NO. 26-2193

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONNOR HURLEY,
Plaintiff-Appellant

v.

GOOGLE LLC, ET AL.,
Defendants-Appellees

On Appeal from the United States District Court for the Northern District of California
(Case No. 3:25-cv-00883-JD) (District Judge James Donato)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING APPELLEES AND AFFIRMANCE

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INTEREST OF AMICUS CURIAE[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus curiae to oppose efforts by plaintiffs to apply U.S. law extraterritorially to obtain remedies unavailable under foreign law. *See, e.g.*, *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023); *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325 (2016).

Hurley, a Canadian consumer, seeks to use U.S. antitrust law to recover damages—including treble damages—for purchases made through Google's Canadian "Google Play" storefront. The question is whether Congress has authorized such an extraterritorial application of the Sherman Act notwithstanding the limits imposed by the Federal Trade Antitrust Improvements Act (FTAIA). It hasn't.

INTRODUCTION & SUMMARY OF ARGUMENT

The FTAIA prevents the United States from becoming the world's antitrust regulator for mobile-app purchases. But Hurley's theory would

[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission.

force American law to walk that beat. Under his reading any one of the billions of non-U.S. app users on Earth could invoke the Sherman Act—and seek treble damages—whenever a price paid abroad could be indirectly linked to a commission charged in the United States. The result would transform U.S. courts into a global forum for app-pricing disputes involving foreign consumers and platform operators. The FTAIA forbids that outcome by barring the Sherman Act from repairing foreign injuries. *See* 15 U.S.C. § 6a. Hurley himself concedes that independent app developers, not Google, set the prices that Canadians pay in Canada. Under the FTAIA, that ends his case.

Congress enacted the FTAIA to ensure that the Sherman Act protects "American consumers and American exporters, not foreign consumers or producers." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 986 (9th Cir. 2008) (internal quotation marks and citations omitted). The Sherman Act is not a global competition code. Like most of the United States Code, it governs domestic commerce and domestic injuries, leaving foreign nations to regulate their own markets and protect their own consumers. To be sure, the FTAIA contains a narrow "domestic effects" exception for claims that directly arise from anticompetitive effects in the United States. But that exception can't be dislodged from its narrow, U.S.-based focus. Courts have repeatedly declined to let that exception swallow other nations' competition laws, and this Court should do likewise.

Hurley claims to have purchased apps from third-party developers through Google Play's *Canadian* storefront, but he doesn't allege that Google set the prices that he paid. ER 032, 073. To the contrary, his amended complaint repeatedly acknowledges that app developers determine the price. ER 073. He instead complains that Google has historically charged a 30% commission on app developers for selling their apps through Google Play's United States storefront. ER 073; Hurley Br. 9. From there, he asserts that the commissions have resulted in monopolistic overcharges to these developers, who allegedly pass those charges to Canadian consumers when deciding to sell apps in Canada. ER 073. These allegations fail on their face.

Even if Google's conduct produced a qualifying "domestic effect" in the United States (and contrary to Hurley's representations, that point was not decided below), Hurley can't show that the "effect" gave rise to his alleged injury. That's because he admits that the prices he paid weren't dictated by the commissions but resulted from independent decisions made by app developers exercising their own discretion. ER 073-75. These intervening decisions break the strict causal chain that the FTAIA's proximate-cause standard requires.

Hurley's response is to reduce the proximate-cause standard to a virtual "but for" causation test without saying so out loud. But that move is unsupported by the statute. The FTAIA requires strict proximate cause because Congress legislated against the backdrop of international comity. Canada already has a comprehensive competition-law regime that governs Canadian markets and protects Canadian consumers. Through its Competition Act, Canada has made judgments about how best to deter and remedy anticompetitive conduct. And one of those judgments is the decision not to offer treble damages. Indeed, Canada has voiced concern that permitting its citizens access to U.S. treble damages will undermine its own policy decisions.

If adopted, Hurley's theory won't end with our northern neighbor. Any foreign app consumer would be able to pursue claims under the Sherman Act by simply correlating the price of a foreign purchase to a sales commission in the United States. That can't be right. The judgment should be affirmed.

ARGUMENT

THE FTAIA BARS HURLEY FROM TAKING ADVANTAGE OF U.S. ANTITRUST LAW.

