No. 16-850

In The
# Supreme Court of the United States

ENERGY CONVERSION
DEVICES LIQUIDATION TRUST,

*Petitioner,*

v.

TRINA SOLAR LIMITED, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

## BRIEF FOR THE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in holding, in conflict with the Third and Ninth Circuits and this Court's precedents, that there is an exception to the rule that horizontal price-fixing among competitors is illegal *per se* under Section 1 of the Sherman Act where the prices are fixed below cost and the plaintiff does not allege that the conspirators' purported losses will later be recouped via higher prices.

2. Whether a competitor bankrupted by its rivals' below-cost horizontal price-fixing agreement has antitrust standing to challenge that agreement under Section 1 (as the Ninth Circuit has held), or whether, absent allegations of recoupment, only consumers may challenge a price-fixing agreement under Section 1 and only if it fixes prices at supra-competitive levels (as the Sixth Circuit held below).

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iv |
| INTRODUCTION AND INTEREST OF *AMICUS CURIAE* | 1 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 6 |
| I. Non-Market Economies Around the World Have Led to Increased Dumping Problems in the U.S. | 6 |
| II. Coordinated and Sustained Foreign Dumping, Particularly by China, is Causing Extensive Harm to U.S. Industries and Jobs, Negatively Effecting Long Term Competitiveness of Markets | 10 |
| A. Foreign dumping and the subsidization of non-market actors, which enables below-cost price fixing, are practices that harm U.S. competitiveness, labor and the economy | 10 |
| B. Retaining a skilled U.S. workforce is vital to competition and the continued prosperity of the U.S. economy | 14 |
| III. A De Facto Antitrust Exemption for Certain Illegal Behavior Would Be Inappropriate and Catastrophic to U.S. Competitiveness | 18 |

TABLE OF CONTENTS – Continued

Page

A. A Private Cause of Action Under Section 1 of the Sherman Act is Necessary to Protect American Interests ............ 19

B. A Recoupment Requirement is Inappropriate for Section 1 Claims ........... 21

CONCLUSION.................................................... 24

## TABLE OF AUTHORITIES

Page

CASES

*Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332 (1982) .......................................................20

*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)............................22

*McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015) .......................................................................11

*Pacific Bell Telephone v. Linkline Comm.*, 129 S. Ct. 1109 (2009) ...................................................22

*Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, 127 S. Ct. 1069 (2007) .....................................22

OTHER AUTHORITIES

*China's Strategic Emerging Industries: Policy, Implementation, Challenges, & Recommendations*, The US-China Business Council (Mar. 2013) .........................................................................9

David Madland & Karla Walter, *Unions are Good for the American Economy*, CENTER FOR AMERICAN PROGRESS ACTION FUND (Febr. 18, 2009) .......................................................................17

Greg Mastel, Andrew Szamosszegi, John Magnus & Lawrence Chimerine, Enforcing the Rules 13 (2007)..................................................8, 11

*Import Injury FAQs*, UNITED STATES INTERNATIONAL TRADE COMMISSION (USITC).........................7

TABLE OF AUTHORITIES – Continued

Page

ITC Investigation No. 731-TA-990 .......... 11

ITC Investigation No. 731-TA-1021 .......... 11

LORI KLETZER, JOB LOSS FROM IMPORTS: MEASURING THE COSTS 31 (2001) .......... 11, 12, 13

Michael Porter, The Competitive Advantages of Nations 71 (1990) .......... 16

Richard M. Steuer, *Jobs and Antitrust*, 23 Antitrust Magazine 3, 98 (July 15, 2009) .......... 14, 18

Robert Ginsburg, *What Plant Closings Cost a Community: The Hard Data*, Labor Research Review: Vol. 1: No. 22, Article 3 (1994) .......... 13

Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 Cornell L. Rev. 297 (1991) .......... 4

Staff Report, Duty Evasion: Harming U.S. Industry and American Workers (Nov. 8, 2010) .......... 20

Steel and the National Defense (January 2007) .......... 14

Terence Stewart, *How The US Can Make Trade Remedies More Effective*, Law360 (Apr. 1, 2015, 10:15 AM) .......... 20

Terence P. Stewart, *United States-Japan Economic Disputes: The Role of Antidumping and Countervailing Duty Laws*, 16 Ariz. J. Int'l & Comp. L. 689 (1999) .......... 3

