No. 14-1122

In The Supreme Court of the United States

MOTOROLA MOBILITY LLC,

Petitioner,

v.

AU OPTRONICS, ET AL.,

Respondents.

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

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF GRANTING CERTIORARI

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INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae the National Association of Manufacturers ("NAM"), is the largest association of manufacturers in the United States. Its membership comprises small and large manufacturers in every industrial sector and in all fifty States. The manufacturing industry employs nearly twelve million men and women, contributes more than $1.8 trillion annually to the American economy, has the largest economic impact of any major sector, and accounts for two-thirds of private sector research and development. NAM is the leading advocate for laws and policies that help manufacturers compete in the global economy and create jobs throughout the United States.

Amicus is interested in this case because the split between the Seventh and Ninth Circuits regarding the applicability of U.S. antitrust laws to certain foreign transactions generates substantial economic uncertainty for U.S. manufacturers and their foreign affiliates. Regardless whether a U.S. manufacturer is in favor of or against the application of U.S. antitrust laws in the circumstances present here, companies need to know where the legal lines are drawn in order to structure their transactions for goods intended for eventual import into the United States. Hundreds of

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letter of petitioner and written consent from all respondents. Respondents were notified of *amicus*'s intent to file this brief more than 10 days prior to its filing date.

billions of dollars of goods are imported into the United States to be used in further domestic manufacturing. The cost of uncertainty – and the cost of being wrong about the applicability or inapplicability of U.S. antitrust laws – thus is a tremendous and potentially ruinous burden. Whether it is domestic purchasers seeking to ensure that their import transactions are protected by U.S. antitrust laws, or foreign affiliates seeking to ensure they do not mistakenly run afoul of such laws despite compliance with varying foreign antitrust rules, all manufacturers and their suppliers have the same interest in clear rules and legal certainty. While *amicus* has not taken a position on the merits of the underlying case, it is convinced that legal certainty one way or the other will be better for manufacturers than the continued uncertainty created by the split in the circuits.

SUMMARY OF ARGUMENT

This Court should grant certiorari in this case to resolve the uncertainty created by conflicting decisions on the applicability of U.S. antitrust laws to foreign transactions involving goods intended for eventual import into the United States. Domestic manufacturers and others import hundreds of billions of dollars of goods into the United States. The conflicting court holdings regarding antitrust coverage of various classes of transactions involving such goods creates legal and economic uncertainty that can exact a significant toll on U.S. manufacturers, their affiliates and their suppliers. *Amicus* has not taken a position on the merits of the decision below, but believes that its members and others will be better served by a clear and uniform rule than by the continued uncer-

tainty caused by the existing circuit split. This Court should grant certiorari to provide such clarity and uniformity.

ARGUMENT

The Existing Uncertainty Regarding the Application of U.S. Antitrust Laws to Foreign Transactions in Goods Intended for Import into the United States Exacts a Substantial Economic Toll on Both Domestic and Foreign Companies.

By narrowly interpreting the scope of the Foreign Trade Antitrust Improvement Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, the Seventh Circuit has excluded a significant class of transactions from the protections (or burdens) of U.S. antitrust laws. The Ninth Circuit, by contrast, has held that the identical transactions are indeed covered and consequently upheld criminal convictions for violation of U.S. antitrust laws based on those transactions. The business community, needless to say, is left without any reliable guidance regarding the reach of U.S. antitrust laws in such circumstances and consequently is hindered in structuring transactions to ensure or avoid coverage by such laws.

The FTAIA provides that while U.S. antitrust laws do not apply to transactions in foreign trade or commerce, they do apply, *inter alia*, to conduct involving "import trade or import commerce" and to conduct that has a direct, substantial, and reasonably foreseeable effect" on domestic trade or commerce or on import trade or commerce where "such effect gives

rise to a claim" under the other provisions of the antitrust laws. 15 U.S.C. § 6a.

According to the Seventh Circuit, because the goods at issue in this case were sold to Motorola's foreign subsidiary, rather than directly imported into the United States by Motorola's domestic parent, such sales did not involve imports and the sellers were not subject to U.S. antitrust laws. Pet. App. 5a. Regarding the apparent effect of the conduct in this case on import and domestic trade and commerce, the Seventh Circuit assumed a direct, substantial, and reasonably foreseeable effect on domestic U.S. commerce, but held that such "effect," rather than the conduct at issue, did not itself give rise to an antitrust claim because the actual effect of the challenged conduct was felt abroad and the domestic effect was only derivative and hence claims based on that effect were barred by the "indirect purchaser doctrine." Pet. App. 11a.

The Ninth Circuit, by contrast, looked at the identical conduct in this case and concluded, for purposes of the criminal prosecution of some of the participants, that the conduct both involved import trade and commerce and had a direct, substantial, and reasonably foreseeable effect on domestic commerce. *United States v. Hsiung*, -- F.3d --, 2015 WL 400550 (9th Cir. Jan. 30, 2015) (amended opinion). The petition for a writ of certiorari in that case is likewise currently before this Court. Petition for Writ of Certiorari, *Hsiung v. United States*, No. 14-1121 (March 16, 2015). The Ninth Circuit's holdings regarding the same conduct as in this case cannot be reconciled with the holdings of the Seventh Circuit. Manufac-

turers with foreign subsidiaries and suppliers thus cannot possibly know, *ex ante*, what rule would apply to purchases by foreign affiliates or intermediaries of goods or manufacturing inputs destined for the United States.

