Nos. 12-10492, 12-10493, 12-10500, 12-10514

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

AU OPTRONICS CORPORATION, AU OPTRONICS CORPORATION AMERICA, HUI HSIUNG, and HSUAN BIN CHEN,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(JUDGE SUSAN ILLSTON)

BRIEF FOR THE UNITED STATES

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STATEMENT OF JURISDICTION

The government agrees with appellants' jurisdictional statements.

STATEMENT OF ISSUES PRESENTED

I.

1. Whether the indictment adequately alleged a price-fixing conspiracy with the nexus to U.S. commerce required by the Sherman Act, as amended by the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. §§ 1, 6a.
2. Whether the evidence sufficiently proved the required nexus to U.S. commerce.
3. Whether the district court properly instructed the jury that the Sherman Act reaches conspiracies carried out, in part, in the United States, as well as conspiracies carried out entirely outside the United States with substantial and intended effects in the United States.
4. Whether the indictment adequately alleged a price-fixing conspiracy within the Sherman Act's reach.
5. Whether the district court correctly concluded that *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), neither required

the government to plead and prove specific intent to produce anticompetitive effects in the United States nor permitted justifications for price fixing under the rule of reason.

II.

6. Whether the district court properly instructed the jury that to establish venue the government must prove by a preponderance of the evidence that a co-conspirator acted in the district to further the conspiracy during the conspiracy period.
7. Whether the evidence sufficiently proved venue in the Northern District of California.
8. Whether the prosecutor fairly characterized the venue evidence during rebuttal closing argument.

III.

9. Whether the fine imposed on AU Optronics Corporation was within the maximum authorized by 18 U.S.C. § 3571(d).

STATEMENT OF THE CASE

On June 9, 2010, a federal grand jury sitting in the Northern District of California returned a single-count indictment charging AU Optronics Corporation (AUO), AU Optronics Corporation America

(AUOA), Hsuan Bin Chen, and Hui Hsiung (collectively, the defendants), as well as seven other individuals, with conspiring to fix prices for thin-film transistor, liquid crystal display (TFT-LCD) panels in the United States and elsewhere. ER1722-23 ¶¶ 1-2. The indictment also alleged, "for purposes of determining the alternative maximum fine" pursuant to 18 U.S.C. § 3571(d), that defendants AUO and AUOA and their co-conspirators "derived gross gains of at least $500,000,000." ER1734 ¶ 23.

Defendants twice sought dismissal of the indictment. On November 12, 2010, defendant Chen, joined by his co-defendants, moved to dismiss the indictment. ER1683-91. Relying on *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), Chen argued that price-fixing conspiracies involving foreign conduct must be evaluated under the rule of reason and, thus, the indictment must allege that defendants intended to produce anticompetitive effects. ER1688-91. On January 29, 2011, the district court denied the motion. SER2479-89. The court rejected defendants' interpretation of *Metro Industries* and found the indictment's allegations sufficient. SER2483-84.

On February 23, 2011, AUO and AUOA moved to dismiss the indictment for failure to allege defendants' conduct was intended to produce a substantial effect in the United States and for failure to allege the requisite nexus to U.S. commerce under the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a. ER1648-72. The district court denied the motion, finding the indictment need not plead substantial and intended effects in the United States because it alleged some domestic conduct and, in any event, the indictment did allege such an effect. SER2474. The court further found the FTAIA "does not require dismissal" because the indictment was based "at least in part on conduct involving 'import trade or import commerce'" and "the FTAIA's exclusionary rule is inapplicable to such import activity conducted by defendants." SER2476.

On March 13, 2012, after an eight-week trial, the jury convicted AUO, AUOA, Chen, and Hsiung. ER587-89.[1] The jury further found that the participants in the conspiracy derived gain from it and that the

[1] The jury acquitted two other individuals, Lai-Juh "L.J." Chen and Tsannrong "Hubert" Lee, and failed to reach a verdict as to a third individual, Shiu Lung "Steven" Leung. ER588. Leung was later retried and convicted. *See infra* p. 160. The other four indicted individuals were fugitives at the time of trial.

amount of gross gain to all participants was $500 million or more. ER589. On June 11, 2012, after extensive briefing and oral argument, the district court denied defendants' motions for acquittal or, in the alternative, for a new trial. ER1-8.

On September 20, 2012, the district court sentenced AUO to a fine of $500 million. ER216-20. The court also sentenced both AUO and AUOA to three years of probation during which the companies are required to develop, adopt, and implement an effective compliance and ethics program, to retain an independent monitor to oversee that program, and to pay a $400 special assessment. ER216-25. The court sentenced Chen and Hsiung each to serve 36 months imprisonment and to pay a $200,000 fine and a $100 special assessment. ER206-15. The defendants each timely filed a notice of appeal. ER201-05, 226-31.

Before sentencing, defendants Chen and Hsiung sought bail pending appeal. The district court denied their request, finding that none of the requirements for bail pending appeal had been met, and ordered Chen and Hsiung to report to prison on November 30, 2012. ER289.

On November 26, 2012, Chen and Hsiung renewed their requests for bail pending appeal in this Court. ECF No. 11, No. 12-10492 (9th Cir.

Nov. 26, 2012); ECF No. 12, No. 12-10493 (9th Cir. Nov. 26, 2012). Before ruling on the motions, this Court directed the district court to provide further explanation of its reasons for denying bail. In response, the district court explained that "defendants did not meet their burden to show that their appeals raise 'a substantial question of law or fact' for purposes of title 18 U.S.C. section 3143(b)." ER198. In particular, the district court found that "the applicability of *Metro Industries* does not present a 'substantial' question," that "[d]efendants have not shown that [the applicability of the Sherman Act to foreign conduct] is a 'substantial question,'" and that "defendants have not shown a 'substantial' question as to the sufficiency of the evidence" on the FTAIA's exceptions. ER199-200.

On January 22, 2013, this Court denied Chen and Hsiung's motions for bail pending appeal, finding that they "have not shown that these appeals raise a 'substantial question' of law or fact that is likely to result in reversal, an order for a new trial," or a reduced sentence. ECF No. 23, No. 12-10492 (9th Cir. Jan. 22, 2013). Chen and Hsiung are currently incarcerated.

STATEMENT OF THE FACTS

In 2001, the major manufacturers of TFT-LCD panels used in desktop computer monitors and notebook computers were two Korean companies, Samsung Electronics Corp. and LG Display Co., and four companies from Taiwan, Chunghwa Picture Tubes (CPT), Chi Mei Optoelectronics Corp. (CMO), HannStar Display Corp., and defendant AUO. Competition to sell TFT-LCD panels, particularly to major U.S. computer companies, was intense, and the panel manufacturers feared a price war that would drive down profits. SER2125-26, 2255-56. Their solution was to meet in secret to fix the prices of TFT-LCD panels contained in almost every computer monitor and notebook computer sold in the United States. During more than five years of successful price fixing, the conspirators substantially increased their margins and secured billions in ill-gotten gains from U.S. purchasers alone.

A. Commerce in TFT-LCD Panels

TFT-LCD is a display technology used in flat-panel computer monitors, notebook computers, and other devices. SER2427-28. The panels used in computer products come in standard sizes, ranging from 12 to 20 inches. SER2302-03. The panels are manufactured in Asia

and sold to computer and other electronics companies around the world for integration into finished products. SER2429, 2432. During the conspiracy, the United States was the single largest country market for finished computer products incorporating TFT-LCD panels, accounting for approximately one third of all panels produced by the six conspiring manufacturers. ER1312-13; SER2129-30, 2409. AUO's major U.S. customers, including Dell Computers, Hewlett-Packard Company (HP), and Apple Computers, purchased as many as a million panels from AUO per month. ER1418.

During the conspiracy, the participants' TFT-LCD panels reached the United States in two ways. First, 2.6 million raw panels—sold for more than $638 million—were shipped from the conspiring manufacturers to customers in the United States. ER617; SER2075-76; *see also* ER1443. Second, $23.5 billion in panels were imported into the United States as part of finished products, such as notebook computers and computer monitors. SER2078-79. The conspiring manufacturers negotiated the sale of these panels directly with U.S. computer companies. SER2149-50, 2161-62. The panels were then shipped either to the U.S. computer company's own factory or to contract

manufacturers, known as system integrators, abroad, where they were incorporated into finished products bound for the United States. SER2144-48, 2412-16.

B. The Conspirators Meet to Fix Panel Prices

On September 14, 2001, senior executives of the four panel makers from Taiwan, including the President of AUO, met in a hotel room in Taipei. ER795-99, 1432-33. At that meeting, the executives agreed to "stabilize the price" of panels, ER1435-36, to "ensure profitability" of the meeting participants. ER795; *see also* SER2296-97. Specifically, the participants "decided to first maintain prices in October . . ., and in November, to try to raise the prices." ER795-98.

AUO's representative at the meeting suggested that the participants invite the two Korean panel manufacturers to ensure their success. ER795-99; SER2117-18, 2298-99. When the conspirators met again a week later, representatives of the two Korean manufacturers, LG and Samsung, were in attendance. SER1982-86, 2118, 2288. At this second meeting, AUO reported that it planned to increase its prices for 14.1-inch notebook panels and 15-inch monitor panels in the next two months. SER1982-86, 2284. All the manufacturers agreed "to adjust

the pricing together." SER2285; *see also* ER1344-45, 1436. The participants also set out the agenda for their next meeting in October, which included discussing the "results of implementation" of the agreed prices. SER1986.

The participants called these meetings Crystal Meetings after the product that was the subject of their conspiracy. And they continued to meet as a group on a monthly basis for four and a half years. ER1028-37; SER2048-52, 2100, 2121-22, 2245-46. The structure of the meetings was determined by the senior executives at the outset of the conspiracy. ER798; SER2100. Responsibility for hosting the meeting rotated among the participants. SER2101. At each meeting, the host would ask the attendees, usually company vice presidents or others with pricing authority, to share their target prices for the standard-sized panels and then record each company's target prices on a whiteboard. SER2259 ("[T]he figures that we were discussing were written on the whiteboards. One is one, two is two, everything is very clear. It's not possible to miscomprehend."); *see also* SER2097, 2103-06, 2402-03. The attendees discussed the prices until an agreement on the target price

per panel size was reached. ER1424-25; SER2097, 2104-07, 2274-76, 2291-93, 2402-03, 2406.

One participant described the usual procedure to the jury: For example, HannStar "would say, 'We raise $3 for 15-inch; or for 14-inch notebooks.'" SER2106. Next, AUO would "say. 'We raise—we intend to raise $5 for 15-inch.'" *Id.* After each company had made their proposal, "the chairman would say, 'Okay. So there were four votes for $5 increase; two votes for $3 increase. The market seems to be not too bad. Then why don't we raise it—why don't we raise $5?'" SER2106-07. And "if people have no objections, then the consensus was reached." SER2107.

The senior executives divided their meetings into two levels: CEO or "Top Management" meetings and "Commercial" or "Operational" meetings. The CEO meetings, attended by CEOs and presidents of the participating companies, initially were held quarterly. SER2101, 2276. If any problems arose in the Commercial meetings, they were raised during the CEO-level meetings. SER2276-77.

AUO's President and Chief Operating Officer, defendant Hsuan Bin Chen, as well as its Executive Vice President, defendant Hui Hsiung

(also known as Kuma), participated in CEO-level meetings where price agreements were reached. *See, e.g.*, ER1433-34; SER2092-94, 2232-36, 2262, 2268. Chen and Hsiung then passed the day-to-day operation of the conspiracy to subordinates, directing them to attend the Commercial meetings, take notes, and report on the matters discussed and the price agreements reached. ER994-96, 976. Those subordinates dutifully sent Crystal Meeting reports to Chen, Hsiung, and other AUO executives detailing the price agreements reached at each meeting. *See* ER1028-37.

The Crystal Meetings also provided an opportunity for the conspirators to monitor compliance with their price-fixing agreement. ER1340. The October 2001 Crystal Meeting minutes show that "[a]lthough each maker had faced customers' resistance against the price increase, since all the makers unanimously upwardly adjusted the price, and the market supply cannot meet demand, the price level for October reached the original target at around $205." SER1980. Buoyed by their success, the conspirators agreed to increase the price again in November. *Id.* When some conspirators fell short of the agreed-upon target price, they were criticized by the other manufacturers. *Id.* ("We

have contacted these two makers informing them 'partially effective on Oct 15' is extremely inappropriate; improvement has been generally implemented."). *See also* ER767-68; SER2088-90, 2232-38. The participants also established a "Hot Line" procedure whereby they would contact individual competitors to verify they were adhering to the target price and to "avoid being tricked by customers into cutting price." ER785; *see also* SER2271.

Throughout the Crystal Meetings, the participants focused particular attention on their major U.S. customers. For example, at the November 2004 meeting, the participants discussed panel prices to Dell. SER1956-57. Samsung announced its intention to respond to "Dell's demand of $165 for 17" . . . with No for anything below $170" and "[h]ope[d] others to participate." SER1957; *see also, e.g.*, ER775 (LG "[w]ill announce April prices to major factories such as Dell/Compaq after making agreement with Samsung"); SER1966 ("Attending companies agree to hold their proposed prices [to HP] unchanged in May and June."); SER1986 (AUO and CPT agree to "simultaneously adjust the price upwards for Compal/HP to $160 in Oct.").

The participants focused on their major U.S. customers because the United States was the single largest country market for their products, and because the conspirators considered these major U.S. computer companies to be "index companies" that were representative of the market as a whole. SER2265. The conspirators reasoned that "if these index companies can accept [the] price increase, then that means the entire market could also accept the price increase." *Id.*

During negotiations with customers, including Dell and HP, participants would contact their co-conspirators to align their prices to those customers. SER2241-42, 2340-42. And Chen, Hsiung, and other AUO employees reached price agreements with competitors in one-on-one meetings and phone calls. In July 2004, Chen and Hsiung set up a call with LG's Executive Vice President to establish a "cooperation plan for preventing the recent sharp drop in price, apparently [t]riggered by Dell's unreasonable demand vis-a-vis AUO of late." SER1924; *see also* SER2185. In June 2005, representatives from LG met with defendants Chen and Hsiung to discuss price increases on notebook panels. SER1920-22; *see also* SER2168-77. Notes from the meeting show that "based on the [notebook] shortage, a sharp price increase is being

planned" and "it was agreed to increase by $10 in July and August, respectively." SER1920, 2176-77.

C. Fearing Detection, the Conspirators Attempt to Conceal Their Conspiracy

From their first meeting, the conspirators recognized the need to keep their conspiracy a secret. ER795-99, 1343, 1349; SER2110. To that end, they varied the location of their meetings; each meeting was in a different hotel only revealed to the attendees shortly beforehand. ER1020-27, 1432; SER1978. The attendees also staggered their entrances and exits so as not to be seen together. ER1332-33; SER2111-14, 2280-81.

The conspirators feared being seen together because they understood their conduct exposed them to antitrust liability. At the December 7, 2001, meeting, the participants discussed "security in connection with violating the Fair Trade Act [Taiwan's competition law]." SER1929; *see also* SER2226-29. A week later, LG "[r]emind[ed] executives in attendance to take notice of anti-trust laws." ER778. And at the July 21, 2004, meeting, LG sales manager Stanley Park "[p]ointed out the fact that two years ago there were cases filed [in the United States] against DRAM companies for antitrust law violations for

colluding" and suggested that "more care be given to security both within and without, and that written communication, which leaves traces, be refrained from as much as possible." SER2210; *see also* SER1961-63.

The meeting attendees were regularly reminded not to disclose the fact of the meetings to anyone. *See, e.g.*, ER798 ("[D]o not disclose this meeting to outsiders, not even to colleagues; keep a low profile."). Information from the December 10, 2003, Crystal Meeting was emailed out with instructions to "delete the mail right after you retrieve the file." SER1930. And Crystal Meeting reports circulated within AUO were designated as "extremely confidential" and for limited distribution. *See, e.g.*, ER982-87, 990-93, 997-1001, 1004-09.

In 2005, rumors began circulating that HP and Dell were aware of the Crystal Meetings, and the participants endeavored to scale down—but not to stop—their conspiratorial meetings. SER1951-55, 2197-202. The participants started meeting in tea houses and karaoke bars. SER1939-50, 2192-94, 2203-04. While the location changed, the purpose of the meetings did not. The attendees—now lower-level employees within the conspiring companies, to better guard against

detection—discussed price targets for various TFT-LCD panels. SER1946-50, 2048-51, 2205-07. Despite their efforts to scale down the meetings, the participants still worried about getting caught. SER1939 ("Currently, this Meeting has cut down its size and is run mainly by hands-on workers. By the nature of the Meeting, we will maintain security regarding its existence as usual.").

D. AUO Sells Price-Fixed Panels to U.S. Customers

AUO established a wholly owned subsidiary in the United States—defendant AUOA—to sell to AUO's major U.S. customers. ER1415-16, 1418. AUOA's practice was to follow its customers and "pitch a tent next to them." ER1419. AUOA strategically located offices and employees in Houston, Texas, near HP/Compaq, in Austin, Texas, near Dell, and in Cupertino, California, near HP and Apple. ER1419-20; SER2381. AUOA Branch Manager Michael Wong testified that his place of employment was in the Bay Area, although he regularly traveled to AUOA's offices in Houston and Austin. SER2391, 2397, 2399. AUO's co-conspirators also located branch offices near the major U.S. computer companies. SER2367-69 (Samsung's U.S. operations were in the Bay Area, Houston, and Austin; LG's U.S. operations were

in San Jose, Houston, and Austin; CMO's U.S. operations were in the South Bay Area and Houston).

AUOA account managers based in the United States negotiated the price and volume of panel sales to AUOA's major U.S. customers on a monthly basis through in-person meetings, phone calls, and emails. SER2375-83, 2419-20. In person negotiations were primarily conducted at the customers' headquarters. HP negotiated panel procurement in the United States out of its Cupertino office until May 2002, when HP merged with Compaq and moved its procurement function to Houston. ER1467. Negotiations with Dell took place mostly at Dell's campus in Austin, Texas. SER2375. Wong was responsible for the Dell account and testified that he visited the Dell campus a few times each month to negotiate panel sales. *Id.* Wong also exchanged emails and phone calls with Dell's procurement team more than once a week. *Id.*; *see also, e.g.*, SER2379-80, 2419-20 (negotiations with HP in-person and by phone); SER1908-10 (email negotiation with Apple). While these negotiations were primarily conducted by AUOA employees located in the United States, including some in the Bay Area, AUO executives Steven Leung and defendant Hsiung also traveled to the United States several times a

year to meet with U.S. customers, including Dell, Apple, and HP. SER2385-88.

AUOA acted as a "tentacle" or an "extension of AUO" in the United States and took its direction regarding sales from AUO. ER1416. Defendant Hsiung also served as President of AUOA. SER1916. Reports of the agreements made by Hsiung and other AUO executives at Crystal Meetings and in one-on-one contacts were distributed to AUOA employees in the United States for use in their price negotiations with U.S. customers. ER953-60, 1004-09; SER2005-09, 2012-14, 2018-19, 2336-37, 2345, 2391.

For example, in a phone call in November 2004, LG Vice President C.S. Chung and defendant Hsiung agreed on prices to offer Dell. SER2010-11. Hsiung related the agreement by email to Wong, with instructions to delete the email after reading it. *Id.* Hours later, Wong emailed his contact at Dell, offering the very prices discussed between Hsiung and Chung. SER1911.

In addition to implementing the price agreements reached by their supervisors at AUO, AUOA employees met one-on-one with counterparts in the United States to coordinate prices to major U.S.

customers. SER2370-72. And they were directed by AUO executives to "align with other TFT vendors to ensure we are not quoting too low or much too high." SER2001; *see also* SER2002 ("All proposed AUO May pricing are decided with consideration of competitors' May quotation targets"; "Aligned toward GENERAL CONSENSUS among competitors for 15"/17"/19" PRICING INCREASES in MAY.").

Michael Wong met or spoke with LG's account manager for Dell, Stephen Yoon, about once a month and reported those communications to his supervisors in Taiwan. ER805; SER2015-17, 2351-54. In June 2004, Wong reported on a meeting with Yoon through which he learned that Dell was asking for a price reduction, but that LG and Samsung "will not yield to Dell's demand." ER805; *see also* SER2355-57. In November 2004, Wong reported to his supervisors that he "[c]onfirmed with [LG] sales here in Austin that their offer [to Dell] in Nov. is $145/15", $160/17" and $260/19"TN." ER804. Four days later, Wong quoted Dell prices identical to those discussed with LG. SER1912. *See also* SER1913-15, 2015-16. Wong testified that aligning prices with AUO's competitors allowed him to charge customers higher prices. SER2306-11.