TABLE OF AUTHORITIES – Continued

Page

Terence P. Stewart, *et al.*, Surging Steel Imports Put Up To Half a Million U.S. Jobs at Risk, Economic Policy Institute (May 13, 2014)................9

Usha C.V. Haley & George T. Haley, *How Chinese Subsidies Changed the World*, Harvard Business Review (Apr. 23, 2013)...............................7

## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") is the largest industrial union in the United States and Canada, with 1.2 million members and retirees. USW represents the majority of workers in the American steel, aluminum, copper, tire, paper and petroleum refining industries. USW represents industries and workers who are adversely impacted by massive sales at fixed, below-cost levels by foreign competitors. These same industries depend on American antitrust law to protect them from unfair competition in the U.S. marketplace by foreign competitors. But what little safeguards they had under American antitrust law against unlawful competition by non-market actors have now been eliminated.

USW is keenly aware of unfair dumping and below-cost price fixing by foreign producers – a blatant violation of American antitrust law, and one that results in the loss of tens of thousands of jobs among its members and other American workers across the broad range of USW-represented industries. American antitrust law provides innocent competitors who have

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[1] No counsel for a party authored this brief, in whole or in part, and no person or entity, other than *amicus curiae* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Parties have consented to the filing of this brief and were timely informed with 10 days notice of *amicus*' intent to file.

been injured or driven out of business by unfair competition, including horizontal price-fixing below cost, with a private right of action to seek relief in the U.S. courts. The Sixth Circuit's decision, however, eliminates injured competitors' standing to sue competitors who engage in unlawful conduct in violation of the antitrust laws.

USW strongly supports the petition for writ of certiorari of Petitioner Energy Conservation Devices Liquidated Trust. Section 1 of the Sherman Act must be enforced to provide competitors with standing to assert claims for below-cost horizontal price-fixing. To be clear, USW does not argue that there should be a private cause of action for violating federal dumping statutes. The Sherman Act was enacted with the intent of providing injured competitors a remedy for seeking redress over violations of the antitrust laws. The record in this case makes clear that Respondents violated Section 1 of the Sherman Act. Petitioner, as an injured competitor and victim of horizontal price-fixing below cost, should have standing to assert a Section 1 claim against Respondents. Reversal of the Sixth Circuit's decision is critical to USW's commitment to preserving the skilled American workforce, both union and non-union, necessary to the survival of American manufacturing, which has been severely crippled by unfair overseas competition. The Sixth Circuit's decision cannot be allowed to stand in today's world where selling below cost among competitors is often supported directly and indirectly by producers' governments, as was the case here. This decision now opens the

floodgates for more anticompetitive behavior to overtake the U.S. market. *See* Terence P. Stewart, *United States-Japan Economic Disputes: The Role of Antidumping and Countervailing Duty Laws*, 16 Ariz. J. Int'l & Comp. L. 689 (1999).

## SUMMARY OF ARGUMENT

Scientists Jack Cohen and Ian Stewart have coined the term "lies-to-children" to describe scientific simplifications that, while not true, are true enough to help people understand complex scientific subjects. A good example of this is the model of atoms where electrons orbit a nucleus like planets orbit the sun. While this model is useful for helping people understand atoms, it is by no means accurate. Actual electrons are more accurately described as a wave-particle duality, existing as standing waves that exhibit some particle-like properties and don't actually orbit as they are never in a single point location. While the orbital model is useful in that it can lead to the full truth once additional facts and analysis is applied, not knowing the full truth will lead to incorrect results in certain applications.

Antitrust law has statements similar to lies-to-children, useful for understanding core principles but with too many exceptions and intricacies to be relied on without contextual analysis. Among these is the statement that low prices benefit consumers, such that they are procompetitive. Not all low prices are

procompetitive – especially those arrived at through coordinated price-fixing among competitors. Horizontal price-fixing at any level is anticompetitive, but this is especially true for those set at below-cost levels. Certain acts are so anticompetitive that they are proscribed by the antitrust laws, regardless of any potential benefit they may generate.