The FTAIA establishes a broad rule that excludes "all (nonimport) activity involving foreign commerce" from the "Sherman Act's reach," subject only to a narrow "domestic effect[s]" exception. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004) (*Empagran I*). To invoke the exception, a foreign plaintiff must show both that the conduct being challenged as anticompetitive has (1) a "direct, substantial and reasonably foreseeable effect" on American domestic, import, or export commerce and (2) that the effect "gives rise to" the plaintiff's Sherman Act claim. 15 U.S.C. § 6a(1)–(2); *Empagran I*, 542 U.S. at 159, 162. The district court properly held that Hurley's case founders on the "gives rise to" requirement. ER 007–08; *see also* 15 U.S.C. § 6a(2).

That text imposes a demanding proximate-cause standard that Hurley can't meet. *DRAM*, 546 F.3d at 988. "But for" causation is insufficient—it isn't enough for a plaintiff to link challenged conduct to his foreign injury through a conjectured chain of economic consequences.

Id. at 987. Nor is it enough for a plaintiff to merely allege that his "injuries abroad" were "foresee[able]" from the domestic effect. *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005) (*Empagran II*). Rather, a plaintiff must show that the domestic effect *itself* directly caused his foreign injury. *See DRAM*, 546 F.3d at 988–89; *see also In re Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d 777, 786 (N.D. Cal. 2007) ("[I]t must be the domestic effects . . . which gives rise to Plaintiffs' foreign injuries.").

This mandate is a substantive element of antitrust claims involving foreign commerce. *United States v. Hui Hsiung*, 778 F.3d 738, 753 (9th Cir. 2015) (explaining that the FTAIA "provides substantive elements under the Sherman Act"). It's rooted in the international comity concerns that animate the FTAIA. *Empagran II*, 417 F.3d at 1271. And it's strictly enforced to prevent foreign plaintiffs from using U.S. antitrust law to seek damages for alleged injuries that have only indirect links (if any links at all) to the United States. *See Seagate Tech. LLC v. NHK Spring Co.*, 163 F.4th 1272, 1276 (9th Cir. 2026) (stating that the FTAIA "largely close[s] our courthouse doors to antitrust claims based on injuries outside the United States").

A. Hurley's own allegations defeat proximate causation.

Hurley's claim flunks that causation test. He asserts that Google's commissions on U.S. app sales constitute anticompetitive conduct that produces a domestic effect in the United States—namely higher commissions paid by U.S. app developers. Hurley Br. 14 (citing ER 016–17). He then assumes—without well-pleaded facts—that developers respond to the commissions by adjusting app prices, not just in the United States, but in other countries, including in Canada, resulting in overcharges to Canadian consumers. Hurley Br. 14 (citing ER 019, 073–75).

Hurley's claim fails because his own allegations establish the existence of intervening decisionmakers. *See Seagate*, 163 F.4th at 1284 (explaining that there's no proximate cause "where intervening forces may have caused the ultimate antitrust injury"). His amended complaint acknowledges that app developers, not Google, determine the prices that consumers pay in Canada. *See, e.g.,* ER 073 (alleging that "developers . . . set prices for their own apps and in-app purchases"). But nowhere does he allege that developers must pass the commission on every app sale to consumers. Indeed, in "set[ting] prices for their own apps" (ER 073) developers may absorb commissions rather than pass them on, spread costs differently across markets, or decline to change prices at all.

Hurley's purported "injury" comes only after independent actors exercise their own discretion regarding foreign-market pricing. It's not "increased U.S. prices" that directly cause any of Hurley's purported injuries. *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 540 (8th Cir. 2007) (rejecting claim where U.S. price increases "constituted merely one link in the causal chain"). Foreign consumers pay prices that developers independently set abroad for their products. And that's fatal to Hurley's claim.

The FTAIA doesn't allow foreign plaintiffs across the courthouse threshold when "[o]ther actors or forces may have affected the foreign prices." *DRAM*, 546 F.3d at 988. On Hurley's own terms, "other actors or forces," the developers, do just that. While the domestic effect that Hurley identifies—commissions in the United States—may cover claims from *domestic* developers, it doesn't give rise to his *foreign* injury. Hurley assumes that because the commissions may alter developers' incentives, every downstream pricing decision they make in foreign markets can be attributed back to that domestic effect. Hurley Br. 14. But the FTAIA rejects that assumption in favor of a strict rule requiring a direct causal relationship. *See DRAM*, 546 F.3d at 989 (explaining that even a "direct correlation" in prices "does not establish a sufficient causal relationship").