As branch manager, Wong also received from AUOA account managers weekly reports that regularly contained pricing information gathered from AUOA's competitors. SER2326-29. For example, Evan Huang, an account manager responsible for Apple who was located in Cupertino, California, sent a weekly report to Wong regarding pricing to Apple and related competitor pricing information he obtained from his contact at CMO. SER1996-98, 2322-23, 2381; *see also* SER1999-2000.

AUOA employees were also attuned to the need for secrecy. Defendant Hsiung and other AUO executives regularly reminded them to keep this information confidential and even to delete emails referencing pricing agreements after reading them. SER1989 ("Do not forward and do not share."); *see also* SER2010-14, 2018-19. In August 2006, AUO's Apple account manager, Huang, sent an email titled "Watchful" to Wong and sales representatives in the AUO notebook business unit. ER801; SER2322-23. In the email, Huang warns that "NYer is suspecting suppliers are exchanging price information. This is illegal, especially in the states. We need to be watchful!" ER801. Wong testified that "NYer" was code for Apple. SER2323.

E. The Conspiracy Succeeds and Causes Massive U.S. Harm

CPT Vice President C.C. Liu told the jury he believed the Crystal Meetings were beneficial because "through our sincerity and collaboration we did see increase in prices." SER2091-92. The evidence showed that the price-fixing conspiracy was indeed very successful. *See, e.g.*, SER1971 ("Remark: 15" history of price increase: $10 up/Oct.; $15 up/Nov.; $5 up/Dec; $10 up/Jan; $5/Feb; $5/Mar; $5/Apr; $5/May. Total increase is $60.").

The conspirators fixed the prices of at least $71.8 billion in panels sold worldwide, at least $23.5 billion of which came into the United States either as raw panels or incorporated in finished products. ER617; SER2074-82. The government's economic expert, Dr. Keith Leffler, estimated that the average price per panel from 2001 to 2006 was $205 and that, during the group Crystal Meetings, the conspirators' per panel margin was $53 higher than it was after the group Crystal Meetings ended. SER2065-68, 2071. Dr. Leffler testified based on his margin analysis that overcharges on the conspirators' panels that came into the United States were "substantially above $500 million."

SER2060-61. Dr. Leffler concluded based on regression analysis that the overcharges were "certainly in excess of $2 billion." SER2055.

TFT-LCD panels are the single biggest cost component in a notebook computer or desktop monitor, comprising 30 to 40 percent of the cost of a notebook computer and 70 to 80 percent of a desktop monitor. SER2160, 2414-15. Therefore, the panel price increases made possible by the conspiracy directly impacted prices for those finished products. As Dell procurement manager Piyush Bhargava testified, there is "definitely correlation between what we do in the procurement function, and in the way we are able to then price the product in the market place." SER2165; *see also* SER2153-54, 2157; SER2423-24 (HP's Tierney testifying that when HP overpays for panels, it impacts the price of the finished product).

The conspirators themselves were well aware of the link between panel pricing and finished-product pricing. At a Crystal Meeting on February 6, 2002, defendant Hsiung proposed raising monitor panel prices slowly. ER762-64. As Hsiung explained, "[t]he greatest demand is in [monitors]. But, given the fact that the panel constitutes a relatively large portion of the [monitor] set cost, and since price-demand

elasticity and market impact are great, we must be prudent when raising [monitor] panel price." SER2222; *see also* ER763. Demand for the finished products was an important consideration for the conspirators because, as LG's Stanley Park explained to the jury, "if the panel price goes up, then it will directly impact the monitor set price." SER2223; *see also* SER2219.

F. The Conspiracy Is Ended by an FBI Raid

Relying on information provided by an informant, the FBI executed a search warrant at AUOA's offices in Houston, Texas, in late 2006. Only then did AUO and AUOA cease participation in the TFT-LCD panel price-fixing conspiracy. At the time of the search, Michael Wong and AUOA's HP account manager Roger Hu were attending a meeting at HP's offices in Houston. SER2319. When they learned that the FBI was searching AUOA's offices, Wong instructed Hu to begin deleting contact information for, and communications with, the conspiring companies from his cell phone and laptop computer. ER1384. Wong soon realized that any efforts to destroy evidence would be futile because the FBI had probably already seized his work computer. SER2315-16.

SUMMARY OF ARGUMENT

In September 2001, AUO, led by its President and Executive Vice President, defendants Hsuan Bin Chen and Hui Hsiung, agreed with the five other major manufacturers of TFT-LCD panels to raise prices on panels sold around the world. Defendants portray their conduct as a benign exchange of information about wholly foreign sales with hardly any connection to the United States. But that portrayal is impossible to reconcile with the trial evidence. The government proved that the conspirators systematically fixed prices on TFT-LCD panels, set up operations in the United States to sell price-fixed panels, and, ultimately sold $23.4 billion worth of these panels to U.S. purchasers. Defendants harmed every family, school, business, and government agency in the United States that paid more for notebook computers and computer monitors incorporating the price-fixed panels. The conspirators understood that their conduct was criminal: they discussed their fears of prosecution under the U.S. antitrust laws during their conspiracy meetings and took great pains to conceal their conduct.

Having been caught and found guilty beyond a reasonable doubt, defendants hope to escape punishment by claiming that, because they held conspiracy meetings abroad, the Sherman Act has no application and the district court no venue. But the conspirators acted in the United States—indeed, in the Northern District of California—to further their unlawful conspiracy, and they reaped billions of dollars in ill-gotten gains at the expense of their U.S. customers. That conspiracy meetings were held abroad does not change the felonious nature of defendants' conspiracy or undo the enormous harm it caused in the United States.

1. The Foreign Trade Antitrust Improvements Act (FTAIA) provides defendants no valid defense here. That statute limits the Sherman Act's application when the anticompetitive conduct involves export or wholly foreign commerce, but it leaves the Sherman Act fully applicable when the conduct either involves or affects U.S. import commerce. 15 U.S.C. § 6a. Because the indictment adequately alleged a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, it need not have negated the exception laid out in the FTAIA. Regardless, the indictment alleged that defendants' price-fixing conspiracy involved

import commerce—the conspirators fixed prices on panels imported into the United States—and that the conspiracy directly affected import commerce in the finished products incorporating price-fixed panels. The jury was properly instructed on the FTAIA defense—with instructions the defendants did not, in substance, dispute—and returned guilty verdicts.

The properly instructed jury also rejected defendants' extraterritoriality defense. The district court instructed that the Sherman Act reaches even wholly foreign conduct that has a substantial and intended effect in the United States. Defendants waived any challenge to this instruction when they told the district court it was a "correct statement" of the law and "should be given." ER1216. Their belated attack is also meritless because it is well settled "that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796-97 & n.24, 814 (1993). *Morrison v. National Australian Bank Ltd.*, 130 S. Ct. 2869 (2010), on which defendants rely, did not abrogate *Hartford Fire*, and defendants' attempt to limit *Hartford Fire* to the civil context is

unavailing. In any event, this case does not involve the extraterritorial application of the Sherman Act because, unlike the wholly foreign conduct at issue in *Hartford Fire*, defendants' conspiracy occurred, in part, in the United States.

Defendants' reliance on *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), is also unavailing. There, the Court held that determining whether conduct occurring abroad violates the Sherman Act requires "an examination of the impact of the [conduct] on commerce in the United States." *Id.* at 845. This is nothing more than a restatement of *Hartford Fire*—indeed, *Metro Industries* cites *Hartford Fire* for the point. Defendants argue that, because their conspiracy involved some foreign conduct, *Metro Industries* imposes additional burdens on the prosecution and allows defendants to argue to the jury that their price-fixing agreement was reasonable. But they misread the opinion, and their claims of deficiencies in the indictment, instructions, and proof lack merit.

2. The properly instructed jury also found venue in the Northern District of California. Defendants waived any attack on the venue instruction when they proposed it jointly with the government,

stipulated to it, and relied on it in closing argument. Defendants' belated challenges to this instruction are also meritless. The claim that venue must be proved beyond a reasonable doubt is foreclosed by precedent in every circuit. Similarly, there is no support for defendants' claim that a venue-establishing act must occur within the statute of limitations.

Because the indictment alleged overt acts in the district within the statute of limitations period, defendants claim that the jury instructions and the government's venue evidence constructively amended or fatally varied from the indictment. But venue allegations cannot be the basis of a constructive amendment because venue need not be presented to the grand jury. *Carbo v. United States*, 314 F.2d 718, 733 (9th Cir. 1963). And any variance from the indictment is not fatal here because it did not affect defendants' substantial rights, *id.* at 733, or mislead defendants in preparing their defense.

Defendants' claim of insufficient evidence supporting venue is also meritless. Acts in furtherance of a price-fixing conspiracy include not only acts reaching or coordinating the price agreement, but also acts advancing or effecting the sale of price-fixed products. *United States v.*

Trenton Potteries, Co., 273 U.S. 392, 403-04 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253 (1940). In this case, AUO and its co-conspirators set up operations in the district to market to, negotiate with, and sell to major U.S. computer companies located in the Bay Area. The jury saw more than forty emails to and from AUOA employees based in the Bay Area that contained competitor pricing communications and negotiations for the sale of price-fixed panels to AUO's customers. The jury easily could have concluded it was more likely than not that an overt act furthering the conspiracy occurred in the Northern District of California.

Defendants' claim that the prosecutor misstated the venue evidence during his rebuttal closing argument and thereby deprived them of due process is unsupported by the record. The prosecutor fairly characterized the record evidence and remained comfortably within his "considerable leeway" to argue "all reasonable inferences from the evidence." *United States v. Hermanek*, 289 F.3d 1076, 1100 (9th Cir. 2002).

3. Lastly, AUO's $500 million fine does not exceed the maximum authorized by law. Under 18 U.S.C. § 3571(d), "[i]f any person derives

pecuniary gain from the offense, . . . the defendant may be fined not more than . . . twice the gross gain." Here, the government pleaded and the jury found beyond a reasonable doubt that the conspirators derived gross gains of at least $500 million from the offense—the charged price-fixing conspiracy—thereby authorizing a fine of up to $1 billion. AUO argues that the relevant gain for purposes of Section 3571(d) is the defendant's own gain, but this argument is foreclosed by the statute itself. Its use of "any person" makes clear that gain from the offense is not limited to defendant's own gain. And though resorting to legislative history is unnecessary here because the statute's language is clear, that history also contradicts AUO's argument.

AUO contends that, if Section 3571(d) authorizes a maximum fine of twice the gain to all conspirators, then the total fines imposed on all conspirators cannot exceed that maximum. AUO relies on torts treatises and forfeiture cases for this creative argument. But once again, the argument is foreclosed by the statute itself, which sets a maximum fine for "the defendant," singular, and not a collective maximum for all culpable participants who may be charged with the same offense.

ARGUMENT

I. Defendants Were Properly Convicted of Conspiring to Fix Prices in Violation of U.S. Law

Defendants were charged with and convicted of joining a price-fixing conspiracy that occurred in part in the United States, restrained U.S. commerce, and ultimately caused billions of dollars of harm to U.S. purchasers. On appeal, defendants do not contest that they and their co-conspirators fixed the price of TFT-LCD panels, AUO Br. 9, that they carried out this conspiracy in part in the United States, Hsiung/Chen Br. 60, or that billions of dollars in price-fixed panels were shipped to the United States either as raw panels or incorporated into finished products, AUO Br. 61 n.16, 62. Instead, they claim that, because their price-fixing meetings took place abroad, the entire conspiracy is beyond the Sherman Act's reach. In defendants' view, by merely off-shoring their conspiracy meetings, they have effectively neutralized the Sherman Act, rendering U.S. prosecutors powerless to protect U.S. commerce and purchasers from the billions of dollars of harm the conspirators caused. But the Sherman Act is not as feeble as defendants contend.

A. The Sherman Act Protects U.S. Commerce from Restraints of Trade

Section 1 of the Sherman Act outlaws agreements "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. In passing the Sherman Act, Congress "wanted to go to the utmost extent of its constitutional power" in an effort to preserve competition in or affecting U.S. commerce. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974) (internal citation omitted). Thus, its prohibition on agreements restraining trade among the states reaches not only conduct in the flow of interstate commerce but also wholly local conduct that nevertheless substantially affects interstate commerce. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980); *see, e.g.*, *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-38 (1948) (finding unlawful restraint in local commerce in sugar beets had the requisite effect on interstate commerce in sugar).

Similarly, the Sherman Act's prohibition on agreements restraining trade with foreign nations goes to the full extent of Congress's constitutional power over foreign commerce. *See Pac. Seafarers, Inc. v. Pac. Far E. Line, Inc.*, 404 F.2d 804, 815 (D.C. Cir. 1968). So broad was

the Sherman Act's application to trade with foreign nations, that Congress became concerned that U.S. exports would suffer as courts applied the statute to anticompetitive conduct involving only export commerce or wholly foreign commerce with no adverse impact in the United States. Pub. L. No. 97-290, § 102(b), 96 Stat. 1233, 1234; *see also* H.R. Rep. No. 97-686, at 7-8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494. Congress's solution was to refine the required nexus to U.S. commerce for some "trade or commerce . . . with foreign nations" by enacting the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).

The FTAIA added a new section to the Sherman Act:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a.

The FTAIA "seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004).

While Congress sought to give some comfort to U.S. exporters and firms operating in wholly foreign commerce, it also sought to ensure that purchasers in the United States remained fully protected by the federal antitrust laws. For that reason, the FTAIA provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations," and thus it leaves the Sherman Act fully applicable to conduct involving import commerce. 15 U.S.C. § 6a.[2] *See also Minn-Chem, Inc. v.*

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[2] Although this is commonly referred to as the FTAIA's "import commerce exception," the term is a misnomer. "Import trade and commerce are excluded at the outset from the coverage of the FTAIA in

Agrium, Inc., 683 F.3d 845, 854 (7th Cir. 2012) (en banc) (The limitations in the FTAIA were "inspired largely by international comity," but "there was no need for this self-restraint with respect to imports."); H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494 (The import commerce language was included so there would be "no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law.").

Import commerce includes the sale of goods from outside the United States into the United States. Accordingly, a price-fixing conspiracy among foreign manufacturers "involv[es]" import commerce, 15 U.S.C. § 6a, if the conspirators fix the price of goods sold in or for delivery to the United States—i.e., goods in import commerce. *See Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 471 n.11 (3d Cir. 2011) (emphasizing the importance of defendants' "sales of magnesite for delivery in the United States" in determining whether the import commerce exclusion applies); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438 n.3, 440 (6th Cir. 2012) (finding a conspiracy to raise the price

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the same way that domestic interstate commerce is excluded." *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 854 (7th Cir. 2012) (en banc).

of copper tubing manufactured abroad and sold into the United States involved import commerce).

In addition, the FTAIA includes an exception for conduct involving only non-import foreign commerce—that is, U.S. export commerce or wholly foreign commerce, *Empagran*, 542 U.S. at 162-63—that nevertheless affects certain U.S. commerce. The FTAIA leaves the Sherman Act applicable to such conduct if it has a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States, U.S. import commerce, or the export trade of a U.S. exporter. 15 U.S.C. § 6a(1).

The FTAIA makes application of the Sherman Act turn on the type of commerce involved or affected, and not on the location of the conduct. Delineating the application of the Sherman Act in this way makes sense because antitrust violations, by their nature, may be committed in one country but cause harm in another. Indeed, potentially anticompetitive activity by U.S. exporters in the United States is precisely the sort of conduct Congress sought to exclude from the Sherman Act so long as it affects only non-import foreign commerce. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 814 (9th Cir. 1988) (noting the FTAIA

exempts from U.S. antitrust law certain conduct even though it originates in the United States). Conversely, the FTAIA leaves the Sherman Act fully applicable to conduct that involves or affects U.S. import commerce, even if the conduct takes place entirely outside the United States.

The location of the conduct is not necessarily irrelevant, however, where an "extraterritoriality defense" is raised. A conspiracy to violate the federal antitrust laws is "a partnership in crime; and an overt act of one partner may be the act of all." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940) (internal quotation marks omitted). Thus, once a participant acts in the United States to further a conspiracy in restraint of U.S. commerce—that is, with the necessary nexus to U.S. commerce—the entire conspiracy is within the Sherman Act's reach, regardless of where else conspiratorial acts may have occurred.

In addition, the Sherman Act applies extraterritorially—that is, to wholly foreign conduct. Again, the Sherman Act's broad language was purposefully chosen to occupy the fullest extent of Congress's constitutional power over commerce. *Summit Health, Ltd. v. Pinhas*,

500 U.S. 322, 328-29 & nn.7, 10 (1991). And Congress's exercise of "the full sweep of its commerce power is not without significance in determining whether the Sherman Act applies" to conduct that, while undertaken abroad, is a "restraint[] that operate[s], in the constitutional sense, against the 'foreign commerce' of the United States." *Pac. Seafarers*, 404 F.2d at 815.

Thus, by 1993, the Supreme Court considered it "well established" that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796-97 & n.24 (1993); *see id.* at 814 (Scalia, J., dissenting) ("We have . . . found the presumption [against extraterritoriality] overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially.").[3] So even "wholly foreign conduct which has an intended and substantial effect in the United States" is within the Sherman Act's reach. *United States v. Nippon Paper Indus. Co.*, 109

[3] The Court in *Hartford Fire* declined to consider whether the FTAIA supplanted prior precedent on the extraterritorial application of the Sherman Act. *See infra* p. 64 n.11. Thus, this brief addresses both the FTAIA's requirements, *see infra* pp. 41-63, and the *Hartford Fire* holding, *see infra* pp. 63-93.

F.3d 1, 4 (1st Cir. 1997); *see also Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 845 (9th Cir. 1996) (The "potential illegality [under the Sherman Act] of actions occurring outside the United States requires an inquiry into the impact on commerce in the United States.").

Together, the FTAIA and *Hartford Fire*'s effects requirement impose sensible but discrete limits on the reach of the Sherman Act to foreign conduct and foreign commerce. These limits preclude application of the Sherman Act to wholly foreign conspiracies that neither involve nor affect U.S. commerce, while ensuring that U.S. commerce and U.S. purchasers remain fully protected from anticompetitive conduct wherever it occurs.

Defendants would turn this body of law on its head, using these limitations to shield themselves from punishment for conduct that both took place here and substantially harmed U.S. commerce and U.S. purchasers. But the jury was properly instructed on the requirements of the FTAIA and *Hartford Fire*, *see* ER1155-56, and it found beyond a reasonable doubt that the government's evidence was sufficient to convict. Notwithstanding the jury's verdict, defendants now argue (1) that the government failed to plead and prove the FTAIA's exceptions;

(2) that the Sherman Act does not apply at all to a conspiracy involving foreign conduct, even if it takes place in part in the United States and has effects in the United States; and (3) that, because the conspiracy involved some foreign conduct, defendants should have been allowed to argue to the jury that they were somehow justified in fixing prices to U.S. purchasers. Many of these arguments were waived by the defendants, and all are meritless.

B. The Government Pleaded and Proved the Required Nexus to U.S. Commerce

Defendants make two arguments related to the FTAIA. First, they contend that the indictment failed to plead that the Sherman Act applies to their price-fixing conspiracy in light of the FTAIA. This claim is based on a misunderstanding of both the requirements for pleading a Sherman Act violation and the implications of the FTAIA. Second, defendants contend that the trial evidence was insufficient to prove that one of the FTAIA's exceptions applied. This claim, too, is based on a misunderstanding of the FTAIA. The jury in this case was properly

instructed on the FTAIA, and the evidence amply supports its guilty verdict.[4]

1. The Indictment Charged a Violation of Section 1 of the Sherman Act

The sufficiency of an indictment is reviewed de novo. *United States v. Awad*, 551 F.3d 930, 935 (9th Cir. 2009). An indictment must be a "plain, concise, and definite written statement of the essential facts constituting the offense charged," Fed. R. Crim. P. 7(c)(1), and it is sufficient if it states "the elements of the charged crime in adequate detail to inform the defendant of the charge and to enable him to plead

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[4] This Court has treated the FTAIA as a limit on a court's subject-matter jurisdiction and thus as a question for the judge to decide. *See United States v. LSL Biotechnologies*, 379 F.3d 672, 679-80 & n.5 (9th Cir. 2004); *McGlinchy*, 845 F.2d at 815. The district court below in a related civil case concluded, however, that the FTAIA implicates the merits, not subject-matter jurisdiction. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 957-59 (N.D. Cal. 2011) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006), and *Animal Sci.*, 654 F.3d at 468-69); *see also Minn-Chem*, 683 F.3d at 851-53. In recognition of that conclusion in the related case and out of an abundance of caution, the government agreed to submit the FTAIA question to the jury, which found beyond a reasonable doubt that its requirements were met. Therefore, this Court need not decide whether the FTAIA is a jurisdictional limit. *Cf. In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 985 n.3 (9th Cir. 2008) (declining to resolve whether FTAIA withdraws jurisdiction from the federal courts).

double jeopardy," *Awad*, 551 F.3d at 935 (internal quotation marks omitted).