Amicus currently takes no position on whether the FTAIA covers the class of transactions in question. At this stage *amicus* simply notes that the scope of coverage is an important issue that affects hundreds of billions of dollars in trade.

The types of transactions at issue in this case – sales of goods made to foreign intermediaries where such goods are destined for import or incorporation into products imported into the United States – arise frequently. Indeed, as in this case, such foreign intermediaries are often affiliates of U.S. manufacturers, purchasing goods or manufacturing inputs for the express purpose of sending such goods and inputs back to the United States for sale or use by the U.S. affiliate. More generally, many other transactions for goods intended for eventual import could be structured with or without an initial sale to a foreign intermediary depending on the parties' goals and concern for potential liability. The question presented in this case thus impacts not only all similarly structured transactions, but future negotiations over virtually all import-related transactions.

The United States imports approximately $2.3 trillion of goods annually. United States Census Bureau, Annual Trade Highlights: 2014 Trade Highlights ($2.37 trillion in 2014; $2.29 trillion in 2013) (www.census.gov/foreign-trade/statistics/highlights/annual.html) (visited Apr.

14, 2015). Many of those imports are used as intermediate inputs for other businesses in the United States. In 2006, for example, imported intermediate inputs accounted for over 10% of total intermediate inputs used by private industries. Lucy Eldridge & Michael Harper, *Effects of imported intermediate inputs on productivity*, MONTHLY LABOR REVIEW 5 (Bureau of Labor Statistics, June 2010) (www.bls.gov/opub/mlr/2010/06/art1full.pdf). For the domestic manufacturing sector – NAM's members – the numbers are even higher. For the manufacturing sector as a whole, imported intermediate inputs accounted for 34% of intermediate inputs, excluding intra-sector inputs. *Id*. at 6.

Viewed from the output side, the gross output of U.S. manufacturers was $5.6 trillion in 2012. Jessica Nicholson & Ryan Noonan, *What Is Made in America*, ESA Issue Brief # 04-14, at 4 (U.S. Dept. of Commerce, Economics and Stat. Admin., October 3, 2014) (http://www.esa.doc.gov/sites/default/files/whatismadeinamerica_0.pdf). Of that amount, 14% constituted imported intermediate inputs – *i.e.*, foreign goods used in U.S. manufacturing processes. *Id*. at 7-8 & Figure 4. Additionally, even domestically manufactured intermediate inputs had a significant component of value added from foreign sources. *Id*. at 10 & Figure 6. Taking those indirect imported components into account, the percentage of imported intermediate inputs rises to 22% of gross manufacturing output. Overall, therefore, $1.2 trillion of U.S. manufacturing output consists of imported intermediate inputs. The question presented in this case thus is of tremendous economic significance to U.S. manufacturers.

Additionally, of the $2.24 trillion of "consumption" imports in 2013, 50.1% or $1.12 trillion was through related parties – *i.e.*, parents, subsidiaries, sibling entities, or the like. United States Census Bureau, *U.S. Goods Trade: Imports and Exports by Related-Parties 2013*, U.S. CENSUS BUREAU NEWS, May 6, 2014 (http://www.census.gov/foreign-trade/Press-Release/2013pr/aip/related_party/rp13.pdf). In such situations, any antitrust issues raised by foreign sales to a foreign affiliate of a U.S. company intending to export such goods to its U.S. affiliate would fall precisely into the grey area created by the conflicting decisions of the Seventh and Ninth Circuits. As the Seventh Circuit itself recognized, "[n]othing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers." Pet. App. 17a. The court of appeals might likewise have noted the similar common occurrence of foreign affiliates of U.S. companies purchasing goods to be imported and used in further manufacturing processes in the United States.

Needless to say, the risks (or benefits) of potential U.S. antitrust liability (or protection) and the financial consequences of getting it wrong are tremendous. Whether it is foreign suppliers or affiliates of U.S. companies seeking to minimize their legal risk or U.S. manufacturers seeking the protection of U.S. antitrust laws for their imports of intermediate manufacturing inputs, it is important for companies to know precisely how to accomplish such goals or to more effectively incorporate the risks and costs of foregoing those goals in the bargaining process.

Whatever the rule turns out to be, businesses must know such rule in advance in order to bargain for its application or avoidance. While bargaining is, of course, possible in situations of uncertainty, it is far more time consuming, expensive, and of uncertain effect when the application of the antitrust laws remains a matter of chance and judicial venue. The transaction costs of such uncertainty (and the consequences of error) are so high that they could put a meaningful damper on trade and increase the price of goods for U.S. manufacturers and consumers alike.

This Court thus should grant the petition for a writ of certiorari and provide as clear a rule as possible for when the U.S. antitrust laws apply to transactions for goods intended for import into the United States. *Amicus* at this point will leave to others whether the Seventh or Ninth Circuit approach is more faithful to the statute, or whether some other approach is correct. Whatever the substantive answer, however, U.S. manufacturers and their suppliers and affiliates, would be best served by this Court imposing clarity and consistency on the currently uncertain state of the law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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