B. Hurley's attempt to relax the proximate-cause standard is unsupported.

Because faithful application of the proximate-cause standard wrecks his case, Hurley tries to dilute that rule into the kind of but-for causation that courts have repeatedly rejected. His move relies heavily on this Court's decision in *Seagate*, as well as the Supreme Court's decision in *Apple Inc. v. Pepper*, 587 U.S. 273 (2019). Neither case advances his cause.

Hurley argues that the district court transformed *Seagate* into a heightened proximate-cause rule. Hurley Br. 15-16. But the district court didn't do that. It simply explained why *Seagate* satisfied the FTAIA's proximate-cause rule and contrasted *Seagate's* direct causal chain with Hurley's allegations. The lower court correctly applied this Circuit's rule: the domestic effect must directly give rise to the foreign injury, not merely influence a sequence of downstream decisions. *See DRAM*, 546 F.3d at 988.

Hurley's reliance on *Seagate* underscores the fatal defect in his case because *Seagate* involved a fundamentally different pricing structure. There, a U.S. maker of "disk drives" used assembly parts that its foreign subsidiaries bought from an overseas company who happened to be part of an illegal cartel. *Seagate*, 163 F.4th at 1277-78. This Court concluded that the foreign subs could proceed with Sherman Act claims against the overseas company. The Court explained that the subs "lacked any authority over the price" of the parts and were required to "follow the lead" of the U.S. parent, which negotiated the prices in the United States and fixed them in a master supply agreement. *Id.* at 1286. The inflated U.S. price thus became, without alteration, the price paid by the foreign subs to the overseas cartel. *Id*. Because no independent pricing decisions intervened between the domestic effect and foreign injury, this Court ruled that the foreign plaintiffs might prove that "the domestic effect of higher U.S. prices gave rise to the foreign injury." *Id*. at 1288.

This case doesn't resemble *Seagate*. Hurley doesn't allege that any U.S. transaction dictated the prices he paid in Canada. To the contrary, he concedes that app developers, not Google, decide what prices to charge and whether to pass through any portion of Google's commission. That distinction is dispositive. Hurley's theory depends on independent business judgments standing between the alleged domestic effect and his alleged injury—exactly the kind of "speculative and attenuated" causal chain that *Seagate* observed as insufficiently "direct" under the FTAIA. *Id*. at 1286-88.

This contrast also shows why dismissal on the pleadings is warranted. In *Seagate*, the causal chain was contested and the issue was evidentiary. But here, the defect appears on the face of the amended complaint. Hurley affirmatively pleads that "intervening forces" set the app prices. ER 073; *Seagate*, 163 F.4th at 1284. And "where a defect is plainly apparent on the face of the complaint," a claim under the FTAIA "may be evaluated"—and dismissed—"at the pleadings stage." *World Ass'n of Icehockey Players Unions N. Am. Div. v. NHL*, 803 F. Supp. 3d 1136, 1177 (W.D. Wash. 2025) (internal quotes omitted); *Prevent DEV GMBH v. Adient PLC*, No. 20-cv-13137, 2021 WL 5585917, at *17 (E.D. Mich. Nov. 30, 2021) (dismissing FTAIA case on causation grounds).

Hurley's reliance on *Pepper* fares no better. Hurley Br. 27–28. He argues that because *Pepper* found Apple users to have "direct purchaser" standing to sue Apple where it also charged a commission to app developers, his allegations should likewise satisfy the FTAIA's proximate-cause requirement. Hurley Br. 28. But that argument conflates two entirely different legal doctrines. *Pepper* didn't address proximate cause under the FTAIA. It addressed whether iPhone users qualified as direct purchasers under the standing rule set forth in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *Pepper* held that they did because they purchased apps through a direct contractual relationship with Apple. *Pepper*, 587 U.S. at 279. The decision turned on contractual privity within the apps' distribution chain, not whether Apple's commission proximately caused any alleged overcharge. *Id.* at 281.