An indictment "should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied." *United States v. Givens*, 767 F.2d 574, 584 (9th Cir. 1985); *see also United States v. Inryco, Inc.*, 642 F.2d 290, 294 (9th Cir. 1981). And while an indictment need not "conform exactly to the language of the applicable statute," *Hockenberry v. United States*, 422 F.2d 171, 173-74 (9th Cir. 1970), one that "tracks the words of the statute charging the offense" is sufficient so long as it sets forth the elements necessary to constitute the offense, *United States v. Davis*, 336 F.3d 920, 922 (9th Cir. 2003) (internal quotation marks omitted).

Defendants were charged with violating Section 1 of the Sherman Act, which outlaws "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," 15 U.S.C. § 1, and the indictment tracked the language of that statute. Specifically, it alleged defendants "entered into and engaged in a combination and conspiracy to suppress and eliminate competition by fixing the prices of thin-film transistor liquid crystal display panels

('TFT-LCD') in the United States and elsewhere," and that this conspiracy "was in unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1)." ER1723 ¶ 2.[5]

Defendants contend that the indictment was insufficient because it did not "mention, much less cite, the FTAIA." AUO Br. 52. That the indictment includes no citation to 15 U.S.C. § 6a is of no significance. "[N]either an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction" absent proof the defendant was misled and thereby prejudiced. Fed. R. Crim. P. 7(c)(2). Given that defendants' motion to dismiss the indictment relied heavily on the FTAIA, ER1663-71, they cannot claim to have been misled as to its potential relevance.

Moreover, defendants were not charged with violating the FTAIA. They were charged with violating Section 1 of the Sherman Act. An indictment "founded on a general provision defining the elements of an

[5] The indictment provided numerous details, including specific information about the nature of the conspiratorial agreement, the TFT-LCD panel sizes at issue, the uses of those panels in notebook computers, desktop monitors, and televisions, and the approximate dates and location of conspiratorial meetings. ER1727-32 ¶¶ 17-18.

offense . . . need not negative the matter of an exception made by a proviso or other distinct clause." *McKelvey v. United States*, 260 U.S. 353, 357 (1922); *see also United States v. Gravenmeir*, 121 F.3d 526, 528 (9th Cir. 1997) (applying this Court's "well-settled rule that a defendant bears the burden of proving he comes within an exception to an offense" in holding that exceptions do not create "additional elements of the offense"). This is true even if the government bears the ultimate burden of proving that the defendant's conduct falls within the reach of the statute. *See United States v. Bruce*, 394 F.3d 1215, 1222-23 (9th Cir. 2005) ("Government need not allege the non-Indian status of the defendant in an indictment" but "retains the ultimate burden of persuasion . . . that the exception [the defendant] claims is inapplicable.").

The FTAIA defines a narrow class of conduct—conduct involving only export or wholly foreign commerce without certain effects on U.S. commerce—to which the Sherman Act does not apply. 15 U.S.C. § 6a. Essentially, it provides U.S. exporters and firms operating in wholly foreign commerce a defense to liability under the Sherman Act. While defendants argued unsuccessfully at trial that this defense applied to

their price-fixing conspiracy, the indictment need not have anticipated defendants' argument. *See United States v. Sisson*, 399 U.S. 267, 288 (1970) ("It has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses.").

Moreover, by charging a violation of Section 1 of the Sherman Act, the government alleged that the conduct was within the reach of that statute. The government "need not allege its theory of the case or supporting evidence, but only the essential facts necessary to apprise a defendant of the crime charged." *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982) (internal quotation marks omitted). Thus, there is no merit to defendants' claim that the indictment was deficient because it failed to "specify which theory of the FTAIA" the government would rely on to defeat defendants' claim that the Sherman Act was inapplicable, AUO Br. 53.

2. The Indictment Pleaded Both the FTAIA's Import Commerce and Effects Exceptions

In any event, the indictment did plead the FTAIA's import commerce exception and its effects exception by alleging that defendants' price-fixing conspiracy both involved U.S. import commerce and had the requisite effect on U.S. import commerce.

a. The Indictment Alleged that Defendants Fixed the Price of TFT-LCD Panels Sold in U.S. Import Commerce

With respect to the FTAIA's import commerce exception, the indictment alleged that defendants fixed the price of TFT-LCD panels sold to customers in the United States. ER1723 ¶ 2, ER1724 ¶¶ 4-5, ER1730-31 ¶ 17(j)-(k). While defendants apparently read these allegations to refer only to panels sold abroad and incorporated into finished products sold into the United States, the allegations in the indictment are not so limited. Fixing the price of panels made abroad and sold as raw panels in, or for delivery to, the United States is conduct involving import trade or import commerce. *See Animal Sci.*, 654 F.3d at 471 n.11. Thus, these allegations are sufficient to plead the FTAIA's import commerce exception.

Defendants fault the indictment for failing to allege defendants "were engaged in importing," AUO Br. 55, but their argument that the import commerce exception applies only when defendants themselves import the price-fixed product finds no support in the statutory language or the case law. The FTAIA leaves the Sherman Act applicable, not just to the conduct of importers, but to any conduct that involves import commerce. Thus, "[f]unctioning as a physical importer

may satisfy the import trade or commerce exception, but it is not a necessary prerequisite." *Animal Sci.*, 654 F.3d at 470.

Minn-Chem, on which defendants rely, AUO Br. 54-55, holds that allegations that plaintiffs "purchased potash directly from members of the alleged cartel" were sufficient to meet the import commerce exception. *Minn-Chem*, 683 F.3d at 855. The decision says nothing, however, about whether defendants themselves imported potash or what other allegations might be sufficient to meet the exception. Moreover, the narrow interpretation of the import commerce exception urged by defendants would be contrary to the FTAIA's broad purpose to ensure that purchasers in the United States remain fully protected by the federal antitrust laws. *See* H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494; *Minn-Chem*, 683 F.3d at 854.

Similarly, the indictment is not deficient for failing to allege defendants' conduct was "'directed' or 'targeted' at United States imports," AUO Br. 56-57. The words "directed" and "targeted" do not appear in the Sherman Act, either in Section 1 or Section 6a, the proviso added by the FTAIA. Thus, those words cannot be said to constitute an element of the offense. And to the extent defendants

contend that a price-fixing conspiracy must particularly or uniquely target U.S. import commerce in order to fall within the import commerce exception, they misstate the law.

Animal Science, on which defendants rely, AUO Br. 56-57, does not support their argument. The *Animal Science* court distinguished *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293 (3d Cir. 2002), where the import commerce exception was not applicable, from *Carpet Group International v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), where it was. *Animal Sci.*, 654 F.3d at 470. In *Turicentro*, the defendant airlines were alleged to have "only set the rates that foreign-based travel agents could charge for their services." 303 F.3d at 303. Because no import commerce was covered by the agreement, the conduct in *Turicentro* did not involve import commerce. In contrast, in *Carpet Group*, the complaint alleged a conspiracy to prevent the plaintiff from importing oriental rugs. 227 F.3d at 72. Defendants' conduct allegedly restrained trade in rugs being sold into the United States and was, therefore, conduct involving import commerce.

The *Animal Science* court merely distinguished conduct that restrains import commerce from conduct that does not. It did not

impose an additional requirement that the conduct uniquely or predominantly restrain import commerce. Moreover, under defendants' interpretation of the FTAIA, price fixers outside the United States could immunize themselves from U.S. prosecution merely by extending the scope of their price fixing well beyond the United States. Nothing in the FTAIA provides a textual basis for such a loophole, which would greatly undermine the purposes of the FTAIA. "Our markets benefit when antitrust suits stop or deter any conduct that reduces competition in our markets regardless of where it occurs and whether it is also directed at foreign markets." *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 393 (2d Cir. 2002), *abrogated on other grounds by Empagran*, 542 U.S. 155.

b. The Indictment Alleged the Required Effect on U.S. Import Commerce in Finished Products

The indictment also alleged the facts necessary to plead the FTAIA's effects exception. There is, therefore, no merit to defendants' claim of constructive amendment. AUO Br. 57-59. "[A] constructive amendment is simply a variance that has resulted in the denial of a defendant's right to the popular judgment of a grand jury." *United States v. Jingles*, 702 F.3d 494, 502 (9th Cir. 2012). But where, as here, "an indictment provided adequate notice and protection against double

jeopardy," any "variance did not deny the defendant his right to the popular scrutiny of the grand jury." *Id.*[6]

The FTAIA's effects exception leaves the Sherman Act applicable to conduct involving wholly foreign commerce that nevertheless has a direct, substantial, and reasonably foreseeable effect on import commerce. 15 U.S.C. § 6a. The indictment here alleged an agreement to fix the price of TFT-LCD panels sold to customers located in the United States. ER1730-31 ¶¶ 17(j)-(k). While some of those panels were sold for delivery in the United States—and thus in import commerce—most were sold to U.S. companies for delivery to the purchasers' foreign affiliates, incorporated into finished products, and imported into the United States.

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[6] Defendants claim that, prior to trial, the government argued that the indictment pleaded the import commerce exception but that "no one then suggested that the government had pleaded the domestic effects exception." AUO Br. 57-58. In fact, in response to defendants' motion to dismiss, the government argued, as it does now, that the indictment adequately alleged the elements of Section 1 of the Sherman Act. ER1639-42. As set forth in that response, the government's consistent position has been that the FTAIA is not an impediment to this prosecution because the indictment alleged that defendants' conduct had substantial "domestic effects." ER1641.

The indictment specifically alleged the "substantial terms" of defendants' conspiracy were "to agree to fix the prices of TFT-LCDs for use in notebook computers, desktop computer monitors, and televisions in the United States and elsewhere." ER1723 ¶ 3; *see also* ER1728 ¶ 17(e) ("[T]he participants in the Crystal Meetings reached price agreements on certain sized TFT-LCD used in computer notebooks and monitors."). And the indictment provided details about those finished products incorporating price-fixed panels. ER1723 ¶ 3, 1732 ¶ 18. There would have been no reason to include allegations about finished products other than to indicate that the conspiracy affected import commerce in those products.

Finally, the indictment alleged that defendants' conspiracy was "in unreasonable restraint of interstate and foreign trade and commerce," ER1723 ¶ 2, and that the co-conspirators "derived gross gains of at least $500,000,000" from the conspiracy, ER1734 ¶ 23. Thus, the indictment alleged that defendants conspired to fix the price of TFT-LCD panels, and one can reasonably infer from the allegations of substantial gains that the conspiracy successfully raised the prices of those panels. The indictment also alleged that those price-fixed panels were incorporated

into many finished products imported into the United States. Read in its entirety and with common sense, *Givens*, 767 F.2d at 584, the indictment adequately alleged that defendants' panel price fixing had a direct, substantial, and reasonably foreseeable effect on import commerce in those finished products identified in the indictment.

3. Substantial Evidence Proved the Nexus to U.S. Commerce Required by the FTAIA

Relying on the FTAIA, the district court instructed the jury that, in order to convict, it must find the government proved beyond a reasonable doubt that members of the conspiracy engaged in one or both of the following activities:

> A, fixing the price of TFT-LCD panels targeted by the participants to be sold in the United States, or for delivery to the United States, or
>
> B, fixing the price of TFT-LCD panels that were incorporated into finished products, such as notebook computers, desktop computer monitors, and televisions; and that this conduct had a direct substantial and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States, or for delivery to the United States.

ER1156.[7]

[7] This instruction rendered unnecessary the conventional instruction on the required nexus to interstate or foreign commerce in criminal

Defendants did not challenge the propriety of these instructions in the district court,[8] and they do not do so on appeal. Rather, they argue that the evidence was insufficient to allow the jury to convict on either basis.

"Claims of insufficient evidence are reviewed de novo." *United States v. Shipsey*, 363 F.3d 962, 971 n.8 (9th Cir. 2004). "There is sufficient evidence to support a conviction if, 'viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a

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prosecutions under the Sherman Act. Ordinarily, courts instruct jurors that, to convict, they must find the conspiracy either affected interstate or foreign commerce in goods and services or it occurred within the flow of interstate or foreign commerce in goods and services. *See* ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* 47, 82-83 (2009); *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992); *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1230 n.2 (8th Cir. 1992). In that context, proof of "indirect," "fortuitous," or unintended actual effects, as well as any "potential" effects had the conspiracy been successful, is sufficient. *Summit Health*, 500 U.S. at 329-30. This conventional instruction was unnecessary in light of the FTAIA instruction above, and thus, without objection, the court gave only the FTAIA commerce instruction.

[8] The district court sustained defendants' only objection to the government's proposed instruction on the import commerce exception—that it failed to include the word "targeted." ER1159-60, 1217-18. Defendants' only objection to the instruction on the effects exception was that the theory was not alleged in the indictment and that the jury should not be instructed on it. ER1218.

reasonable doubt.'" *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Moreover, a general verdict should not be set aside "because one of the possible bases of conviction was . . . merely unsupported by sufficient evidence." *Griffin v. United States*, 502 U.S. 46, 56 (1991). Thus, the jury's verdict must be upheld if the evidence is sufficient as to either of the alleged theories. The government presented ample evidence on both.

a. The Evidence Proved the Conspiracy Involved U.S. Import Commerce in TFT-LCD Panels

In challenging the sufficiency of the evidence supporting the import commerce exception, defendants focus primarily on evidence related to panels both sold and incorporated into finished products abroad. AUO Br. 60-62. This argument misses the point. The government relied on evidence of price-fixed raw panels imported into the United States for the import commerce exception, not on evidence of panels incorporated into finished products.

Defendants concede that the government presented evidence that 2.6 million of the conspirators' price-fixed raw panels—priced at more than $638 million—were shipped into the United States between

October 2001 and June 2006. AUO Br. 61 n.16 (citing ER617); *see also* SER2075-76. Nor do defendants contest HP procurement official Timothy Tierney's testimony that HP paid AUO for raw panels shipped to HP's facility in the United States. ER1443.

Instead, defendants claim that the volume of price-fixed imports at issue here is "small," at least as a proportion of the total volume of price-fixed panels, and that selling "panels directly to the U.S. . . . hardly makes AUO an importer." AUO Br. 61 n.16. As discussed above, *see supra* pp. 47-48, AUO need not be "an importer" to engage in anticompetitive conduct involving import commerce. It is sufficient that the conspirators sold price-fixed products for delivery to the United States, and the undisputed evidence shows that they did. Nor is there any basis for defendants' suggestion that the price-fixed imports must constitute a large portion of the total volume of price-fixed products.

To the extent that defendants suggest that only AUO's panel imports are relevant here, *see* AUO Br. 61 n.16, they are wrong. The FTAIA leaves the Sherman Act applicable to *conduct* involving import commerce. 15 U.S.C. § 6a. The term "conduct" refers to activity that might violate the Sherman Act, which in this case is a single conspiracy

among AUO and the other panel makers to fix the price of panels. Thus, the conspiratorial agreement and any acts in furtherance of it by any conspirator are the "conduct" for purposes of the FTAIA. *See Socony-Vacuum*, 310 U.S. at 253-54. Whether the charged conspiracy involved import commerce, therefore, turns not on the acts of any particular defendant, but on whether the price-fixing agreement and the conspirators' acts in furtherance of it involved import commerce.

b. The Evidence Proved the Required Effect on U.S. Import Commerce in Finished Products

Defendants do not contest that the government proved the price-fixing conspiracy had a substantial and reasonably foreseeable effect on import commerce in finished products, but they argue that this effect cannot be "direct" under the FTAIA. AUO Br. 63. This argument ignores the record evidence and misreads the applicable case law.

The jury heard testimony that the price-fixing conspiracy enabled its participants to raise prices for their TFT-LCD panels sold to U.S. customers. SER1971, 2091-92, 2306-11. Indeed, the government's expert estimated that the average price per panel from 2001 to 2006 was $205 and that, during the group Crystal Meetings, the conspirators' average per-panel margin was $53 higher than after the group Crystal

Meetings ended. SER2065-68, 2071. The price-fixed panels are the single largest cost component of the finished products, accounting for 70 to 80 percent of the cost of finished monitors and 30 to 40 percent of the cost of finished notebook computers, SER2160, 2414-15, which were assembled abroad and imported into the United States, SER2414-16.

As Dell procurement official Piyush Bhargava testified, "there is definitely correlation between what we do in the procurement function, and in the way that we are able to then price the product in the marketplace, and offer the right deals to . . . our customers." SER2165; *see also* SER2423-24 (HP's Tierney testifying that when HP overpays for panels, it impacts the price of the finished product). The conspirators themselves understood well the impact of panel prices on sales of finished products. Indeed, defendant Hsiung suggested to his co-conspirators that they take into account demand for finished products when agreeing on how high to raise the price of panels. ER763; SER2222-23.

The jury could have readily concluded from this evidence that the conspirators' inflated panel prices resulted in inflated prices for finished products imported into the United States. As co-conspirator Stanley

Park of LG explained, that effect on import commerce in the finished products was direct. SER2223 ("[I]f the panel price goes up, then it will directly impact the monitor set price").

United States v. LSL Biotechnologies, 379 F.3d 672 (9th Cir. 2004), on which defendants rely, AUO Br. 63-64, provides them no support. The civil complaint in *LSL* alleged that an agreement between U.S. and foreign biotech firms reduced the likelihood of innovations that could result in the development of long-shelf-life tomato seeds suitable for North American farmers. 379 F.3d at 681. This Court found the alleged effect—which depended upon the development of seeds that did not yet exist—too speculative and too dependent on uncertain intervening developments to be characterized as "direct." *Id.* at 681 & n.7.[9]

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[9] In *LSL Biotechnologies*, the government argued, unsuccessfully, that a "direct" effect in the FTAIA context is one with a "proximate cause relationship." 379 F.3d at 692 (Aldisert, J., dissenting). In *Minn-Chem*, the government similarly proposed, and the Seventh Circuit agreed, that "direct" means a "reasonably proximate causal nexus." 683 F.3d at 856-57. Although the government believes that the Seventh Circuit's interpretation is correct, it is not necessary to revisit *LSL Biotechnologies* here, because defendants' conspiracy had a "direct" effect on import commerce in finished products under either interpretation.

The actual effect of defendants' conspiracy on import commerce in finished products is nothing like the hypothetical effect found not to be direct in *LSL*. Unlike the not-yet-developed tomato seeds at issue in *LSL*, TFT-LCD panels do exist, and defendants and their co-conspirators sold them to U.S. firms at inflated prices to be incorporated into finished products imported into the United States. The evidence showed that the inflated panel prices led "directly" to increased prices for the finished products. SER2223. There are no intervening developments—let alone uncertain ones—breaking the causal relationship between defendants' conduct and the effect on import commerce in finished products. The jury need not have speculated to appreciate how a conspiracy to fix the price of the single largest cost component of monitors and notebook computers affected import commerce in those finished products.

Defendants contend that the effect here "depended entirely on intervening actors—namely, the [original equipment manufacturers]" that integrated the price-fixed panels into finished products—and that there is no evidence the "higher prices were passed on, through the manufacturing chain, to consumers." AUO Br. 64. But panel prices

were negotiated directly with the U.S. computer companies like Apple, HP, and Dell. ER1467; SER2140-41, 2375-83, 2419-20. And the evidence is clear that increased panel prices had a direct effect on the prices of their notebook computers and computer monitors. SER 2133, 2136-37, 2165, 2222-23, 2423-24.

Finally, defendants cite three district court decisions, none of which supports their argument. In *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F. Supp. 2d 1003 (N.D. Ill. 2001), defendants allegedly prevented plaintiffs from manufacturing and selling a tuberculosis drug, but the court found no evidence that plaintiffs intended to sell the drug in the United States, and therefore, "no effect on any United States commerce" as required by the FTAIA. *Id.* at 1007, 1009.[10] In contrast, here, the finished products were sold in the United States at higher prices because of defendants' conspiracy.

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[10] To the extent that the district court in *United Phosphorus* concluded that the FTAIA "explicitly bars antitrust actions alleging restraints in foreign markets for inputs (such as [the chemical] AB) that are used abroad to manufacture downstream products (like ethambutol) that may later be imported into the United States," 131 F. Supp. 2d at 1014, that court was wrong. The direct effects exception explicitly leaves the Sherman Act applicable to restraints in wholly foreign commerce that nevertheless affect U.S. import commerce. If that exception is read to exclude restraints of wholly foreign commerce in

The plaintiff in *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F. Supp. 2d 555 (D. Del. 2006) (*Intel I*), argued that defendants' monopoly in non-import foreign commerce had a direct effect on U.S. commerce because lost foreign sales by plaintiff's foreign subsidiary reduced plaintiff's profitability, which in turn affected its ability to discount to U.S. customers, reduced revenues to its shareholders, and reduced its competitiveness in the United States. *Id.* at 560-61. The court rejected the plaintiff's argument because the alleged effect was premised on "a multitude of speculative and changing factors affecting business and investment decisions." *Id.* at 561; *see also In re Intel Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452 (D. Del. 2007) (rejecting claim of direct effect based on "same allegations" as in *Intel I*).