For example, monopsonies can violate antitrust law even though they reduce costs and can lead to reduced prices for consumers. *See*, *e.g.*, Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 Cornell L. Rev. 297 (1991). Indeed, antitrust scholars Roger Blair and Jeffrey Harrison discussed this very same problem in their important paper on monoposonies: if a judge looks purely at the monopsony's effect of lowering prices to the exclusion of how those prices were reached, then she will reach a result that is contrary to America's antitrust laws. *Id.* at 298-301.

The Sixth Circuit's ruling has fallen into this trap, and if the Supreme Court does not review and overturn the decision, such failure will create a precedent that threatens to turn antitrust policy in the United States on its head. By focusing solely on lower prices to the consumer, and ignoring the fact that defendants horizontally agreed to fix prices below cost with the purpose of destroying not only competitors, but *competition* over the long term, the Sixth Circuit has committed a grave error that calls out for this Court's review.

The Sixth Circuit held that below-cost price fixing among competitors is not a violation of antitrust laws if there is no allegation of a future plan to raise prices and recoup losses. The Sixth Circuit's decision is wrong: horizontal price-fixing below cost is a violation of Section 1 of the Sherman Act, regardless of whether competitors intend to recoup their losses. The Sixth Circuit's error becomes more readily apparent when one examines the broader effects that the sale of goods at fixed, artificially low levels, especially foreign dumping that is coordinated and supported by a non-market economy, has on U.S. industries.

But the Sixth Circuit's decision is not only wrong – it is a grave threat to American industry. We submit this brief to explain how the massive selling of product at horizontally fixed, below-cost prices among competitors, especially dumping by competitors from non-market economies, destroys industries, jobs, and American competitiveness. In non-market economies, subsidies and other government assistance create industries that prioritize production over profits, motivating these firms to not only engage in foreign dumping, but to maintain below-cost pricing over extended time periods without the need to recoup the losses from such practices. Because these firms do not face true free market forces, companies in non-market economies do not face pressure to innovate or increase efficiencies in their production. Such firms are free to coordinate massive sales below cost in the U.S. market with the goal of overtaking the U.S. market, without regard to profit-maximizing considerations. U.S.

companies cannot fairly compete in such circumstances.

Without market forces found in capitalist economies, valuable innovation and improvements to efficiency and cost structure are lost. Additionally, the loss of American jobs results in a loss of the experience and know-how that enables American companies to better compete.

Unfortunately, such tactics by foreign governments are not rare. And long term, the repercussions from the shrinking of U.S. industry in the wake of unfair competition can have severe national security effects. For these reasons, we request that the Supreme Court accept certiorari in this case and reverse the Sixth Circuit's erroneous ruling that would create a de facto antitrust immunity for unlawful price-fixing practices.

## ARGUMENT

### I. Non-Market Economies Around the World Have Led to Increased Dumping Problems in the U.S.

The Sixth Circuit states "The possibility of recoupment is what makes the choice to 'forgo profits' 'rational,' and it's what makes the battle of attrition caused by predatory pricing worth the wait and the cost." Petitioner App. 8a. The Sixth Circuit's conclusion that below-cost pricing is only rational through

recoupment ignores the reality of our global economy in which many non-market economies export goods to the U.S. These countries groom their industries to prioritize production and employment over profits through significant subsidies that can enable companies to run at a loss for long periods of time.

For example, a 2013 study of Chinese subsidies found that China would offer companies in key industries "free or low-cost loans; artificially cheap raw materials, components, energy, and land; and support for R&D and technology acquisitions." Usha C.V. Haley & George T. Haley, *How Chinese Subsidies Changed the World*, Harvard Business Review (Apr. 23, 2013).[2] The study found that many of these Chinese industries were "highly fragmented" with "no scale economies or technological edge," yet "Chinese products routinely sold for 25% to 30% less than those from the U.S. or European Union." *Id.* The study concluded that "[b]ecause of massive Chinese subsidies to several industries, no free trade exists and markets have failed." *Id.*

When foreign companies unload their excess production on U.S. markets at fixed, low prices, it is called dumping. The International Trade Commission ("ITC") defines dumping as manufacturers in a foreign country that export a product into the U.S. at a price that is either lower than the price charged in the manufacturer's home market or below the cost of production. *Import Injury FAQs*, UNITED STATES INTERNATIONAL

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[2] https://hbr.org/2013/04/how-chinese-subsidies-changed.