That distinction dooms Hurley's use of *Pepper*. *Illinois Brick* is a standing rule and asks who may sue. *See Del. Valley Surg. Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1120 (9th Cir. 2008) (describing *Illinois Brick* as a rule of "standing"). The FTAIA's proximate-cause rule is a statutory, merits-based element of a Sherman Act claim involving foreign commerce. *Hui Hsiung*, 778 F.3d at 753. It asks whether an alleged domestic effect directly caused the claimed foreign injury. *DRAM*, 546 F.3d at 988. Standing under *Illinois Brick* and proximate cause under the FTAIA answer different questions, serve different purposes, and arise from different legal authority. *Pepper* didn't interpret the FTAIA or address extraterritorial application of the antitrust laws, let alone relax the FTAIA's proximate-cause rule. *See Pepper*, 587 U.S. at 276 (expressly confining its holding to the direct-purchaser standing rule).

C. Hurley's reading would wreck international comity.

Finally, Hurley's attempt to dilute the FTAIA's proximate-cause rule does not "accor[d] with [the] principles of prescriptive comity" on which Section 6a(2) of the FTAIA is based. *Empagran II*, 417 F.3d at 1271; *DRAM*, 546 F.3d at 987 (internal quotations and citations omitted). Comity is "the respect sovereign nations afford each other by limiting the reach of their laws." *Id.* "[I]nterference with the authority of another sovereign" risks breeding resentment abroad. *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 32 (1925). And so courts interpret statutes "to avoid unreasonable interference with the sovereign authority of other nations." *Empagran I*, 542 U.S. at 164. That principle precludes inventive or expansive readings of Section 6a(2)'s "gives rise to" text. Otherwise, U.S. antitrust law would displace "other nations' prerogative[s]" in regulating conduct and injuries occurring "within their own borders." *Empagran II*, 417 F.3d at 1271.

Hurley's theory not only disregards comity, but it would risk serious interference with the policies of Canada and beyond. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). Under his approach, any foreign plaintiff could invoke U.S. antitrust law simply by asserting that a domestic effect influenced a business decision that ultimately affected prices abroad. As set forth at Sections A & B *supra*, that's not a proximate-cause standard; it's but-for causation by another name. And if that becomes the standard, the FTAIA will cease to perform its core function of confining the Sherman Act's reach. It would yield exactly what Congress sought to avoid: interference with other nations' choices about how to regulate commerce within their own borders. *Empagran II*, 417 F.3d at 1271; Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U. L. Rev. 598, 606 (1990) ("The Supreme Court has long believed that

Congress generally eschews unnecessary confrontation" with other nations). Look no further than Canada itself.

In explaining the comity concerns underlying the FTAIA, the Supreme Court in *Empagran I* asked, "[w]hy should American law supplant, for example, Canada's . . . own determination about how best to protect Canadian . . . customers?" *Empagran I*, 542 U.S. at 165 (punctuation altered). Hurley doesn't answer that question. Aside from invoking contractual forum-selection and choice-of-law provisions—which, for the reasons in Google's brief, do not save his claim—he offers no reasonable explanation for why U.S. law should displace Canadian law in governing the alleged injuries of Canadians occurring in Canadian commerce.

Hurley's failure to provide an explanation is unsurprising. Canada maintains its own robust antitrust regime through its Competition Act. *See* Competition Act R.S.C., 1985 c. C-34 (Can.). Under that law, Canada has established policy objectives, enforcement mechanisms, and remedies for addressing anticompetitive conduct. *See, e.g.,* Competition Act, R.S.C. 1985, c. C-34 § 1.1 (Can.) (explaining that the Competition Act exists to "promote efficiency and adaptability of the Canadian economy" and to "provide consumers with competitive prices and product choices"). The Competition Act is comprehensive, and Canada continues to build on it. For example, in 2024, Canada passed amendments that significantly expanded opportunities for private consumers to seek monetary relief against those who violate its competition laws. *See* Competition Act, R.S.C. 1985, c. C-34, §§ 36, 74.1, 75, 76, 77, 79, 90.1 (Can.); *see also* Government of Canada, *Guide to the June 2024 amendments to the Competition Act* (2024).