Unlike the speculative chain of events at issue in *Intel I*, the effect of defendants' price-fixing conspiracy proceeded without deviation or interruption from the panel manufacturers that fixed panel prices to the inflated prices on monitors and notebook computers imported into the United States. As the district court below explained in a related

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one product that affect U.S. import commerce in a closely related product, then the exception is largely superfluous.

civil case, "[w]here, as here, the nature of the effect does not change in any substantial way before it reaches the United States consumer, the effect is an 'immediate consequence' of the defendant's anticompetitive behavior." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 964 (N.D. Cal. 2011). "[B]ecause the effect of defendants' anticompetitive conduct did not change significantly between the beginning of the process (overcharges for LCD panels) and the end (overcharges for televisions, monitors, and notebook computers)," it is "direct" for purposes of the FTAIA. *Id.*

C. No "Extraterritoriality Defense" Bars the Convictions

Relying on *Hartford Fire*, the district court explained to the jury that the "Sherman Act applies to conspiracies that occur, at least in part, within the United States" and that it "also applies to conspiracies that occur entirely outside the United States, if they have a substantial and intended effect in the United States." ER1155. Thus, the district court instructed the jury that it must find beyond a reasonable doubt one or both of the following:

> A, that at least one member of the conspiracy took at least one action in furtherance of the conspiracy within the United States, or,

> B, that the conspiracy had a substantial and intended effect in the United States.

Id.

Defendants do not dispute that the evidence was sufficient to allow the jury to convict under these instructions. Instead, they argue that their convictions must be vacated because their price-fixing conspiracy involved foreign conduct and the Sherman Act does not apply extraterritorially. Defendants assert this belated extraterritoriality defense to challenge both the jury instructions and the indictment. But their argument is flawed in two fundamental respects. First, the Sherman Act does apply extraterritorially, "to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire*, 509 U.S. at 796-97 & n.24.[11] Indeed, the

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[11] The Supreme Court rested its "substantial and intended effects" requirement on cases that predate the FTAIA, and it expressly declined to consider whether the FTAIA "amends the existing law or merely codifies it" because "[a]ssuming that the FTAIA's standard affects this litigation, and assuming further that that standard differs from the prior law, the conduct alleged plainly meets its requirements." 509 U.S. at 796 n.23. If the FTAIA supplanted prior precedent on the extraterritorial application of the Sherman Act, the jury's findings with regard to the FTAIA alone are sufficient to sustain the convictions. *See McGlinchy*, 845 F.2d at 813 n.8 ("In an effort to provide a single standard for the issue of extraterritorial application of the Sherman Act, Congress enacted section 6a."). This Court need not decide that

district court so-instructed the jury at defendants' urging. ER1218. Second, this case does not require the extraterritorial application of the Sherman Act because defendants' conspiracy was conducted, in part, in the United States.

1. Defendants Waived Any Attack on the Instructions Regarding the Sherman Act's Extraterritorial Reach

While defendants objected to part A of this instruction, they all agreed that B "is a correct statement of the *Hartford Fire* requirements for establishing extraterritorial jurisdiction over foreign anticompetitive conduct, and should be given." ER1216; *see also* ER1241-46 (defense counsel repeatedly invoking *Hartford Fire*). When the defendants themselves "propose[] allegedly flawed jury instructions," and thereby "relinquish[] or abandon[] a known right," this Court denies review of the alleged error under the invited error doctrine. *United States v. Perez*, 116 F.3d 840, 844-45 (9th Cir. 1997) (en banc); *see also United States v. Baldwin*, 987 F.2d 1432, 1437 (9th Cir. 1993).

There can be no doubt that the defendants "considered the controlling law" before urging the court to give what they now claim is a

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question, however, because the jury was also instructed on *Hartford Fire*'s requirements.

flawed instruction. *Perez*, 116 F.3d at 845. The applicability of the Sherman Act to foreign conduct and foreign commerce was the subject of numerous pre-trial motions, in which defendants repeatedly invoked *Hartford Fire*. *See, e.g.*, ER1624-36, 1648-72; SER2448-69. Because defendants requested the instruction they now claim is erroneous and thereby relinquished their right to challenge its legal foundation, the claimed error is waived and unreviewable. *United States v. Cain*, 130 F.3d 381, 383 (9th Cir. 1997) ("When an attorney signs a jury instruction proposal, he certifies to the court, as an officer of that court, that the instructions are legally correct.")

Even if defendants' claim of error was not waived and unreviewable, the instruction can be reviewed only for plain error because defendants did not object to the instruction in the district court. *United States v. Moreland*, 622 F.3d 1147, 1165-66 (9th Cir. 2010). To satisfy the plain error standard, defendants must show that there has been an error that was plain, affected substantial rights, and seriously affected the fairness, integrity, or public reputation of the judicial proceeding. *Id.* at 1166. For the reasons explained below, defendants cannot carry their burden with respect to the court's instructions.

2. The Jury Was Properly Instructed on the Sherman Act's Extraterritorial Reach

Part B of the jury instruction is, as defendants told the district court, a "correct statement" of the Sherman Act's extraterritorial reach. And defendants' new-found argument that *Hartford Fire* is wrong and that the Sherman Act does not apply to foreign conduct regardless of its impact on the United States is without merit. It is also directed at the wrong court, for "it is [the Supreme] Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

Hartford Fire's holding is fully supported by the Sherman Act's language. Section 1 outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Congress formulated Section 1 in this way because it "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements." *Gulf Oil*, 419 U.S. at 194 (quoting *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 558 (1944)); *cf.* U.S. Const. art. II, § 8 ("Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States."); *see*

also Summit Health, 500 U.S. at 329 & n.10 ("It is firmly settled that when Congress passed the Sherman Act, it left no area of its constitutional power unoccupied." (internal quotation marks omitted)).

As a result, all nine justices concluded in *Hartford Fire* that the presumption against "extraterritoriality" does not bar the Sherman Act's application to conduct affecting the United States. 509 U.S. at 796-97 & n.24, 814; *cf. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 252 (1991) (*Aramco*) (explaining that the Lanham Act's "broad jurisdictional grant" and "sweeping reach into all commerce which may lawfully be regulated by Congress" supported applying the statute to foreign conduct that had "some effects within the United States" (internal quotation marks omitted)).

a. *Morrison* Does Not Overrule or Abrogate *Hartford Fire*

Notwithstanding the breadth of the Sherman Act's language and the binding Supreme Court precedent establishing its extraterritorial reach, defendants urge this Court to conclude that the Sherman Act does not apply to foreign conduct, regardless of its effects in the United States. They rely for this argument on *Morrison v. National Australian Bank Ltd.*, 130 S. Ct. 2869 (2010). In *Morrison*, the Supreme Court

held that Section 10(b) of the Securities Exchange Act of 1934 does not allow foreign plaintiffs to sue in connection with securities traded on foreign exchanges because that section does not apply extraterritorially. 130 S. Ct. at 2875, 2883. Defendants claim that *Morrison* articulates a more "muscular" presumption against the extraterritorial application of federal statutes and that the reach of the Sherman Act must be reconsidered in light of this new test. Hsiung/Chen Br. 39-40. But defendants misunderstand the reasoning of both *Morrison* and *Hartford Fire*.

As an initial matter, the application of *Morrison*, a civil case, to this criminal case is doubtful in light of *United States v. Bowman*, 260 U.S. 94 (1922). *Cf. Morrison*, 130 S. Ct. at 2894 n.12 (Stevens, J., concurring) (noting nothing in the Court's opinion forecloses government enforcement actions, which "differ from private . . . actions in numerous" ways and "pose a lesser threat to international comity"). In *Bowman*, the Supreme Court held that the presumption against extraterritoriality "should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction." *Id.* at 98. Instead, extraterritoriality may be "inferred

from the nature of the offense" for criminal statutes when the effect of limiting "their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home." *Id.*; *see also United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205 n.3 (9th Cir. 1991) (observing that *Bowman* states an "exception to the presumption against extraterritoriality" for certain criminal statutes). The Sherman Act is such a criminal statute.

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). As Section 1 makes clear, its protections extend not only to the nation's interstate trade, but also to its trade with foreign nations. 15 U.S.C. § 1. The nature of an antitrust crime does not depend upon the locality of the defendants' acts, but rather on their connection to and impact on U.S. commerce. And as this prosecution demonstrates, foreign companies can and do easily conspire outside our borders to restrain U.S. trade with foreign nations.

Whether or not the *Bowman* exception applies to the Sherman Act, the Supreme Court has long construed the Sherman Act to apply extraterritorially. *Hartford Fire*, 509 U.S. at 796-97. And *Morrison* did not overrule *Hartford Fire*. Indeed, *Morrison* did not even mention *Hartford Fire*, and there is no reason to believe that the *Morrison* Court intended to abrogate *Hartford Fire sub silentio*. The Supreme Court has cautioned against drawing such conclusions from its silence. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Contrary to defendants' claim, *Morrison* did not "radically recalibrate[]" the law on extraterritoriality, Hsiung/Chen Br. 44. Rather, it reiterated the presumption against applying federal civil statutes to foreign conduct absent a clear indication that Congress intended the statute to apply extraterritorially. 130 S. Ct. at 2877. The *Morrison* Court criticized the Second Circuit because it had ignored the previously articulated presumption—not because the Supreme Court

had decided to alter the presumption. *See id.* at 2878 ("Despite this principle of interpretation, long and often recited in our opinions, the Second Circuit believed that, because the Exchange Act is silent as to the extraterritorial application of § 10(b), it was left to the court to 'discern' whether Congress would have wanted the statute to apply.").

As defendants acknowledge, that presumption has long been a part of Supreme Court jurisprudence. Hsiung/Chen Br. 38. It was, for example, rearticulated in *Aramco*. 499 U.S. at 248. In his *Aramco* concurrence, Justice Scalia agreed that the majority "accurately describe[d]" the presumption against extraterritoriality, *Aramco*, 499 U.S. at 260, and in his majority opinion in *Morrison*, Justice Scalia quotes *Aramco* for the presumption, *Morrison*, 130 S. Ct. at 2877. But *Aramco* was decided just two years before *Hartford Fire*, in which all nine justices agreed that the Sherman Act applies extraterritorially. Indeed, Justice Scalia, in his *Hartford Fire* dissent, recognized that the Court has "found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially." 509 U.S. at 814 (citing *Aramco*, 499 U.S. at 248). The *Hartford Fire* Court was undoubtedly aware of the presumption

when it held the Sherman Act applies extraterritorially. Thus, *Morrison* provides no basis for ignoring *Hartford Fire*.

Nor does *Morrison* "abrogate[] *Hartford Fire*'s 'effects test,'" Hsiung/Chen Br. 45. *Morrison* holds that Section 10(b) of the Exchange Act has no extraterritorial application. 130 S. Ct. at 2881. Therefore, the effects test the Second Circuit developed to govern that section's application to foreign conduct was unnecessary. *Id.* But *Morrison* says nothing about the propriety of effects tests for statutes, like the Sherman Act, that do apply to foreign conduct. Extraterritorial jurisdiction based upon "detrimental effects within the United States" is not only consistent with international law, *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002), it is a principle "recognized in the criminal jurisprudence of all countries," *Ford v. United States*, 273 U.S. 593, 623 (1927), and "[i]ts logical soundness and necessity received early recognition in the common law," *id*. *See generally* Jordan J. Paust, *International Law as Law of the United States* 417-19 (2d ed. 2003) (detailing recognition by U.S. courts of "objective territorial jurisdiction" based on effects in the United States).

Moreover, in the FTAIA, Congress expressed its understanding that the Sherman Act reaches foreign conduct and reaffirmed its intent to do so. *See Empagran*, 542 U.S. at 166 (With the FTAIA, "Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm" except "of course . . . where that conduct also causes domestic harm."). Because the Sherman Act goes "to the utmost extent of [Congress's] Constitutional power," *Se. Underwriters Ass'n*, 322 U.S. at 558, Congress was concerned the Sherman Act might be applied to anticompetitive conduct with no impact on the United States to the detriment of U.S. exporters. This undesirable result, the FTAIA's drafters explained, was exemplified by *Pacific Seafarers*, 404 F.2d 804, which applied the Sherman Act to an alleged conspiracy among U.S. shipping companies to destroy plaintiffs' business of carrying cement and fertilizer between Taiwan and South Vietnam. H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494. The FTAIA is premised on the view that such anticompetitive conduct "should not, merely by virtue of the American ownership, come within the reach of our antitrust laws." *Id.*

To remedy this problem, Congress enacted the FTAIA, which provides that, absent proof of certain effects, the Sherman Act does not apply to "conduct involving trade or commerce (other than import trade or commerce) with foreign nations." 15 U.S.C. § 6a. This phrase was deliberately chosen to include conduct involving "commerce that did not involve American exports but which was wholly foreign." *Empagran*, 542 U.S. at 162-63. Through the FTAIA, Congress sought "to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as it applied to foreign commerce." *Id.* at 169. But if the Sherman Act had no extraterritorial reach, no such clarification or limitation would have been necessary. And the language of the FTAIA that Congress deliberately chose to cover wholly foreign commerce would be rendered largely "superfluous, void, or insignificant" in contravention of the "cardinal" principles of statutory interpretation. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Defendants claim *Morrison* "squarely held that a statutory provision similar to the FTAIA does not provide a clear statement of extraterritorial effect," Hsiung/Chen Br. 48, but that is not correct. The extraterritoriality-providing language at issue in *Morrison* was directed

at only one part of the Exchange Act concerning the concealment of domestic violations (§ 30(b)) and not the whole act. 130 S. Ct. at 2882-83. In contrast, the FTAIA relates to the entire Sherman Act and declares its application to conduct, wherever it occurs and even if it involves wholly foreign commerce, so long as it has the requisite effect on U.S. commerce. 15 U.S.C. § 6a.

b. The Extraterritorial Reach of the Sherman Act Is Not More Limited in Criminal Cases

Alternatively, defendants argue that *Hartford Fire* should be read narrowly to address only the extraterritorial application of the Sherman Act in civil cases. Hsiung/Chen Br. 48. But defendants cite nothing in *Hartford Fire* itself that supports such a reading. And such a reading would override the principle of statutory construction that interpreting a criminal statute in a civil setting establishes its "authoritative meaning." *United States v. Thomson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion).

Section 1 of the Sherman Act is a criminal statute containing a single operative phrase outlawing conspiracies in restraint of trade or commerce among the states or with foreign nations. "Under settled principles of statutory construction, [courts] are bound to apply

[*Hartford Fire*'s holding] by interpreting Section One the same way in a criminal case." *Nippon Paper*, 109 F.3d at 9. The Sherman Act's "words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort." *N. Secs. Co. v. United States*, 193 U.S. 197, 401-02 (1904) (Holmes, J., dissenting).

United States v. U.S. Gypsum Co., 438 U.S. 422 (1978), on which defendants rely, Hsiung/Chen Br. 53-55, provides no support for the claim that the Sherman Act's extraterritorial reach should be different in civil and criminal cases. *Gypsum* holds that "criminal offenses defined by the Sherman Act should be construed as including intent as an element" based on the centuries-old Anglo-American legal tradition that criminal liability—unlike civil liability—must ordinarily be premised on malevolent intent. *Id.* at 436-37, 443. But there is "simply no comparable tradition or rationale for drawing a criminal/civil distinction with regard to extraterritoriality." *Nippon Paper*, 109 F.3d at 7.

Lacking any sound basis in the Sherman Act itself to draw this criminal/civil distinction, defendants claim that "the presumption against extraterritoriality assumes even greater force with criminal laws." Hsiung/Chen Br. 49. But the authorities they cite merely articulate the general presumption against extraterritoriality and provide no support for this claimed "super-presumption." *See id.* (citing *United States v. Flores*, 289 U.S. 137, 155 (1933); *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984)). To the contrary, as this Court recently made clear in *United States v. Chao Fan Xu*, the presumption against extraterritoriality articulated in *Morrison* must be applied statute by statute and should not vary from the civil to the criminal context. 706 F.3d 965, 974 (9th Cir. 2013) (applying cases addressing the extraterritorial reach of RICO in civil cases to a criminal RICO case).

Amicus Professor Guzman contends that *Bowman* supports a stronger presumption in criminal cases, Guzman Br. 9-10, but his reliance is puzzling. *Bowman* holds the presumption against extraterritoriality does not apply to criminal statutes that are "not logically dependent on their locality for the government's jurisdiction."

260 U.S. at 98; *see United States v. Corey*, 232 F.3d 1166, 1170 (9th Cir. 2000). For other criminal statutes, *Bowman* does nothing more than reiterate the presumption against extraterritoriality established in civil cases such as *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). 260 U.S. at 98. The *Bowman* Court regarded *American Banana*, a Sherman Act case, as the appropriate analogy because the antitrust statute "is criminal as well as civil." *Id.* As the First Circuit explained, "[t]his seems to support the notion that the presumption is the same in both instances and leaves little room to argue that the *Bowman* Court was attempting to craft a special, more rigorous rule for criminal proceedings." *Nippon Paper*, 109 F.3d at 6 n.4.

Similarly, the Restatement (Third) of Foreign Relations Law does nothing more than state the ordinary presumption, which the Supreme Court found to be no bar to extraterritoriality in *Hartford Fire*. *Compare* 1 *Restatement (Third) of Foreign Relations Law* § 403 cmt. f, 247-48 (1987) ("[L]egislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication."), *with Aramco*, 499 U.S. at 248 (explaining the presumption ordinarily is overcome by an "affirmative

intention of the Congress clearly expressed" to apply a statute to foreign conduct). The Reporters' Notes to the Restatement also suggest that potential conflicts with foreign sovereigns might lead "enforcement agencies of the United States government" to exercise "criminal jurisdiction over activity with substantial foreign elements . . . more sparingly." *Restatement* § 403, Reporters' Note 8. This admonition to enforcement agencies, however, says nothing about the substantive reach of the antitrust laws, and, as discussed more fully below, the Department of Justice's decision to criminally prosecute this price-fixing conspiracy resolved such concerns. *See infra* pp. 117-18.

3. The Jury Was Properly Instructed that the Sherman Act Applies to Conspiracies Carried Out, in Part, in the United States

Defendants do not contest that participants in their price-fixing conspiracy acted in the United States to further that conspiracy. Hsiung/Chen Br. at 60 ("[D]efendants never contested that *some* overt acts occurred in the United States."). Nor could they. The trial record is replete with evidence of conspirators, including AUO and AUOA employees, acting in furtherance of the conspiracy in the United States. *See supra* pp. 17-21, *infra* pp. 132-40. Rather, they contend that,

because some of the conspiratorial conduct occurred abroad, the entire conspiracy is beyond the reach of the Sherman Act. Thus, they argue that the district court erred in giving part A of the instruction, which allowed the jury to convict based upon "at least one action in furtherance of the conspiracy within the United States," ER1155. AUO Br. 67-70; Hsiung/Chen Br. 55-60.

Defendants contend that this instruction created a "one-touch" rule, but they overlook the instruction on the elements of the offense that required the jury also to find that the conspiracy had the requisite nexus to U.S. commerce under the FTAIA. *See supra* p. 53. Their fear that part A of the instruction could premise Sherman Act liability merely on "one phone call in furtherance of the conspiracy made from a U.S. airport on a layover between foreign destinations," Hsiung/Chen Br. 56; *see also* AUO Br. 68, is unfounded.

