foreign injuries to cases where those injuries arise directly from an effect on U.S. commerce.

III. HAVING CONCEDED THAT FOREIGN INJURIES ARE ACTIONABLE ONLY IF THEY WERE PROXIMATELY CAUSED BY AN EFFECT ON U.S. COMMERCE, PETITIONERS CANNOT NOW ASSERT THAT "BUT FOR" CAUSATION SUFFICES

This Court remanded this case to the D.C. Circuit to consider petitioners' alternative jurisdictional theory that their "worldwide market" allegations satisfied the FTAIA's requirement that a U.S. effect "give[] rise to" their claims. 542 U.S. at 175 (Pet. App. 45a). As the Court noted, this theory posits that "higher prices in the United States" were a "'but for' condition" of petitioners' foreign harm. *Id.* (Pet. App. 45a). The question for the court of appeals on remand was accordingly whether such a "but for" condition satisfied the FTAIA.

In the court of appeals, however, all parties and the circuit court agreed that the FTAIA requires that a U.S. effect was the proximate cause of a foreign injury. See *supra* p. 7 & n.1. And the court of appeals quite sensibly ruled that (as this Court had previously indicated) petitioners' allegations described only a "but for" connection to U.S. effects and thus could not satisfy that standard. Nor could the circuit court possibly have concluded otherwise, given the international

comity concerns that this Court recognized in *Empagran*. How could foreign nations possibly control competition policy in their own countries if participants in transactions in those countries could invoke U.S. antitrust law simply by alleging that a cartel's U.S. effects were necessary to avoid international arbitrage in the affected product?

Petitioners' concession on the issue that the court of appeals was asked to decide weighs heavily against review. As a result of that litigation choice, petitioners cannot now argue that the FTAIA is satisfied by a showing of "but for" causation. This limitation makes this case a poor vehicle for review. Even if the Court thought it worthwhile to consider whether "but for" or proximate causation is the standard under the FTAIA, it should not do so in this case, where that question is foreclosed.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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