But just as Canada has made decisions about what remedies should be available to its consumers, it's also made deliberate decisions about what remedies should not be available. And unlike the United States,15 U.S.C. § 15, Canada has not adopted treble damages for antitrust violations. "Neither treble damages nor punitive damages are available under the [Competition Act]." Ellen Meriwether & Andrew J. Morganti, *Merging Trends in Certification of Antitrust Class Actions in Canada*, 24-SUM Antitr. 71, 72 (2010). Canada emphasized this point in its *Empagran I* amicus brief, explaining that treble damages conflict with its own "national policy decision" concerning appropriate punishment and deterrence of anticompetitive conduct. Br. for the Government of

Canada as Amicus Curiae, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.,* No. 03-724, 2004 WL 226389, at *14 (U.S. 2004). This policy decision remains in place today.

Treble damages have been criticized in Canada and elsewhere as having an overdeterrent effect, chilling legitimate business conduct for fear of massive awards, and inviting weak claims. *See* Int'l Ctr. for Law & Econ., *Comments of the International Center for Law & Economics to the Competition Bureau of Canada on Anti-Competitive Conduct and Agreements* at 9 (Jan. 27, 2026) (describing the "millions of dollars in legal costs" for treble damages suits in the United States as well as the "pressure to settle even weak claims"); *The Antitrust Treble Damages Remedy*, 9 Wm. Mitchell L. Rev. 435, 441–46 (1983) (describing historical criticisms of the "treble damages" antitrust remedy). While the utility of treble damages is subject to debate, Canada has made the sovereign choice not to allow for them. Letting Canadian consumers pick them up for Canadian-based injuries would override, rather than respect, that policy choice.

An adjacent conflict also exists with Canada's enforcement priorities. Canada operates immunity and leniency programs designed to encourage those participating in anticompetitive conduct to come forward and cooperate with enforcement authorities. *See* Government of Canada, *Immunity and Leniency Programs under the Competition Act* at 6, 8-24, 25-44 (2024). Canada has described these programs as "[a]n important element of effective enforcement of Canada's antitrust laws" and has warned that the threat of U.S. treble damages "may make it too expensive" for violators "to cooperate" thus undermining the effectiveness of those programs. Br. for Canadian Gov., 2004 WL 226389, at *11, *14. Allowing Canadians access to U.S. antitrust law for injuries sustained in Canada jeopardizes this important law enforcement tool.

These are precisely the sovereign policy judgments that the FTAIA insists courts respect. If Canadian consumers can bypass Canadian law by indirectly tracing a foreign injury to some U.S. effect, Canada loses control over the careful balance it has struck between enforcement, deterrence, and compensatory damages. People follow incentives. Canadian consumers like Hurley will doubtless gravitate toward the higher-paying U.S. regime, seeking treble damages that Canada has long rejected. The effect is a gradual substitution of Canadian policy with American judgment and a shift from Canadian regulation to the U.S.

courts—exactly what the Supreme Court counseled against in *Empagran I*. *See Empagran I*, 542 U.S. at 167 (explaining that concerns for comity exist where nations "disagree dramatically about appropriate remedies").

And that's only Canada. There's no telling what kind of interference Hurley's theory would wreak on other nations if citizens of those countries could bring similar Sherman Act claims in U.S. courts. Google Play serves more than two billion users across more than 190 countries and territories. *See* Google Play, *How Google Play Works*, https://perma.cc/T3G8-GXZU. Hurley's position would invite all of those users to file Sherman Act claims in U.S. courts for app purchases made abroad under foreign market conditions and subject to foreign regulatory regimes. It means that America will become the world's antitrust tribunal for app purchases—a result at complete odds with the FTAIA. If the FTAIA's domestic-effects exception is to be expanded to such a far-reaching extent, that policy judgment belongs to Congress, not the courts. *See RJR Nabisco v. Eur. Cmty.*, 579 U.S. 325, 335 (2016) (explaining the presumption against extraterritorial application of U.S. law absent "clearly expressed congressional intent").

CONCLUSION

Hurley's amended complaint doesn't merely fail to allege proximate cause. It alleges intervening decisionmakers whose pricing discretion severs the direct causal chain required by the FTAIA. What's more, Hurley's invitation to water down Section 6a(2)'s proximate-cause requirement would undermine the premise of comity on which it is based. The Court should affirm.

August 26, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 3,695 words, excluding the items exempted by Fed. R. App. P. 32(f). This amicus brief complies with the word limit of Fed. R. App. P. 29(a)(5). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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August 26, 2026

CERTIFICATE OF SERVICE

I certify that on August 26, 2026, I filed the forgoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the ACMS System, which sent notification of filing to all counsel of record.

August 26, 2026

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