The Sherman Act reaches only conduct that involves or affects commerce within the United States, U.S. import commerce, or certain U.S. export commerce. *See* 15 U.S.C. § 6a. Thus, a conspiracy to fix the price of goods sold entirely in foreign commerce that has no effects on U.S. commerce is not outlawed by the Sherman Act, regardless of an

overt act in a U.S. airport. *See Empagran*, 542 U.S. at 166. But, when a co-conspirator acts within the territory of the United States to further a conspiracy to fix the price of goods sold into the United States, no extraterritorial application of the statute is necessary to prosecute that conspiracy. *Cf. United States v. Moncini*, 882 F.2d 401, 403 (9th Cir. 1989) (finding analysis of the extraterritorial scope of the child pornography laws unnecessary where defendant mailed pornography from Italy to the United States because "part of the offense was committed in the United States as [defendant's] letters traveled through the mail").[12]

Moreover, part A of the court's instruction is fully supported by bedrock principles of conspiracy law, as well as *Hartford Fire*. A

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[12] *Morrison* observed that an overt act in the United States did not justify application of Section 10(b) of the Exchange Act. 130 S. Ct. at 2883-84. The Court reasoned that, because the "focus of congressional concern" is preventing deceptive conduct in connection with the purchase and sale of securities in the United States, the Act did not apply to deceptive conduct related to foreign securities transactions, even if some of that conduct took place in the United States. *Id.* at 2884. Likewise, price-fixing with no nexus to U.S. commerce is not prohibited by the Sherman Act, even if an overt act in furtherance occurred here. But that portion of *Morrison* gives no help to these defendants, *see* Hsiung/Chen Br. 58, whose price-fixing conspiracy is plainly within the "focus of congressional concern" in protecting U.S. commerce from anticompetitive harm.

conspiracy to violate the antitrust laws is "a partnership in crime; and an overt act of one partner may be the act of all." *Socony-Vacuum*, 310 U.S. at 253-54 (internal quotation marks omitted). Like all criminal conspiracies, defendants' price-fixing conspiracy occurs where any overt act in furtherance of the conspiracy by any co-conspirator occurs. "Any conspiratorial act occurring outside the United States is within United States jurisdiction if an overt act in furtherance of the conspiracy occurs in this country."[13] *United States v. Endicott*, 803 F.2d 506, 514 (9th Cir. 1986); *United States v. Angotti*, 105 F.3d 539, 545 (9th Cir. 1997) ("[A] conspiracy charge is appropriate in any district where an overt act committed in the course of the conspiracy occurred."); *Woitte v. United States*, 19 F.2d 506, 508 (9th Cir. 1927) ("[T]he place of the conspiracy was immaterial, provided the overt acts were committed within the jurisdiction of the court."). And the United States' antitrust laws

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[13] Defendants argue that this principle is merely "a stray sentence" in *Endicott* and that the decision "did not approve jurisdiction without intended effects in the United States." Hsiung/Chen Br. 59; *see also* AUO Br. 68 n.17. A better reading, however, is that this principle was listed as one of several distinct bases for jurisdiction. In any case, acts in the United States, coupled with the jury's finding that the defendants either targeted U.S. import commerce or directly, substantially, and reasonably foreseeably affected U.S. import commerce (or both), are certainly sufficient.

"certainly may control [foreign] citizens and corporations operating in our territory." *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 105-06 (1913) (rejecting the claim that a case involving some domestic conduct required extraterritorial application of the Sherman Act); *see also United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (finding an antitrust conspiracy involving "deliberate acts, here and elsewhere, [was] within the jurisdiction of our courts and may be punished for offenses against our laws").

For this reason, *Hartford Fire*'s substantial and intended effects test for extraterritorial application of the Sherman Act does not apply to conspiracies carried out, in part, in the United States. *Hartford Fire* "dealt exclusively with the extraterritorial applicability of the Sherman Act to wholly foreign conduct." *Carpet Group*, 227 F.3d at 75 (rejecting defendants' reliance on *Hartford Fire* in a case involving some domestic conduct); *see also Nippon Paper*, 109 F.3d at 4 (The *Hartford Fire* Court allowed Sherman Act claims "to go forward despite the fact that the actions which allegedly violated Section One occurred entirely on British soil.").

To the extent that defendants contend that *Hartford Fire*'s extraterritoriality holding is based on antitrust claims involving some domestic conduct, Hsiung/Chen Br. 57, they misread the opinion. *Hartford Fire* involved multiple suits by states and private parties alleging several distinct conspiracies among foreign and domestic reinsurers and insurance brokers. 509 U.S. at 770. The Supreme Court granted two separate petitions for certiorari. The first petition concerned the domestic insurers' claims of immunity under the McCarran-Ferguson Act. *Id.* at 780. The second petition raised the issue of "whether certain claims against the London reinsurers should have been dismissed as improper applications of the Sherman Act to foreign conduct." *Id.* at 794-95. As that second petition explained, "[t]he claims from which it arises involve wholly foreign actors and conduct." Petition for Writ of Certiorari at 9, *Hartford Fire*, 509 U.S. 764 (No. 91-1128). The issue raised was the application of U.S. law to "the conduct of business subject to the regulatory authority of a foreign sovereign taking place in a foreign market, and undertaken by foreign actors." *Id.* at 19. Thus, the Supreme Court's opinion in that case

addressed the application of the Sherman Act to wholly foreign conduct. *See Carpet Group*, 227 F.3d at 75; *Nippon Paper*, 109 F.3d at 4.

Although defendants claim that part A of this instruction was erroneous, they suggest no alternative. To the extent they contend that the government must prove a price-fixing conspiracy had substantial and intended effects in the United States in every case under the Sherman Act, regardless of the allegations and evidence of domestic conduct, there is no legal support for such a requirement. And to the extent they contend there is some threshold of overt acts in the United States below which the substantial and intended effects requirement applies, there is no sound basis in law or logic for requiring either some arbitrary number of overt acts or a preponderance of domestic conduct.

Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd., 299 F.3d 281 (4th Cir. 2002), on which defendants rely, Hsiung Br. 57-58, underscores how unworkable such a standard would be. According to the Fourth Circuit's analysis in *Dee-K*, whether a price-fixing conspiracy is foreign conduct must be determined, not based on the conduct's location, but through a "flexible and subtle inquiry" that considers "whether the participants, acts, targets, and effects involved" are "primarily foreign

or primarily domestic." 299 F.3d at 294. Because "this area of antitrust law has historically been marked by change" and courts, commentators, and other nations have "differing views," the Fourth Circuit concluded that courts must "remain able to consider the full range of factors that may appropriately affect the exercise of our antitrust jurisdiction in any given case" *Id.* at 294-95. It is difficult to imagine how a judge could instruct a jury on this "flexible and subtle inquiry" or how a jury so-instructed could reach a unanimous verdict. Moreover, this inquiry ignores the basic principle that under the Constitution's Commerce Clause, exercised to its utmost in the Sherman Act, the federal government has the authority to prosecute conduct occurring within the United States territory that restrains U.S. trade or commerce with foreign nations.

4. Any Claimed Error in the Instruction Was Harmless

Even if part A of the extraterritoriality instruction were incorrect, any error was harmless. Where the instructions allow a jury to convict on two theories, one of which is invalid, the error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Anchrum*, 590

F.3d 795, 801 (9th Cir. 2009); *see also Hedgpeth v. Pulido*, 555 U.S. 57, 58-61 (2008) (holding instructional error is subject to harmless error review); *United States v. Green*, 592 F.3d 1057, 1071 (9th Cir. 2010). Because the evidence overwhelmingly supported a jury finding of substantial and intended effects in the United States—which the defendants conceded at trial was a proper basis for conviction—any claimed error in part A of the instruction was harmless.

Indeed, the defendants do not argue on appeal that the evidence was insufficient to allow the jury to find an effect in the United States. Nor could they, because the evidence was not merely sufficient—it was overwhelming. Approximately $23.5 billion worth of TFT-LCD panels produced by the conspirators came into the United States. SER2074-82. AUO and its co-conspiring panel manufacturers established subsidiaries in the United States to sell panels to large U.S. companies like Apple, Dell, and HP, which were among the conspirators' largest customers. *See supra* pp. 17-18. AUO and its co-conspirators discussed the U.S. market and these large customers at their price-fixing meetings, and employees of the conspiring firms met one-on-one to discuss pricing to major U.S. customers. *See supra* pp. 14-15, 19-21.

The government's expert, Dr. Keith Leffler, testified that the conspirators increased their margins on the price-fixed panels an average of $53 per panel during the group Crystal Meetings, SER2064-65, and that they reaped more than $500 million in gains on those TFT-LCD panels that came into the United States in finished monitors and notebook computers, SER2057, 2085. Indeed, Dr. Leffler's best estimate based on his regression analysis was that the overcharges were "certainly in excess of $2 billion." SER2055.

Defendants suggest that the district court's preliminary instructions improperly told the jurors "that the government need not prove that the conspiracy had detrimental effects on competition" and that "they were forbidden from considering the economic effects of the conspiracy 'when deciding the guilt or innocence of the individual defendants.'" Hsiung/Chen Br. 12 (citing and quoting ER1471-72.). But the cited instruction, which was requested by defendant Hsiung, SER2434-35, merely explained that gain from the offense was a separate and distinct question from whether the offense was committed. ER1471-72. At the close of the evidence, the jurors were instructed regarding the required effects on U.S. commerce, *see supra* pp. 53, 63-64, and told that they

could consider economic evidence, including expert testimony, about the effect of the conspiracy on U.S. commerce against all defendants, SER2040.

The record evidence enabled the jury to find the defendants' price-fixing conspiracy had the requisite nexus to U.S. commerce under the FTAIA,[14] and to find that AUO and its co-conspirators derived at least $500 million in gains from the conspiracy from affected sales of TFT-LCD panels either sold in the United States or incorporated into finished products that were sold in the United States. ER587-89, 604-05. These jury findings, combined with the trial evidence, make clear beyond a reasonable doubt that a rational jury would have found that the conspiracy had a substantial and intended effect in the United

[14] Although the FTAIA instruction allowed the jury to convict defendants on two distinct bases, both are consistent with a substantial and intended effect in the United States. The first required the jury to find beyond a reasonable doubt that the conspirators "fix[ed] the price of TFT-LCD panels targeted by the participants to be sold in the United States, or for delivery to the United States." ER1156. The second required the jury to find beyond a reasonable doubt that the conspirators' conduct "had a direct substantial and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States, or for delivery to the United States." *Id.*

States. Thus, even if part A of the instruction were given in error, that error was harmless.

5. The Indictment Alleged Both Conduct and Effects in the United States

Finally, defendants claim that, even if the Sherman Act did apply to foreign conduct with a substantial and intended effect in the United States, the indictment failed to charge such an effect. AUO Br. 67. As an initial matter, the indictment did not have to allege a substantial and intended effect in the United States because it charged a conspiracy that took place in part in the United States. The indictment alleged that defendant AUOA has its principal place of business in Houston, Texas, ER1724 ¶ 5, and that AUOA employees "located in the United States had regular contact through in-person meetings and phone calls with employees of other TFT-LCD manufacturers in the United States to . . . agree on pricing, to certain TFT-LCD customers located in the United States," ER1730 ¶ 17(k). The indictment further alleged that AUOA employees negotiated sales of panels at fixed prices with "certain TFT-LCD customers located [in] the United States." ER1731 ¶ 17(k); *see also* ER1732 ¶ 21 (alleging that "the combination and conspiracy

charged in this Indictment was carried out, in part, in the Northern District of California").

As explained above, the substantial and intended effects requirement applies only in cases of wholly foreign conduct. *See supra* pp. 80-85. Because the indictment here alleged that the conspiracy was carried out, in part, in the United States, it need not have charged that defendants' conspiracy had a substantial and intended effect in the United States. *See Sisson*, 399 U.S. at 288.

In any event, the indictment did allege such an effect. The indictment charged defendants with agreeing to fix prices of TFT-LCDs sold to customers located in the United States. ER1723 ¶¶ 2-3, ER1730-31 ¶¶ 17(j)-(k). And the indictment made clear that this was not an aborted or ineffective conspiracy. It specifically alleged that reports of the co-conspirators' meetings and price agreements "were used by certain employees of [AUOA] in their price negotiations with certain TFT-LCD customers located in the United States," ER1730-31 ¶ 17(k), and that the co-conspirators "derived gross gains of at least $500,000,000" from the conspiracy, ER1734 ¶ 23; *see also* ER1732 ¶ 20

(charging that activities alleged in the indictment "substantially affected, interstate and foreign trade and commerce").

These allegations pleaded a substantial effect in the United States and one can reasonably infer from the allegations that the effect was intended. *Frohwerk v. United States*, 249 U.S. 204, 209 (1919) (An "intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it."). A common-sense reading of the indictment's allegations provided defendants ample notice of the charges against them, including that the charged conspiracy had a substantial and intended effect in the United States.

D. *Metro Industries* Does Not Require Application of the Rule of Reason Here, Nor Would Applying It Have Mattered

Defendants rely on *Metro Industries*, 82 F.3d 839, to argue that, because their conspiracy involved some foreign conduct, the government was required to plead and prove specific intent and the defendants should have been allowed to argue to the jury that their agreement to fix the price of TFT-LCD panels was reasonable. AUO Br. 19-41; Hsiung/Chen Br. 20-37. But defendants misunderstand both the facts and reasoning of *Metro Industries*. Correctly interpreted, *Metro Industries* is not the radical departure from ordinary principles of

antitrust law that defendants claim, but merely a restatement of the familiar requirements for extraterritorial application of the Sherman Act to wholly foreign conduct.

1. *Metro Industries* Holds that the Sherman Act Applies to Wholly Foreign Conduct with Effects in the United States

The Sherman Act does not prohibit all agreements in restraint of trade, but only those that are unreasonable. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). Certain practices, including "agreements among competitors to fix prices," are deemed unreasonable *per se*, and thus unlawful, without regard to their rationale or justification and without inquiry into their actual effects. *Id.* at 886; *see also Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991) ("In [*per se*] cases, we do not require evidence of any actual effects on competition because we consider the potential for harm to be so clear and so great."). Other restraints demand a fuller inquiry, dubbed the rule of reason, which requires the factfinder to "weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin*, 551 U.S. at 885.

In *Metro Industries*, this Court considered plaintiff's allegations that a Korean design registration system conferring limited exclusive rights to the defendants "constituted a market division that is a *per se* violation of section 1 of the Sherman Antitrust Act." 82 F.3d at 841. This Court held first that the challenged registration system was not "a classic horizontal market division agreement" normally subject to the *per se* rule. *Id.* at 844. But even if Metro could prove that the registration system constituted a market division, the Court found "application of the *per se* rule is not appropriate where the conduct in question occurred in another country." *Id.* at 844-45. A market division formed and carried out in the United States would be deemed *per se* unlawful even if it had no effect. But determining whether such conduct occurring abroad violates the Sherman Act requires "an examination of the impact of the [conduct] on commerce in the United States." *Id.* at 845.

This is nothing more than a restatement of the *Hartford Fire* Court's declaration that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. at 796. In fact, *Metro Industries* supports its

holding with citations to *Hartford Fire* and *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."). While the decision uses the term "rule of reason," it does not suggest that the contemplated analysis includes consideration of possible justifications for price fixing; there are none. *See Leegin*, 551 U.S. at 886 ("horizontal agreements among competitors to fix prices . . . have manifestly anticompetitive effects and lack any redeeming virtue" (internal quotation marks and citation omitted)). The Court merely required an inquiry into whether the conduct had "a sufficient negative impact on commerce in the United States." *Metro Indus.*, 82 F.3d at 843.

Defendants try to support their erroneous interpretation of *Metro Industries* by asserting that "the usual assumptions about anticompetitive effects get lost in translation when applied to foreign conduct," Hsiung/Chen Br. 23, and that "*per se* treatment is inappropriate for pricing agreements between foreign businesses in the context of a dynamic and rapidly changing market for a technological product," AUO Br. 33. But price-fixing conspiracies cannot become

procompetitive just because they are hatched outside the United States by people not speaking English. And the fact that TFT-LCD panels are a "technological product" sold in a "dynamic market" has nothing to do with whether the conduct is foreign or domestic. There is no "technological product exception" to the *per se* rule.

To be sure, circumstances can be important in assessing the legality of conduct under the Sherman Act, and relevant circumstances can differ materially between the United States and other countries. This explains the 1977 policy statement issued by the Justice Department indicating that the rule of reason might apply more broadly to international transactions than to domestic transactions. U.S. Dep't of Justice, Antitrust Guide for International Operations 3 (1977) (cited by Hsiung/Chen Br. 26). But no circumstances justify price fixing, which is why that statement "emphasize[d]" that the Department's policy was "that the normal per se rules will be applied fully to basic horizontal restraints designed to affect U.S. market prices or conditions." *Id.*[15]

[15] The superseding 1988 statement set out the Department's policy of criminally prosecuting price-fixing conspiracies formed and carried out entirely outside the United States if they substantially affect U.S. import commerce. U.S. Dep't of Justice, Antitrust Enforcement Guidelines for International Operations § 3.1, case 14 (1988). The

Defendants make much of *Metro Industries*' one reference to "price fixing." AUO Br. 27-28, 37; Hsiung/Chen Br. 25, 31. It occurs in a quotation from a treatise stating that "price fixing in a foreign country might have some but very little impact on United States commerce." *Metro Indus.*, 82 F.3d at 845 (quoting 1 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 237, at 269 (1978)). But neither the treatise nor *Metro Industries* suggests that price fixing abroad can be lawful when it does significantly affect United States commerce. And the current edition of the treatise advises that a court need not "hesitate very long before condemning restraints" affecting U.S. commerce and lacking "any plausible purpose other than the suppression of competition." 1B Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 273b, at 330 (3d ed. 2006).[16]

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treatment of price fixing outside the United States in the current guidelines addresses only whether the conduct is subject to the Sherman Act. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations § 3.12 (1995), *available at* www.justice.gov/atr/public/guidelines/internat.htm.

[16] If, as defendants contend, *Metro Industries* did radically alter the substantive analysis of price fixing in cases involving wholly foreign conduct, then it conflicts with Supreme Court precedent holding price fixing *per se* unlawful, *Socony-Vacuum*, 310 U.S. at 222-23, and treating allegations of wholly foreign conduct as raising questions of the

As with *Hartford Fire*, *Metro Industries*' requirement of actual effects in the United States does not apply here, where defendants' price-fixing conspiracy involved domestic conduct. *See supra* pp. 80-85. To the extent that defendants contend that *Metro Industries* also involved domestic conduct, AUO Br. 37-38; Hsiung/Chen Br. 29-30, they misread the opinion, just as they misread *Hartford Fire*.

Metro Industries, Inc. imported kitchenware made in Korea by Sammi Corp. and sued Sammi in 1983 when it was unable to obtain "stainless steel steamers from any of Sammi's competitors in Korea." *Metro Indus.*, 82 F.3d at 841-42. Initially, Metro raised several antitrust theories, including the predatory pricing allegations defendants highlight, AUO Br. 38; Hsiung/Chen Br. 28-29, which involved conduct in the United States by a Sammi subsidiary. But the predatory pricing allegations dropped out of the case in 1993, and Metro began advancing "a new theory—that the Korean design registration system under which Sammi had the exclusive rights to manufacture a

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Sherman Act's reach and not the substantive analysis of the conduct, *Hartford Fire*, 509 U.S. at 796-97. *See Dee-K*, 299 F.3d at 286 n.2.

particular steamer design constituted a market division that was illegal *per se* under § 1 of the Sherman Act," *Metro Indus.*, 82 F.3d at 842-43.

This new theory was the only theory at issue on appeal. *See id.* at 843 ("Metro appeals only the district court's grant of summary judgment in favor of Sammi on Metro's Sherman Act § 1 market division claim and the court's denial of Metro's cross-motion for summary judgment."). And it involved wholly foreign conduct. As the Court explained, Metro's new theory was "the same theory" that the Court had declined to consider in a parallel case because it had not been presented to the district court.[17] *Id.* at 843 n.2. That theory was that Sammi and other exporters had restrained trade by establishing the design registration system "in Korea." *Id.* at 842.

[17] Metro adopted this new theory precisely because it was the only theory not considered, and thus not foreclosed, by this Court's decision in the parallel case, *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455 (9th Cir. 1993). *Metro Indus.*, 82 F.3d at 843 & n.2. In *Vollrath*, this Court had affirmed judgment for the defendant notwithstanding the verdict but declined to consider a theory, not presented at trial, that Sammi had participated in a *per se* unlawful market division. *Vollrath*, 9 F.3d at 1462 n.4.

This case, unlike *Metro Industries*, does not involve wholly foreign conduct that had no impact on U.S. commerce. Accordingly, the decision has no application here.

2. Defendants' Claims that the Indictment, Instructions, and Proof Were Insufficient Under the Rule of Reason Are Meritless

Defendants' claims of error with regard to the *per se* rule are based either on their misreading of *Metro Industries* or a misunderstanding of the rule of reason and are, therefore, without merit.

a. *Metro Industries* Did Not Change the Law on Price Fixing

Defendants contend that the district court's application of the *per se* rule was an "unexpected departure from the bright-line rule in *Metro Industries*" and therefore "violates due process." Hsiung/Chen Br. 37. But application of the *per se* rule to this price-fixing conspiracy is a judicial interpretation of the Sherman Act that is neither "unforeseeable, nor an enlargement of the usual and ordinary meaning of the statute." *Poland v. Stewart*, 117 F.3d 1094, 1100 (9th Cir. 1997). The Supreme Court declared price fixing *per se* unlawful more than eighty years ago, *United States v. Trenton Potteries*, 273 U.S. 392, 396-99 (1927), and criminal prosecutions under the Sherman Act have been

common for a century, *see Nash v. United States*, 229 U.S. 373, 376-78 (1913).

Contrary to defendants' argument, *Metro Industries* did not sweep aside decades of Supreme Court precedent and hold that foreign price-fixing conspiracies, when subject to the Sherman Act, are judged under special substantive rules. Indeed, defendants cannot cite a single case in which a court refused to apply the *per se* rule to price fixing because the conduct was foreign.[18] Because *Metro Industries* has never been relied upon to bar a price-fixing prosecution, it cannot have negated defendants' ample warning that their conduct was *per se* unlawful. *See Rogers v. Tennessee*, 532 U.S. 451, 466-67 (2001) (rejecting due process argument that rested on common law rule that had "never been relied upon as a ground of decision").[19]

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[18] To the contrary, district courts have consistently rejected the reading of *Metro Industries* advanced by defendants here. *See* ER189-91 (Jan. 29, 2011, ruling denying motion to dismiss indictment); *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F. Supp. 2d 1050, 1055 (N.D. Cal. 2006); Order Den. Mot. to Dismiss Indictment or, in the Alternative, for Ruling as a Matter of Law Re: Rule of Reason, *United States v. Eagle Eyes Traffic Indus. Co.*, No. 3:11-cr-00488 (N.D. Cal. Sept. 11, 2012).

[19] Not only was this criminal prosecution foreseeable under the law, the conspirators actually foresaw it during their conspiracy. A similar

b. Defendants Waived Any Attack on the Price-Fixing Instruction

Any error in failing to instruct the jury on the rule of reason is without merit and, in any event, was invited by defendants in proposing a price-fixing instruction with no mention of defenses, exceptions, or justifications for price fixing. Counsel for the government and all defendants jointly submitted to the district court a single document containing 24 stipulated jury instructions and additional disputed instructions. ER1184-1240. The court gave stipulated instruction number 15, which defined price fixing and instructed the jury that it is illegal.[20] ER596-97, 1203-04.

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prosecution in another industry was discussed at a Crystal Meeting. SER1961-63, 2210-12, 2249, 2252. And in an email to the employees in the AUO notebook division, AUOA's Evan Huang warned that Apple "is suspecting suppliers are exchanging price information. This is illegal, especially in the states. We need to be watchful!" ER801; SER2323.

[20] At the defendants' request, the district court struck a sentence from stipulated instruction 15. *See* SER2043, and *compare* ER596 *with* ER1203. Based on *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992), the government also proposed to instruct the jury that price fixing is "conclusively presumed to be an unreasonable restraint on trade" and that "whether the agreement was reasonable or unreasonable" was not at issue. ER1215. The defense objected to this instruction, *id.*, and the court declined to give it. ER1250.

Because defense counsel proposed the "allegedly flawed jury instructions," and thereby "relinquished or abandoned a known right," any error was invited and is not subject to review by this Court. *Perez*, 116 F.3d at 844-45. Defendants, who sought dismissal of the indictment based on *Metro Industries*, were undoubtedly aware of any rights it potentially bestowed when they joined the government in proposing the price-fixing instruction. Any objection to the instruction was thereby waived. *Cain*, 130 F.3d at 383-84.

Defendants contend that they jointly proposed the stipulated price-fixing instruction, despite disagreeing with it, because the district court had rejected their earlier reading of *Metro Industries*. AUO Br. 40; Hsiung/Chen Br. 33-34. Defendants analogize their action to the failure to renew a motion made *in limine* when the issue the motion addressed arose at trial. Hsiung/Chen Br. 34 (citing *United States v. Varela-Rivera*, 279 F.3d 1174, 1177-78 (9th Cir. 2002)). But defendants did not just fail to renew an objection. They affirmatively sponsored an instruction contrary to a position they previously had taken.

Defendants cite no cases excusing defendants who invite error rather than merely remain silent.[21]

c. The Rule of Reason Has No Effect on the Pleading and Proof Requirements on Intent

Defendants claim that the government failed to plead the requisite intent or mens rea, AUO Br. 19; Hsiung/Chen Br. 10, and that the jury instructions did not require the jury to find the requisite intent, AUO Br. 19; Hsiung/Chen Br. 36. But the indictment alleged that defendants joined a conspiracy "to fix the prices of TFT-LCDs," which constituted an "unreasonable restraint" of trade. ER1723 ¶¶ 2, 3. And it further charged that AUO secretly met with co-conspirators many times and exchanged information with them "for the purpose of" fixing prices. ER1727-28 ¶ 17(e). The indictment plainly alleged both the object of the conspiracy and the intention to achieve it. The failure to use the word "intent" is of no consequence. *United States v. Metro.*

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[21] Even if defendants did not intentionally abandon a known right, they still acquiesced in the instructions under which they were convicted. Consequently, any infirmity is reviewable only for plain error under Fed. R. Crim. Proc. 52(b). *Moreland*, 622 F.3d at 1165-66. Here, defendants have not demonstrated that there is an error at all, much less one that was plain, affected substantial rights, or seriously affected the integrity of the proceedings. *Id.* at 1166.

Enters., Inc., 728 F.2d 444, 453 (10th Cir. 1984); *see also Frohwerk*, 249 U.S. at 209.[22]

Defendants' claim that "the district court's instructions at trial also did not require the jury to find the requisite mens rea," AUO Br. 19, ignores entirely the court's instruction requiring the jury to find beyond a reasonable doubt that "the defendants knowingly—that is, voluntarily and intentionally—became members of the conspiracy charged in the Indictment, knowing of its goal, and intending to help accomplish it." ER1156; *see also* ER603.

Defendants' claim of error is largely based on the holding of *Gypsum*, 438 U.S. at 443, that "criminal offenses defined by the Sherman Act should be construed as including intent as an element." AUO Br. 20-21, 26. But defendants misunderstand the import of *Gypsum*, which unlike this case, involved the mere exchange of price information. 438 U.S. at 428, 435, 441.

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[22] Defendants also contend that the government was required to allege "every element of a rule of reason offense," AUO Br. 30, but they do not specifically identify any other omitted element. As explained above, *see supra* pp. 42-44, the indictment in this case tracks the language of the statute and states all the elements of a Section 1 offense, including that the conspiracy was in "unreasonable" restraint of trade. ER1723 ¶ 2.

In *Gypsum*, the Supreme Court concluded that criminal liability should not be imposed "for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken." *Id.* at 441. The Court contrasted the exchange of price information at issue in *Gypsum* with conduct, like price fixing, "with unquestionably anticompetitive effects." *Id.* at 440. "The mere existence of a price-fixing agreement establishes the defendants' illegal purpose since '[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.'" *United States v. Soc'y of Indep. Gasoline Marketers*, 624 F.2d 461, 465 (4th Cir. 1980) (quoting *Trenton Potteries*, 273 U.S. at 397). The *Gypsum* intent requirement is always satisfied when the "defendants knowingly engaged in a conspiracy to fix prices." *United States v. Therm-All, Inc.*, 373 F.3d 625, 639 (5th Cir. 2004). That is so because "the intent to fix prices is equivalent to the intent to unreasonably restrain trade." *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 (5th Cir. Unit B Sept. 1981), *cited with approval in United States v. Brown*, 936 F.2d 1042, 1046 n.2 (9th Cir. 1991).

d. The Rule of Reason Permits No Justifications for Price Fixing

Finally, defendants argue that *Metro Industries* requires the government to plead and prove defendants' price fixing "was *unreasonable* in light of all the surrounding circumstances," AUO Br. 31, or that their price fixing did not "produce[] sufficient procompetitive benefits to avoid liability," Hsiung/Chen Br. 36. But the indictment set out "the elements of the offense charged with sufficient clarity to apprise" defendants of the offense charged, *United States v. Hinton*, 222 F.3d 664, 672 (9th Cir. 2000), including that the charged conspiracy was in "unreasonable restraint" of trade. ER1723 ¶ 2. The indictment was not deficient.

Nor were defendants denied the opportunity to introduce evidence on the nature of their conduct and the circumstances in which it was undertaken. The district court denied the government's motion to exclude five categories of evidence and argument relevant to reasonableness. ER146, 1557; AUO Br. 22. Defendants nevertheless say that the court "agreed with the government," AUO Br. 8; Hsiung/Chen Br. 12, because the court said defendants could not argue that "there's a price-fixing conspiracy, but it was a reasonable one,"

ER146. Defendants claim they were not "allowed to present a full defense," including "additional and powerful evidence that their conduct was reasonable" and "actually *benefitted* American consumers . . . by stabilizing an industry that would otherwise have collapsed in a time of rapid change." AUO Br. 32-33.

Defendants cite, in support of this argument, the district court's statement at sentencing that defendants were motivated to fix prices by their desire to assist their "fledgling industry." *Id.* at 34 (quoting ER248-49). But the district court also said "it was proved beyond peradventure at trial that this conspiracy existed and was affected and caused exactly the damages set out." ER245. And the court found defendants' proffered justifications for price fixing "don't make it not a crime," that "they don't excuse it," and that defendants "did know it was illegal." ER248-49. The district court's decision to take defendants' motivations into account when determining an appropriate punishment for their felonious conduct does not undermine their convictions for that conduct.

Moreover, defendants' argument lacks merit because the rule of reason does not countenance justifications for price fixing. This Court

"reject[s] some justifications as a matter of antitrust policy, even though they might show that a particular restraint benefits consumers." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1152 (9th Cir. 2003). "If there is any argument the Sherman Act indisputably forecloses, it is that price fixing is necessary to save companies from losses they would suffer in a competitive market." *Id.* at 1152 n.24.

Freeman relied on the explication of the rule of reason in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). In that case, the Society banned members from offering services through competitive bidding, and it contended that the ban was reasonable because it "ultimately inures to the public benefit" by preventing "deceptively low bids" and eliminating the "tempt[ation of] individual engineers to do inferior work with consequent risk to public safety and health." *Id.* at 693. The Supreme Court viewed this justification as "nothing less than a frontal assault on the basic policy of the Sherman Act" and rejected it on the basis that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* at 695-96.

The evidence defendants contend "could well have convinced a properly instructed jury of the defendants' innocence under the rule of reason standard," AUO Br. 32, is, in fact, not relevant under the rule of reason because a price-fixing conspiracy is never reasonable. "Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." *Prof. Eng'rs*, 435 U.S. at 688. Defendants point to evidence, for example, that they invested in new manufacturing facilities and increased their production during the conspiracy period. AUO Br. 32. But they do not claim that their price-fixing conspiracy was connected in any way to those investments, other than by making their operations more profitable because reduced competition allowed them to charge higher prices. Thus, this evidence provides no basis to acquit defendants even under the rule of reason.

And to the extent that defendants sought to rely on this evidence to argue that they did not enter a price-fixing agreement, they could (and did) make that argument under the *per se* instructions. That argument

was not, however, persuasive to the jury, which found that defendants had entered an agreement to fix prices—a finding that defendants do not contest on appeal. *See* AUO Br. 9.

E. Principles of International Law and International Comity Provide Defendants No Support

Defendants, Hsiung/Chen Br. 49-50, and amicus Professor Guzman, Guzman Br. 11-12, argue that application of U.S. criminal law to the conduct in this case would run contrary to the principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). But the application of the *Charming Betsy* principle to a case brought by the United States is doubtful. And, even if it were to apply, there is no conflict with the law of nations here.

"[T]he purpose of the *Charming Betsy* canon is to avoid the negative 'foreign policy implications' of violating the law of nations . . . ." *Serra v. Lappin*, 600 F.3d 1191, 1198 (9th Cir. 2010). As this Court has explained, the *Charming Betsy* Court interpreted the relevant statute "so as to avoid embroiling the nation in a foreign policy dispute unforeseen by either the President or Congress." *Corey*, 232 F.3d at

1179 n.9. Yet "when construing a statute with potential foreign policy implications" in a case brought by the Executive Branch, a court "must presume that the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States." *Id.* Thus, as this Court has observed, "the Supreme Court has never invoked *Charming Betsy* against the United States in a suit in which it was a party." *Id.*

Moreover, this case presents no conflict with international law. "The law of nations permits the exercise of criminal jurisdiction by a nation under five general principles," including the "territorial" principle. *Felix-Gutierrez*, 940 F.2d at 1205. The territorial principle includes "not only acts occurring within the United States, but acts occurring outside the United States' borders that have effects within the national territory." *Id.* at 1205-06. In this case, the government pleaded and proved both. *See supra* pp. 80, 87-93.

Nor does this case run contrary to international norms regarding the treatment of price fixing. The view of international norms painted by defendants and the amicus is decades out of date. Price-fixing conspiracies fall into the category of hard-core cartels. "A truly global

effort against hard core cartels has emerged," partly due to the work of the International Competition Network (ICN), a consensus-based organization made up of over 100 national competition agencies, including both the Taiwan Fair Trade Commission and the U.S. Department of Justice. ICN Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Regimes* 5 (2005). In 2005, the ICN working group devoted to cartels observed:

> This worldwide consensus is based on the recognition that hard core cartels harm consumers and damage economies. . . . Secret cartel agreements are a direct assault on the principles of competition and are universally recognised as the most harmful of all types of anticompetitive conduct. Any debate as to whether cartel conduct should be prohibited has been resolved, as the prohibition against cartels is now an almost universal component of competition laws.

Id.

Other jurisdictions' responses to defendants' TFT-LCD conspiracy are good examples of the current international consensus regarding price fixing. Participants in this conspiracy have been sanctioned in China, the European Union, and Korea based on the conspiracy's effects in each of those jurisdictions, with total fines exceeding a billion dollars. These three jurisdictions all apply their competition laws

extraterritorially to protect their consumers from price fixing anywhere in the world.[23] Thus, for example, the EU exercised jurisdiction over the TFT-LCD cartel because "the prices discussed at the cartel meetings were global in scope and, therefore, intended to also cover customers in the EU market—the fact that the collusive conduct took place entirely in Asia, among Asian suppliers only and with limited to no involvement of their local EU subsidiaries was irrelevant." Yves Botteman & Agapi Patsa, *The Jurisdictional Reach of EU Anti-Cartel Rules: Unmuddling the Limits*, 8 Eur. Competition J. 365, 377-78 (2012).

These three jurisdictions are not exceptional. "The extraterritorial application of antitrust laws on the basis of the effects doctrine is by now widely accepted. . . . Nor do comity concerns seriously limit the extraterritorial reach where there are domestic effects . . . ." Florian Wagner-von Papp, *Competition Law and Extraterritoriality*, *in Research*

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[23] *See* Yves Botteman & Agapi Patsa, *The Jurisdictional Reach of EU Anti-Cartel Rules: Unmuddling the Limits*, 8 Eur. Competition J. 365, 377-78 (2012); Joseph Seon Hur, *Extraterritorial Application of Korean Competition Law*, 6 Regent J. Int'l L. 171 (2008); Philip F. Monaghan, *Cartel Enforcement Comes of Age in China—The National Development and Reform Commission's* LCD Panels *Decision*, CPI Antitrust Chron., Feb. 2013 (2), https://www.competitionpolicy international.com/file/view/6887.

Handbook on International Competition Law 21, 57-58 (Ariel Ezrachi ed. 2012); *see also* Einer Elhauge & Damien Geradin, *Global Competition Law and Economics* 1187-88 & n.43 (2d ed. 2011) (citing Argentina, Brazil, Canada, Egypt, India, Korea, New Zealand, Singapore, South Africa, Taiwan, and Turkey as additional countries that "apply their antitrust laws to extraterritorial conduct").

While defendants argued below that principles of international comity barred this prosecution, they have abandoned that argument here. The amicus, Professor Guzman, however, has taken up the cause. Guzman Br. 13-16. He maintains that he is relying on the sort of comity "exercised by legislatures when laws are enacted." *Id.* at 13. But such notions of comity do not preclude extraterritorial application of U.S. antitrust law. To the contrary, the Supreme Court has observed that "application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Empagran*, 542 U.S. at 165. Professor Guzman simply ignores the Supreme Court's most recent teaching.

Professor Guzman also focuses on factors, like Taiwan's response to this price-fixing conspiracy and the U.S. prosecution, that have little to do with statutory construction. Such facts are considered by some courts in private cases in determining whether comity concerns counsel them to decline jurisdiction out of deference to the interests of other nations. *See Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614-16 (9th Cir. 1976). But no such consideration is warranted in a case brought by the Executive Branch that is charged both with enforcing the criminal laws of the United States and with managing the relations between the United States and foreign nations. *See Pasquantino v. United States*, 544 U.S. 349, 369 (2005) (declining to second-guess the government's decision to prosecute a scheme to defraud a foreign government of tax revenue "based on the foreign policy concerns," which courts have "neither aptitude, facilities nor responsibility to evaluate" (internal quotation marks omitted)). By bringing these charges, the Executive Branch has stated its determination that international comity concerns do not warrant forbearance. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for

International Operations § 3.2 (1995) (outlining comity factors the agencies consider before bringing an antitrust action).

In any event, international comity does not counsel against this prosecution. In *Hartford Fire*, for example, the Court focused on the degree of conflict with foreign law or policy as the primary consideration for international comity. 509 U.S. at 798. The Court held that "[n]o conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.'" *Id.* at 799 (quoting 1 *Restatement (Third) Foreign Relations Law* § 403, cmt. e). Defendants could have easily complied with both U.S. and foreign law because, as defendants and the amicus acknowledge, Taiwan also prohibits price fixing. Hsiung/Chen Br. 52 n.9; Guzman Br. 17.

Professor Guzman suggests that, even though there is no conflict with foreign law, additional comity analysis is still appropriate. Guzman Br. 14. Although he is unclear as to the factors he considers relevant and how they apply here, Guzman suggests that Taiwan has treated defendants' price-fixing conspiracy differently and that the imposition of criminal sanctions in the United States intrudes on "Taiwan's ability to regulate its economy." *Id.* at 16. But the modern

international consensus does not find it unduly intrusive for a country harmed by a price-fixing conspiracy to sanction foreign conspirators, as was done here. *See supra* pp. 113-16.

The economic reality is that a conspiracy in one jurisdiction to fix the price of products predominantly exported "transfers wealth away from the territory containing the buyers and toward the territory containing the sellers." Areeda & Hovenkamp, *supra*, ¶ 272j, at 325. Here, the United States and other countries containing large numbers of buyers are "more appropriate criminal prosecutor[s]" than the jurisdiction containing the conspiring sellers. *Id.* at 326. Thus, it is perhaps not surprising that Taiwan "investigated the events in question but concluded that no action was appropriate," Guzman Br. 18, while the United States, the EU, and China—where many of the price-fixed products were ultimately sold—have enforced their competition laws.

Notwithstanding Professor Guzman's assessment that Taiwan "feel[s] that such aggressive intrusion into its regulatory sphere is unjustified," Guzman Br. 14, to date, neither Taiwan, nor any other foreign government, has voiced a concern to the United States about this prosecution. Nor did any government object to the United States'

earlier sanctioning of five companies based in Taiwan, Japan, and Korea, and ten foreign nationals for participation in the TFT-LCD conspiracy with sentences totaling more than $715 million in fines and 89 months imprisonment.

Given that there is no conflict with foreign law or policy, that the conspiracy operated in the United States, that it had a reasonably foreseeable, direct, and substantial effect on U.S. commerce, and that it victimized U.S. companies and consumers, this criminal prosecution was appropriate.

II. The Jury Was Properly Instructed and Found Venue in the Northern District of California

Defendants attack the jury's finding of venue in the Northern District of California, arguing that the jury instructions were erroneous or constructively amended the indictment, that the proof was insufficient, and that the government's rebuttal closing tainted the jury's finding and denied defendants due process. Hsiung/Chen Br. 61-87. These arguments are legally and factually meritless.

A. The Jury Was Properly Instructed on the Preponderance Standard and Time Period Applicable to Finding Venue

The district court instructed the jury that, "[b]efore you can find a defendant guilty of committing a crime charged in the Indictment, you must find by a preponderance of the evidence that between September 14th, 2001, and December 1st, 2006, the conspiratorial agreement, or some act in furtherance of the conspiracy, occurred in the Northern District of California," which includes fifteen specified counties. SER2032-33; *see also* ER598. The court further instructed that "[t]o prove something by a preponderance of the evidence is to prove it is more likely true than not true," which "is a lesser standard than beyond a reasonable doubt." ER1155; *see also* ER598-99. Defendants argue that the standard should have been beyond a reasonable doubt and that the time period should have been limited to the limitations period, which extends back only to June 2005. Hsiung/Chen Br. 72-73, 79-82. Both arguments were waived and, in any event, are wrong.

1. Defendants Waived Any Attack on the Venue Instruction

The invited error doctrine bars appellate review of defendants' argument. The doctrine applies when a defendant induces what he subsequently claims to be an error, having been aware at the time that

he was relinquishing some advantage or right. *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997). Invited errors are unreviewable on appeal. *Id.*

Contrary to the defendants' suggestion that they merely "did not object to the jury instruction," Hsiung/Chen Br. 79 n.14, they actually proposed it jointly with the government and stipulated to it. ER1207. One defense counsel also emphasized in his closing argument that preponderance is the relevant burden of proof, "not reasonable doubt," and that the relevant time period was the conspiracy period, "between September 14th, 2001, and December 1, 2006." SER2022. Thus, the defendants bear responsibility for introducing what they now claim is an error, for binding themselves to it by stipulation, and for repeating it and disclaiming their current argument in front of the jury. Under these circumstances, the invited error doctrine applies.

Even if defendants had not invited what they now consider to be an error, they did not raise a timely objection to the venue instruction, and therefore their argument is subject to plain error review, as they concede, Hsiung/Chen Br. 79 n.14. *See United States v. Moreland*, 622 F.3d 1147, 1165-66 (9th Cir. 2010). That is, relief is not warranted

unless there has been an error that was plain, affected substantial rights, and seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 1166. Defendants cannot show that there was an error, let alone a plain one. Moreover, nothing about the supposed error affects the fairness, integrity, or public reputation of the proceedings. There is no dispute that the defendants' knowing participation in the charged price-fixing conspiracy was proved beyond a reasonable doubt in a fair trial before an impartial jury.[24]

2. The Preponderance Standard Applies to Venue

As defendants rightly acknowledge, this Court's precedents contravene their contention that "venue must be proved beyond a reasonable doubt," Hsiung/Chen Br. 79, 81 (citing *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002); *United States v. Powell*, 498 F.2d 890,

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[24] To the extent defendants argue their trial was unfair because venue is proper nowhere—and they do not suggest an alternative venue, nor did they move to transfer—they ignore the catch-all venue provision, 18 U.S.C. § 3238. Under Section 3238, offenses begun or committed outside the United States "shall be" tried in any district in which an offender "is arrested or is first brought," and if there is no such district, then the government may indict in the district of the "last known residence" of any of the offenders. AUOA is incorporated in California, SER1916-19, with its office in the Northern District of California, SER2399, making it a resident of that district. Thus, trial in that district did not seriously affect the fairness of the proceedings.

891 (9th Cir. 1974)). This Court has never wavered from the rule that the government need establish venue only by a preponderance of the evidence. *See, e.g.*, *United States v. Lukashov*, 694 F.3d 1107, 1120 (9th Cir. 2012) (describing the rule as "well settled"); *United States v. Angotti*, 105 F.3d 539, 541 (9th Cir. 1997); *United States v. Prueitt*, 540 F.2d 995, 1006 (9th Cir. 1976).[25]

Defendants' contention that this Court has failed to adequately justify the rule, *see* Hsiung/Chen Br. 81-82, is not only irrelevant given the binding precedent, but also wrong. This Court has explained that the burden for proving venue is lower than "beyond a reasonable doubt" because venue "is not an essential fact constituting the offense charged." *Powell*, 498 F.2d at 891; *see also United States v. Svoboda*, 347 F.3d 471, 485 (2d Cir. 2003) (rejecting argument that *United States*

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[25] Post-*Apprendi*, every other regional circuit has also continued to apply this rule. *See United States v. Cameron*, 699 F.3d 621, 636 (1st Cir. 2012); *United States v. Coplan*, 703 F.3d 46, 77 (2d Cir. 2012); *United States v. Root*, 585 F.3d 145, 155 (3d Cir. 2009); *United States v. Engle*, 676 F.3d 405, 412 (4th Cir. 2012); *United States v. Strain*, 396 F.3d 689, 692 n.3 (5th Cir. 2005); *United States v. Kuehne*, 547 F.3d 667, 677 (6th Cir. 2008); *United States v. Knox*, 540 F.3d 708, 714-15 (7th Cir. 2008); *United States v. Rivera-Mendoza*, 682 F.3d 730, 733 (8th Cir. 2012); *United States v. Cope*, 676 F.3d 1219, 1224 (10th Cir. 2012); *United States v. Stickle*, 454 F.3d 1265, 1271-72 (11th Cir. 2006); *United States v. Brodie*, 524 F.3d 259, 273 (D.C. Cir. 2008).

v. Gaudin, 515 U.S. 506 (1995), requires proof of venue beyond a reasonable doubt because "venue is *not* an essential element of the crime charged").

The Court's explanation is entirely consistent with venue's constitutional significance. Indeed, this Court extensively described venue's constitutional provenance in *Angotti* while simultaneously specifying preponderance as the relevant burden. 105 F.3d at 541-42. It saw no tension in that position, and there is none.

3. Acts Establishing Venue Can Occur Anytime During the Conspiracy's Existence

Defendants assert that a venue-establishing act must occur within the statute of limitations and make two arguments based on that assertion. First, they argue, by implication, that the jury instruction that they jointly proposed was erroneous. Hsiung/Chen Br. 72-73. But the instruction is correct because there is no such requirement. *See United States v. Tannenbaum*, 934 F.2d 8, 13 (2d Cir. 1991) (holding that the government need not prove "that the overt act establishing proper venue also must have been committed within the statute of limitations"); *cf. Forman v. United States*, 264 F.2d 955, 956 (9th Cir. 1959) (applying prior requirement of venue within a division of a

district and holding that overt acts in the division are sufficient to establish venue "notwithstanding only the later acts [outside the division] satisfy the requirements of the statute of limitations").

The contrary rule suggested by defendants finds no support in the case law or the statutory or constitutional venue provisions, which focus on where the offense occurs, not when it occurs.[26] And defendants' rule makes no sense: it would deny venue in a district where numerous acts in furtherance took place simply because the final act, and the only one within the limitations period, occurred elsewhere.

Defendants focus on the indictment's allegation that the conspiracy "was carried out, in part, in the Northern District of California, within the five years preceding the filing of this Indictment," ER1732 ¶ 21. Hsiung/Chen Br. 72. But they cannot rely on the indictment as legal authority establishing a new rule for venue when the stipulated jury instruction correctly stated the law on venue.

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[26] Defendants' only purported authority is a single sentence in a discussion of the statute of limitations from an out-of-circuit district court decision a half-century ago. Hsiung/Chen Br. 72-73 (citing *United States v. Luros*, 243 F. Supp. 160, 168 (N.D. Iowa 1965)). To the extent the sentence pertains to venue, it is mere dicta supported by no analysis.

Second, defendants argue that the jury instruction and the government's evidence on venue constructively amended or fatally varied from the indictment, but this argument lacks merit. A constructive amendment occurs when "'the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them.'" *United States v. Adamson*, 291 F.3d 606, 614 (9th Cir. 2002) (quoting *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984)). But "[v]enue is not an element of the charged crime," *United States v. Casch*, 448 F.3d 1115, 1117 (9th Cir. 2006), and it need not be pleaded in the indictment or presented to the grand jury, *Carbo v. United States*, 314 F.2d 718, 733 (9th Cir. 1963). Allegations regarding venue in an indictment are not "charging terms" and, therefore, cannot be the basis of a constructive amendment.

A fatal variance occurs only when "'the evidence offered at trial proves facts materially different from those alleged in the indictment,'" and the variance affects the defendants' "'substantial rights.'" *Von Stoll*, 726 F.2d at 586-87 (quoting *United States v. Cusmano*, 659 F.2d 714, 718 (6th Cir. 1981); *see also United States v. Kaiser*, 660 F.2d 724,

730 (9th Cir. 1981)). A variance is not fatal if it would not mislead a defendant in preparing his defense (or raise double jeopardy concerns, not pertinent here). *United States v. Tsinhnahijinnie*, 112 F.3d 988, 991 (9th Cir. 1997).

Here, the alleged variance does not touch the defendants' "substantial rights," for "[d]efendants have the right to be tried in the proper forum, [but] not the right to be charged with the proper venue." *Carbo*, 314 F.2d at 733. Moreover, defendants could not have been misled in preparing their defense. One month before trial, the government proposed a jury instruction on venue explaining that the relevant time period for venue evidence was the conspiracy period ("between September 14, 2001 and December 1, 2006") rather than the limitations period, giving defendants ample notice of the time period relevant to venue. SER2440.[27] During the trial, the parties jointly proposed and stipulated to a set of jury instructions that included a venue instruction identical to the one the government had proposed before trial. ER1207. In closing argument, defense counsel emphasized

[27] Defendants' corresponding proposed instructions lacked a venue instruction altogether. ER1474-1548.

the conspiracy period as the relevant time period, SER2022, raising no doubts about it at any point. These circumstances undermine defendants' contention that the government's venue argument somehow caught them by surprise at the end of the trial. Thus, if there was a variance from the indictment, it is hardly a fatal one.

In any event, there is no variance at all because the government offered proof of several overt acts that a rational jury could have found occurred in the district during the limitations period. As explained below, defendants' co-conspirators committed numerous acts in the district, including acts within the limitations period. AUOA employees Michael Wong and Evan Huang, who were based in the district, routinely emailed other AUO employees about their communications with competitors and transmitted collusive prices to AUO's customers, and several such emails were sent within the limitations period. *See, e.g.*, SER1996-98 (August 11, 2006, email from Huang to Wong regarding pricing); ER801 (August 25, 2006, email from Huang to AUO employees warning them to be "watchful" because Huang's customer account, Apple, suspected that AUO was engaged in illegal activities). Thus, even assuming defendants were correct that venue evidence must

be gleaned from within the limitations period, the evidence was sufficient to prove venue.

B. The Evidence Sufficiently Proved Acts in Furtherance of the Conspiracy in the Northern District of California

In reviewing the sufficiency of the evidence supporting venue, this Court views the evidence in the light most favorable to the government and then asks whether any rational trier of fact could have found by a preponderance of the evidence that venue was proper.[28] *United States v. Cruz*, 554 F.3d 840, 844 (9th Cir. 2009). Direct proof is not required; circumstantial evidence alone can establish venue. *United States v. Childs*, 5 F.3d 1328, 1332 (9th Cir. 1993).

1. Acts Coordinating the Price Agreements or Advancing the Sale of Price-Fixed Goods Establish Venue

To satisfy the statutory and constitutional venue requirements, the government "must prosecute an offense in a district where the offense was committed." Fed. R. Crim. P. 18. For conspiracies, venue is proper in any district where an overt act in furtherance of the conspiracy occurred. *United States v. Meyers*, 847 F.2d 1408, 1411 (9th Cir. 1988); *see also* 18 U.S.C. § 3237(a) (permitting prosecution "in any district in

[28] Defendants propose a special, higher standard for this case, but their argument is misguided. *See infra* pp. 141-43.

which such offense was begun, continued, or completed"). It is "not necessary that [the defendant] himself have entered or otherwise committed an overt act within the district." *Meyers*, 847 F.2d at 1411. In fact, venue may lie in districts "with which the defendant had no personal connection, and which may occasionally be distant from where the defendant originated the actions constituting the offense." *Angotti*, 105 F.3d at 543.

The objective of the conspiracy here, like all price-fixing conspiracies, was selling products at artificially inflated prices. Acts in furtherance of that objective include not only communications among the conspiring competitors, but also acts by any of the conspirators to advance or effect sales of the price-fixed panels. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 403-04 (1927) (holding that venue-establishing acts in furtherance of a price-fixing conspiracy include the "circulation of price bulletins, and the making of" and "effect[ing] sales within the district"); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253 (1940) (holding that, for venue purposes, acts in furtherance include "making of . . . sales" at inflated prices).

In sum, the question on appeal is whether, viewing the evidence in the light most favorable to the government, a reasonable jury could have found that it was more likely than not that some overt act furthering the conspiracy, which could be a co-conspirator communication or an effort to effect sales, occurred in the Northern District of California. Ample evidence answers that question in the affirmative.

2. AUOA Employees Furthered the Conspiracy in the Northern District of California

In a seminal decision on venue for price fixing, the Supreme Court found venue was proper in the Southern District of New York because, "[a]lthough the [manufacturers] were widely scattered, an important market for their manufactured product was within the Southern district of New York, which was therefore a theater for the operation of their conspiracy." *Trenton Potteries*, 273 U.S. at 403. Likewise, the conspiring panel manufacturers, while based in Asia, made the Northern District of California a "theater for the operation of their conspiracy" because major U.S. customers were there. And in that theater, they established offices, marketed price-fixed panels, and

communicated with their co-conspirators, all in furtherance of their conspiracy.

Like Samsung, LG, and CMO, AUOA maintained an office in the Northern District of California because of the presence of major customers. ER1417-19; SER2367-70. Michael Wong was employed by AUOA from 2001 to 2008 and was based in AUOA's office in the district, although he travelled to AUOA's offices in Texas, as well. SER2391, 2397, 2399. Wong had responsibility for AUOA's customer accounts with HP, Apple, and Dell. ER1410; SER2394. He conducted negotiations with these customers in person, by email, and by telephone. SER2375-76, 2379-80, 2419-20; *see also e.g.*, SER1908-10 (price negotiation via email between Wong and Apple).

Wong personally discussed panel pricing with AUO's competitors in the United States and shared with his colleagues in Taiwan pricing information gathered by other AUOA employees through communications with competitors. ER1402; SER2312, 2326, 2332-33, 2342, 2352-53, 2358. Wong and his contact at LG coordinated the panel prices they charged to Dell and, in doing so, obtained higher prices. SER2306-11. Subordinates sent Wong weekly reports containing

information from pricing communications with competitors, including communications about Bay Area customer accounts. SER1996-98 (Evan Huang report regarding Apple, which includes competitor pricing information).

More than forty trial exhibits contain emails that Wong sent or received, reflecting both competitor pricing communications and the implementation of agreed-upon prices.[29] *E.g.*, ER804; SER1912-15, 2015-16. Thus, a rational jury could rightly conclude that it was more likely than not that Wong participated in and supervised both collusive conduct and marketing of panels from his Bay Area office, sometimes involving Bay Area customers like HP and Apple. Indeed, it would be irrational for the jury to presume that, each time Wong sent or received any of these emails or otherwise marketed TFT-LCD panels, all of which furthered the conspiracy, he first exited the district.

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[29] Defendants suggest that the government cannot rely on emails involving Wong and Huang or their price negotiations because such a theory of venue was "not presented to the jury." Hsiung/Chen Br. 65-66. The claim is puzzling because the government's argument is based entirely on testimony and evidence presented to the jury at trial and on the stipulated jury instruction on venue. The government, having highlighted some evidence establishing venue during closing argument, is not somehow estopped on appeal from pointing to additional evidence that the jury was free to consider in reaching its verdict.

The numerous emails sent or received by Wong reflecting price communications with competitors and implementing agreed-upon prices also refute defendants' claim that "[n]o reasonable jury could have found that Wong was a co-conspirator," Hsiung/Chen Br. 70. When the district court ruled that many of Wong's emails were admissible under the co-conspirator hearsay exception, it explicitly observed that AUOA employees participated in the conspiracy, ER1422-23, and after hearing the trial testimony, the court did not waver from that conclusion when admitting the emails into evidence. To the extent that Wong claimed he was not engaged in price fixing, the jury was of course free to disregard such self-serving denials. *See United States v. Heredia*, 483 F.3d 913, 923 n.14 (9th Cir. 2007) ("We have long held that juries are not bound to believe or disbelieve all of a witness's testimony."). It would be unremarkable for the jury to have concluded, just as the district court did, that Wong participated in the conspiracy.

Similarly, the activities of AUOA's Evan Huang independently support the jury's venue finding. Huang was assigned to sell to Apple, one of AUO's major customers. ER1418; SER2381. While he was responsible for the Apple account, Huang was located in Cupertino,

California. SER2322-23, 2381. And while stationed in Cupertino, he engaged in collusive conduct regarding the Apple account. His boss, Wong, testified that Huang had a contact at CMO who provided competitor pricing information regarding Apple. SER2327-28.[30] Huang submitted his report on Apple pricing with a cover email that included a local South Bay telephone number (area code 408) in the signature block. SER1996-98. He also emailed information about Apple pricing negotiations to AUO employees with the subject line "Pls call me….at" a South Bay phone number. SER1999-2000.

Again, the district court rightly concluded that Huang's emails were admissible as co-conspirator statements. ER1422-23. Huang's participation in these collusive price communications undermines the defendants' claim that there is "no evidence that Huang was aware of

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[30] Defendants contend that "efforts to gather competitor data relevant to informed pricing decisions . . . is not illegal," Hsiung/Chen Br. 70. But "[t]he overt act need not be unlawful" by itself. *United States v. Monroe*, 552 F.2d 860, 864 (9th Cir. 1977) (citing *Braverman v. United States*, 317 U.S. 49, 53 (1942)); *see also United States v. Tzolov*, 642 F.3d 314, 320 (2d Cir. 2011) (explaining an act "need not be unlawful; it can be any act, innocent or illegal, as long as it is done in furtherance of the object or purpose of the conspiracy"). And the jury's conviction of AUO and AUOA belies the contention that Huang's acts were not in furtherance of the price-fixing conspiracy.

any price-fixing activities," Hsiung/Chen Br. 71. Indeed, the evidence shows Huang not only knew of and participated in the conspiracy, but fully appreciated its illegal nature. In August 2006, Huang sent an email to Wong and others while working for AUOA in Cupertino. ER801; SER2322-23. That email was titled "Watchful!" and read, "Dear All, NYer is suspecting suppliers are exchanging price information. This is illegal, especially in the states. We need to be watchful!" ER801. Wong testified that NYer was code for Apple. SER2323. This email also included Huang's South Bay telephone number.

Based on these exhibits and Wong's related testimony, the jury could reasonably conclude that Huang participated in and furthered the conspiracy not only by doing his job marketing the price-fixed panels, but also through his specific pricing communications with competitors and his attempt to safeguard it from discovery, all while stationed in Cupertino.

United States v. Pace, 314 F.3d 344 (9th Cir. 2002), on which defendants rely, Hsiung/Chen Br. 67-69, is not on point. The defendant in *Pace* was charged with wire fraud, and venue for a wire-fraud scheme lies "only where there is a direct or causal connection to the misuse of

wires," that is "where the wire transmission at issue originated, passed through, or was received, or from which it was 'orchestrated.'" 314 F.3d at 349-50. But venue for a price-fixing conspiracy is not so limited, extending to the site of any act of any conspirator in furtherance of the conspiracy. Besides, the volume of documented communications advancing the conspiracy in this case, as well as testimony from multiple witnesses, dwarfs the two stray communications in evidence in *Pace*.

3. Conspirators Negotiated Sales of Price-Fixed Panels to HP and Apple in the Northern District of California

Evidence that major American customers negotiated the procurement of panels from offices in the Northern District of California independently establishes venue there. One of those customers was HP. Evidence at trial showed that HP negotiated the procurement of panels out of its Cupertino, California, office until May 2002, when its procurement operation moved to Houston following HP's merger with Compaq. ER1467. Four conspirator companies (AUO via AUOA, LG, Samsung, and CMO) maintained offices in the South Bay near HP, and they negotiated sales of panels to HP at collusive prices. SER2367-70. The Crystal Meeting reports from that time show the conspirators

specifically discussed prices to charge HP. ER774-77, 785-94; SER1964-68, 1982-86. The jury could reasonably infer that representatives from the major panel manufacturers had regular contact with HP's procurement team in Cupertino to negotiate panel sales until May 2002.

Apple is another customer that procured panels in the district. In September 2002, Wong was working in the Bay Area and negotiated the sale of panels to Apple, which is also located there.[31] SER1908-10. During those negotiations, Wong emailed AUO's Steven Leung to confirm the prices he was authorized to offer Apple. *Id.* Accordingly, the jury could infer from the record evidence, viewed in the light most favorable to the prosecution, that it was more likely than not that pricing negotiations between AUOA and Apple occurred in the Northern District of California.

Even if the jury were somehow unpersuaded that participants in the conspiracy were ever physically present in the district when they acted

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[31] It is common knowledge in the Northern District of California that Apple is located in the district, in Cupertino, California. In fact, defendants invoked that common knowledge in their closing argument, telling jurors that "Apple, as you know, is headquartered in Cupertino, 40 miles away from here." SER2029.

in furtherance of the conspiracy, despite the government's ample evidence, they were nevertheless entitled to credit telephone calls or emails between a conspirator outside the district and a nonconspirator in the district, provided the call or email furthered the conspiracy's objectives. *United States v. Rommy*, 506 F.3d 108, 119-22 (2d Cir. 2007); *see also United States v. Gonzalez*, No. CR 10-00834, 2011 WL 500502, at *3 (N.D. Cal. Feb. 9, 2011) (collecting cases).

Thus, even if the conspirators were absent from the district, however inexplicably, every time they endeavored to sell price-fixed products to customers like Apple and HP that were located there, their communications with those customers establish venue. And Wong testified that defendant Leung emailed American customers about pricing negotiations. SER2385-86. Likewise, emails from defendants Leung and Hsiung to AUOA employees located in the district that furthered the conspiracy, *see* SER1908-10, 1987-88, 2348, also establish venue, whether or not those employees were knowing participants in the conspiracy. In short, abundant evidence allowed the jury to conclude the government had proven venue.

C. The Prosecutor's Rebuttal Closing Did Not Alter the Standard of Review or Deny Defendants Due Process

Defendants claim the government mischaracterized the evidence proving venue during its rebuttal closing argument. The prosecutor argued that HP "was a major victim of this crime" and "had a procurement office in Cupertino from the beginning of the charged conspiracy time until HP and Compaq merged in May of 2002." ER1042. He further argued that "negotiations for LCD panels were carried out there" and that the "conspirators' negotiation of price-fixed panels with HP in Cupertino were acts in furtherance of this conspiracy." *Id.* Attempting to rebut this rebuttal, defense counsel objected, stating in open court that this "[m]isstates the evidence." *Id.* The court asked "[i]s that in evidence," received an affirmative response from the prosecutor, and summarily responded "[o]verruled." *Id.*

First, citing *Lukashov*, 694 F.3d 1107, defendants argue that, because the district court overruled their objection, a heightened standard of review for sufficiency of venue evidence applies on appeal. Hsiung/Chen Br. 63-64. In *Lukashov*, the district court had answered the factual venue inquiry for itself, as a matter of law. 694 F.3d at 1120. This Court noted that those circumstances were "unusual" and

had "no prior precedent." *Id.* Because of the abnormal procedure, this Court reformulated its typical standard of review to ask whether "a rational jury could not fail to conclude that a preponderance of the evidence establishes venue." *Id.*

Nothing similar occurred here to take the venue question away from the jury. Overruling the objection did not somehow "signal agreement" with the prosecutor's characterization of the evidence, let alone the government's position on venue. Hsiung/Chen Br. 64. To the contrary, the district court had instructed the jurors that their recollection of the evidence controlled and that "what the lawyers have said . . . in their closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence." SER2037. The court had also instructed the jurors to "not read . . . into anything that I may have said or done as any suggestion as to what verdict you should return. That is a matter entirely up to you." SER2036. The jury must be assumed to have followed these instructions. *Heredia*, 483 F.3d at 923.

Defendants' reliance on *Powell v. Galaza*, 328 F.3d 558 (9th Cir. 2003), Hsiung/Chen Br. 64, is unavailing because there the district court had wrongly instructed the jury "that the only contested issue in

the case should be decided against" the petitioner. *Id.* at 564. In contrast, here the court overruled an objection without commentary or direction. That opaque ruling did not command the jury to decide the issue against defendants, just as a ruling sustaining the objection would not have commanded the jury to decide the issue against the government. The jurors were properly instructed on venue and on how to treat all they heard. Defendants provide no sound reason to depart from the ordinary standard of review here.

Second, defendants argue that the prosecutor's statement "grossly misled the jury about the venue evidence," thereby denying defendants due process. Hsiung/Chen Br. 83. But the prosecutor did not misstate the venue evidence, much less "infect[] this eight-week trial with "unfairness." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation marks omitted).

Defendants contend that the prosecutor "saved any mention of venue for rebuttal closing argument" and then "sandbagg[ed] the defense." Hsiung/Chen Br. 83, 85. The government was under no obligation to address venue in its closing argument at all, and it was certainly free in rebuttal to respond to defense counsel's lengthy

discussion of venue in its closing argument, SER2021-26. *See United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989) ("It is fair advocacy for the prosecution to advance an argument in rebuttal to which the defendant has opened the door."). Moreover, prosecutors are "granted reasonable latitude to fashion closing arguments" and are "free to argue reasonable inferences from the evidence." *Id.* at 1417. They have "'considerable leeway to strike "hard blows" based on the evidence and all reasonable inferences from the evidence.'" *United States v. Hermanek*, 289 F.3d 1076, 1100 (9th Cir. 2002) (quoting *United States v. Henderson*, 241 F.3d 638, 652 (9th Cir. 2002)).

The record shows that the prosecutor fairly characterized the evidence when he stated that HP maintained its procurement office in Cupertino until its May 2002 merger with Compaq and that pricing negotiations affected by the conspiracy were carried out there. Both AUOA's Wong and HP's Tierney testified that HP maintained its procurement office in Cupertino, California until mid-2002. ER1419, 1467. Wong testified that he was employed by AUOA from 2001 to 2008, was located in the Bay Area, and was responsible for selling TFT-LCD panels to HP before he became branch manager in early 2003.

ER1418; SER2377-78, 2399. LG, Samsung, and CMO also had U.S. headquarters in the Bay Area, near their major U.S. customers. SER2367-70. While HP's procurement office was in Cupertino, many of those suppliers reached agreements on the prices they would charge HP. ER762-64, 774-77, 785-94; SER1964-68, 1982-86. Sales, obviously, are the result of price negotiations, and those negotiations occurred during the conspiracy period. There was nothing exceptional or misleading about the prosecutors' characterization of this evidence in closing. He remained comfortably within his "considerable leeway," *Hermanek*, 289 F.3d at 1100, hewing closely to the evidence presented at trial. The defendants were not denied due process.

III. AUO's Fine Does Not Exceed the Maximum Authorized by Law

When the ordinary statutory maximum fine for an offense—$100 million for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1—does not adequately reflect the seriousness of the offense in light of the pecuniary gain or loss it caused, Congress has authorized an alternative maximum fine:

> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined

> not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

18 U.S.C. § 3571(d). Here, the government alleged the conspirators derived gross gains of at least $500 million from their price-fixing conspiracy. ER1734 ¶ 23. Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the district court determined that the gross gain was a jury question and required the government to prove it beyond a reasonable doubt. SER2446.

Thus, the jurors were instructed that, if they found AUO guilty,[32] they "must then determine whether the Government has proven beyond a reasonable doubt that any of the defendants or other participants in the conspiracy derived monetary or economic gain from the conspiracy." ER1154. If the jurors found such a gain, they were directed to make findings "regarding the total gross gain from the conspiracy," including "the gross gains to the defendants and other participants in the conspiracy." *Id.* The jurors unanimously agreed the gross gain was at

[32] The government sought to rely on Section 3571(d) to set a statutory maximum fine only for AUO and AUOA. At sentencing, the government did not seek and the district court did not impose a fine on AUOA. Thus, AUO is the only defendant challenging its sentence.

least $500 million, ER589, and thus the maximum fine was $1 billion, twice the $500 million fine actually imposed on AUO.

AUO argues on appeal that the relevant pecuniary gain under Section 3571(d) is limited to the pecuniary gain to the individual defendant. But Section 3571(d) contains no such limitation, and none of the authority AUO marshals supports AUO's reading. Because the statute is not ambiguous, AUO's reliance on the rule of lenity is misplaced. Lastly, Section 3571(d) does not impose a collective maximum fine for a group of co-conspirators, and AUO's reliance on the civil law concept of joint and several liability, AUO Br. 80-83, is unavailing because criminal fines serve entirely different purposes from civil damages.

A. The Gross Gain from a Conspiracy Offense Includes All Conspirators' Gains

Despite the language of Section 3571(d), which authorizes a maximum fine of "twice the gross gain" if "any person derives pecuniary gain from the offense," AUO argues that the maximum fine is limited to twice the defendant's own gain. But where, as here, "the language of a statute is unambiguous, the plain meaning controls." *United States v. Robinson*, 94 F.3d 1325, 1328 (9th Cir. 1996). "'Any person' means

exactly that, and may not be interpreted restrictively." *Bonnichsen v. United States*, 367 F.3d 864, 874 (9th Cir. 2004); *see also Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999) ("The term 'any person' is quite broad, and we give words their ordinary meaning."; "[A]ny means ALL-used to indicate a maximum or whole." (internal quotation marks omitted)). Because the statute plainly contemplates that persons other than the defendant may derive gain from the offense, the gain for Section 3571(d) includes the gain derived by "any person" from the "offense."

AUO cites in support of its argument *United States v. Pfaff*, in which the Second Circuit describes Section 3571(d) as authorizing a fine of "not more than twice the gross pecuniary loss caused by, or gain derived from, the defendant's offenses," 619 F.3d 172, 174 (2d Cir. 2010). AUO Br. 77. AUO reads this to require that the maximum fine be "based on [a defendant's] own individual conduct." *Id.* at 78. But *Pfaff* refers to the gains from the defendant's "offenses," not from its "conduct." AUO's offense is the price-fixing conspiracy charged and proved at trial. Like all antitrust conspiracies, it "is a partnership in crime; and an overt act of one partner may be the act of all." *United States v. Socony-Vacuum*

Oil Co., 310 U.S. 150, 253-54 (1940). Thus, *Pfaff* does not support AUO's reading of Section 3571(d) and instead is consistent with including all the gains or losses from the price-fixing conspiracy, not only those realized by AUO.[33]

AUO also cites the statute's legislative history, AUO Br. 74, but ordinary rules of statutory construction require the Court to "follow the plain meaning of those words" in the statute, and "not look to legislative history where their meaning is clear on their face." *Farr v. United States*, 990 F.2d 451, 455 (9th Cir. 1993). Moreover, AUO's reliance is puzzling because Congress rejected the limitation AUO presses here when it modified the language of a predecessor statute to create Section 3571(d).

That predecessor statute provided that "[i]f the *defendant* derives pecuniary gain from the offense . . . the defendant may be fined not more than . . . twice the gross gain." 18 U.S.C. § 3623(c)(1) (Supp. III

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[33] AUO cites two additional cases, neither of which addresses the issue AUO raises, much less provides a persuasive analysis to support AUO's argument. *See United States v. Chusid*, 372 F.3d 113, 117 (2d Cir. 2004) (imposing a fine of $250,000 without resort to Section 3571(d)'s alternative maximum fine); *United States v. Sanford Ltd.*, 878 F. Supp. 2d 137, 150 (D.D.C. 2012) (interpreting the term "gross gain" to refer to before-tax profit).

1985) (emphasis added). But Congress changed "defendant" to "any person" so that the relevant gain from the offense would not be limited to the defendant's gain. As the legislative history explains:

> New section 3571(d) carries forward, with a modification, the provision of current law authorizing an alternative fine of twice the gross gain or gross loss resulting from an offense. Current law authorizes such a fine, notwithstanding the otherwise applicable fine limit, if the defendant derives pecuniary gain from the offense or if the offense results in pecuniary loss to another person. New section 3571(d) amends this provision by authorizing the court to impose such an alternative fine *if a person other than the defendant* derives pecuniary gain from the offense. Thus, if the defendant knows or intends that his conduct will benefit *another person* financially, the court can measure the fine imposed based on twice that benefit.

H.R. Rep. No. 100-390, at 4 (1987) (emphasis added), *reprinted in* 1987 U.S.C.C.A.N. 2137, 2142; *see also United States v. Andreas*, No. 96 CR 762, 1999 WL 116218, at *2 (N.D. Ill. Feb. 24, 1999) (explaining in a price-fixing case that "Congress amended subsection (d) to ensure that criminal defendants like Andreas would be liable for their conduct even if they intended to enrich a third party like ADM"). Section 3571(d) was drafted to allow for an alternative maximum fine when there is no gain

at all to the defendant, but AUO's interpretation would nullify Congress's change.

AUO contends that this language change was intended only to cover cases in which defendants "committed crimes for the benefit of others," such as when an employee commits a crime "on behalf of his employer corporation." AUO Br. 75. Although the statutory language certainly encompasses such a scenario, nothing in it suggests any such limitation.

In any event, AUO, like all participants in price-fixing conspiracies, did commit a crime for the benefit of others. Defendants' price-fixing conspiracy, by its nature, was intended to benefit all its participants. Only by conspiring to fix the price of TFT-LCD panels could the conspirators successfully raise prices to their customers, and thereby secure massive pecuniary gains. Each of the conspirators, including AUO, committed this crime to benefit both itself and its co-conspirators. Thus, even if AUO were correct that Section 3571(d) was altered to cover cases in which defendants commit crimes "for the benefit of others," this is such a case.

Finally, AUO relies on the definition of "pecuniary gain" in the U.S. Sentencing Guidelines to interpret Section 3571(d). AUO Br. 76-77. As

an initial matter, the Supreme Court has "never held that, when interpreting a term in a criminal statute, deference is warranted to the Sentencing Commission's definition of the same term in the Guidelines." *DePierre v. United States*, 131 S. Ct. 2225, 2236 (2011).

AUO contends that the statement in a Guidelines Application Note that "'[p]ecuniary gain' is derived from 18 U.S.C. § 3571(d) and means the additional before-tax profit to the defendant resulting from the relevant conduct of the offense," U.S.S.G. § 8A1.2, App. Note 3(h), shows "the Sentencing Commission has interpreted the statute to mean exactly what AUO says it means." AUO Br. 77. But a better reading is that the Commission merely adopted Section 3571(d)'s concept of "pecuniary gain," and not any definition of whose pecuniary gain is relevant. And the focus on gain to an individual defendant in certain provisions of the Guidelines does not override Section 3571(d)'s plain language.

AUO claims that the government's interpretation of Section 3571(d) would have "grotesquely draconian consequences." AUO Br. 79. But AUO fails to distinguish between the maximum allowable fine and the actual fine imposed. While Section 3571(d) sets an alternative

maximum fine, the actual fine imposed is determined by the district court based upon the factors in 18 U.S.C. §§ 3553(a) and 3572(a), including the advisory fine range provided by the Sentencing Guidelines. And while Section 3571(d) requires a court to calculate the maximum fine based upon the gain from the offense—here, a price-fixing conspiracy—the Sentencing Guidelines applicable to antitrust crimes direct that each conspirator's fine range be calculated based upon that conspirator's own volume of affected commerce. U.S.S.G. § 2R1.1.

Thus, a conspirator that sold only a small volume of price-fixed products has little reason to fear a "massive fine[] based on the gains received by central players," AUO Br. 79, even if Section 3571(d) would authorize such a fine, because the Guidelines fine range would be based on that conspirator's own "small volume" of commerce. In any event, AUO was no such minor player, as evidenced by its Guidelines fine range of $936 million to $1.872 billion, based on its own $2.34 billion in affected commerce. ER239-41.

B. The Rule of Lenity Does Not Apply Because There Is No "Grievous Ambiguity"

AUO argues that, because Section 3571 "does not specifically address how fines are to be imposed in multi-defendant cases," the rule of lenity requires this Court to adopt its interpretation of the statute. AUO Br. 78-79. But Section 3571 is a statute of general application. It applies to all federal offenses, even if the offense specifies a lower fine, unless the law setting forth an offense "by specific reference, exempts the offense" from the application of Section 3571. 18 U.S.C. § 3571(e). The Sherman Act contains no such exemption. Nor do numerous other federal statutes outlawing criminal conspiracies, all of which create the possibility of a multi-defendant case. *See, e.g.*, 18 U.S.C. §§ 371, 1349. Section 3571's failure to specifically address multi-defendant cases or any other scenario in which it could be applied does not implicate the rule of lenity.

The rule of lenity applies only where there is "a grievous ambiguity, that requires [the Court] to guess as to what Congress intended." *United States v. O'Donnell*, 608 F.3d 546, 555 (9th Cir. 2010) (internal quotation marks and citation omitted). AUO does not identify any ambiguous terms in Section 3571(d), and there are none. Section

3571(d)'s "pecuniary gain from the offense" is unambiguous and rightly includes all gain from the offense. And there is no need to guess whether the gain is limited to AUO's own gain because Congress used the term "any person," rather than "the defendant." AUO's advancement of a narrower interpretation with no basis in the statutory language does not create an ambiguity. *See Smith v. United States*, 508 U.S. 223, 239 (1993) ("The mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable.").

C. Section 3571(d) Does Not Impose a Collective Maximum Fine

Lastly, AUO argues that, if Section 3571(d) authorizes a maximum fine of twice the gain to all conspirators, then the total fines imposed on all conspirators cannot exceed that maximum. AUO Br. 80-83. Thus, in its view, the maximum fine would be $285 million, the difference between the $715 million in fines imposed on AUO's co-conspirators and the $1 billion maximum based on the jury's gain finding.

But the unambiguous language of Section 3571(d) sets a maximum sentence for "the defendant," singular, and not a collective maximum sentence for all defendants who may have been charged with the same offense. Had Congress intended to set a collective maximum fine, it

could have easily done so. Yet statutes governing the imposition of criminal fines make no mention of apportioning fines amongst criminal defendants. *See* 18 U.S.C. §§ 3571-74.

AUO is unable to support its argument with a single case directly on point.[34] Instead, it relies on torts treatises and forfeiture cases to argue this Court should adopt a "one recovery" rule. AUO Br. 81-82. But civil damages awards are intended to compensate the plaintiff for his injuries. *Felder v. United States*, 543 F.2d 657, 667 (9th Cir. 1976). And the purpose of criminal forfeiture is to disgorge ill-gotten gains. *United States v. Newman*, 659 F.3d 1235, 1243 (9th Cir. 2011). Neither seeks to punish offenders by recovering more than the total gain or loss from an offense.

Criminal fines are quite different. They are intended to punish offenders and deter offenses, and thus, they are not so limited. The difference is plain on the face of Section 3571(d), which sets the

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[34] While AUO cites two cases in which it asserts that courts have imposed "joint and several fines for criminal violations," neither decision addresses whether such fines are proper. *See* AUO Br. 81 (citing *United States v. Pruett*, 681 F.3d 232, 237-38 (5th Cir. 2012), and *United States v. Radtke*, 415 F.3d 826, 836 (8th Cir. 2005)). And AUO acknowledges that such fines "run against the usual grain" of individual accountability for criminal conduct. *Id.*

maximum fine, not equal to the gain or loss from the offense, but *twice* the gain or loss from the offense. Moreover, AUO's novel proposal would allow individuals contemplating crimes that may produce pecuniary gain to reduce the fines they face simply by enlisting co-conspirators.[35]

AUO also argues that, if Section 3571(d) does not impose a collective maximum fine, then it "would produce absurd results that would run afoul of the Excessive Fines Clause." AUO Br. 82. But the Excessive Fines Clause applies to the actual fine imposed, not the maximum fine permitted. *United States v. Mackby*, 339 F.3d 1013, 1017 (9th Cir. 2003). And AUO does not argue that the fine imposed on it violates the Excessive Fines Clause. Nor could it.

A fine is unconstitutional under the Excessive Fines Clause only if it is "grossly disproportional to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 337 (1998). AUO's offense consisted of a conspiracy to fix the price of panels costing more than

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[35] Here, had the jury only found a gross gain of $350 million, such a strategy would have paid off for AUO because its co-conspirators had already paid $715 million in fines. The court would have been unable to fine AUO at all—indeed, the co-conspirators might claim the government owes them a $15 million rebate.

$23.5 billion that were imported into the United States either as raw panels or in finished products, $2.34 billion of which were sold by AUO itself. SER1888-89, 2075-76, 2078-79. At sentencing, the government's expert estimated that AUO's overcharge on its panels was over 19 percent. SER1906. The district court concluded that "it was proved beyond peradventure at trial that this conspiracy existed and was affected and caused exactly the damages set out" and that "the financial consequences to the U.S. market were enormous." ER245. In light of this evidence, AUO's $500 million fine is not "grossly disproportional." Indeed, it is well below AUO's Guidelines fine range of $936 million to $1.872 billion.

CONCLUSION

For the reasons stated, the judgments of the district court should be affirmed.

Respectfully submitted.

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STATEMENT OF RELATED CASES

1. In December 2009, the grand jury, which was investigating price fixing among the TFT-LCD panel makers and subsequently returned the indictment in this case, subpoenaed AUO's and AUOA's law firm requesting certain non-privileged AUO and AUOA documents in the firm's custody in the United States. The firm, AUO, and AUOA moved to quash the subpoena, and the district court granted their motion. The government appealed, and this Court reversed, holding that the subpoena was enforceable. *In re Grand Jury Subpoenas*, 627 F.3d 1143 (9th Cir. 2010). The firm, AUO, and AUOA petitioned the Supreme Court for a writ of certiorari. The government opposed the petition, and the Supreme Court denied it. *Nossaman LLP, AU Optronics Corp., & AU Optronics Corp. Am. v. United States*, 131 S. Ct. 3062 (2011).

2. The jury in the present case failed to reach a verdict as to one of the individual defendants, Shiu Lung "Steven" Leung. Leung was subsequently found guilty on retrial. He is currently awaiting sentence. That case, *United States v. Leung*, is proceeding under the same docket number in the district court as the present case did, No. 09-cr-110-SI.

3. Another individual charged in the indictment, Borlong "Richard" Bai, had been a fugitive at the time of trial in this case. Bai has recently appeared in the district court and pleaded not guilty. Trial of the indictment against Bai is set for September 23, 2013. Again, that case, *United States v. Bai*, is proceeding under the same docket number in the district court, No. 09-cr-110-SI.

CERTIFICATE OF COMPLIANCE

1. This brief is accompanied by a motion for leave to file an oversized brief pursuant to Ninth Circuit Rule 32-2. This brief contains 31,555 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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

April 5, 2013

/s/ Kristen C. Limarzi
Attorney

CERTIFICATE OF SERVICE

I, Kristen C. Limarzi, hereby certify that on April 5, 2013, I electronically filed the foregoing Brief for the United States and the accompanying Supplemental Excerpts of Record with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

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

April 5, 2013

/s/ Kristen C. Limarzi
Attorney