Trade Commission (USITC).[3] To be clear, USW files this brief to request that the Sherman Act be enforced, and not to seek a private cause of action for dumping. Even so, the Sixth Circuit's decision has ramifications for victims of dumping who now have no recourse under the American antitrust laws to assert claims for horizontal price-fixing below cost. And the two practices go hand in hand.

Like horizontal price-fixing below cost, dumping is dangerous because it distorts markets and makes efficient domestic production seem inefficient in comparison to foreign competition. Also like horizontal price-fixing below cost, injurious, long-term dumping is usually enabled by the "maintenance of a sanctuary home market, the application of subsidies, or the consequences of a non-market economy government." Greg Mastel, Andrew Szamosszegi, John Magnus & Lawrence Chimerine, Enforcing the Rules 13 (2007).[4] Together, dumping and price-fixing can destroy domestic industry and command monopoly or oligopoly positions without ever needing to recoup lost profits.

A 2014 economist study of the steel industry demonstrates how this occurs. The study found that the "[h]igh fixed costs, capital intensity, and the large scale of steelmaking encourages state-backed producers with excess capacity to maintain production in excess of domestic demand, and export the surplus at

[3] http://usitc.gov/faqs/import_injury_faws.htm.

[4] http://s.bsd.net/aamweb/main/page/file/6b5644f7a7b72a1805_p3m6vlt55.pdf.

below-market rates." Terence P. Stewart, *et al.*, Surging Steel Imports Put Up To Half a Million U.S. Jobs at Risk, Economic Policy Institute (May 13, 2014).[5] This led to a surge of steel on the global market due to " 'uneconomic additions to capacity' – increases in capacity that don't make economic sense because they are not driven by demand." *Id.* The result of this government supported manufacturing was that "U.S. steel imports increased from 28.5 million net tons in 2011 to 32.0 million net tons in 2013, an increase of 12.3 percent. Imports . . . seiz[ed] more of the U.S. market and thwart[ed] the domestic industry's efforts to recover from the Great Recession." *Id.*

Subsidized production at artificially low and below-cost prices will continue to shape global commerce in favor of non-market producers while at the same time shrinking U.S. industries. Indeed, the Chinese government has identified seven strategic emerging areas to support through policies and subsidies, including energy efficient and environmental technologies, next generation information technology, biotechnology, high-end equipment manufacturing, new energy, new materials, and new-energy vehicles. *China's Strategic Emerging Industries: Policy, Implementation, Challenges, & Recommendations*, The US-China Business Council (Mar. 2013).[6] Because foreign governments often subsidize a number of companies at the same time, and the companies can agree to coordinate their efforts

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[5] http://www.epi.org/publication/surging-steel-imports/.

[6] https://www.uschina.org/sites/default/files/sei-report.pdf.

abroad, opportunities for collusive dumping at fixed, low-cost prices abound. This is not a problem that can be ignored.

## II. Coordinated and Sustained Foreign Dumping, Particularly by China, is Causing Extensive Harm to U.S. Industries and Jobs, Negatively Effecting Long Term Competitiveness of Markets

### A. Foreign dumping and the subsidization of non-market actors, which enables below-cost price fixing, are practices that harm U.S. competitiveness, labor and the economy

Coordinated sales at below-cost prices, including dumping, can lead to a dramatic shrinking or cessation of domestic production of the dumped goods as domestic companies exit the market because they are unable to fairly compete. There are many examples of industries being destroyed by foreign dumping. In this case, an ITC investigation found that Respondents' pervasive underselling enabled them to gain market share and "materially injure[ ]" the "[U.S.] solar manufacturing industry." Petitioner App. 30a-31a. This led to nearly a dozen American companies shuttering their doors, and dozens more closing plants and laying off American workers. Petitioner App. 4a.

Another recent example – and one that the *amicus* and its members have felt directly – is iron pipe fittings, a market in which the ITC has found to be

materially injured by dumping. ITC Investigation Nos. 731-TA-990, 731-TA-1021. Even though most iron fittings were made in the U.S. prior to the 1980s, dumping and related anticompetitive pricing practices have driven most domestic manufacturers from the market and only one full line ductile iron pipe fitting manufacturer remains. *McWane, Inc. v. FTC*, 783 F.3d 814, 820 (11th Cir. 2015).

A 2007 study of the effects of dumping on ten industries showed a significant impact on revenues and wages in the U.S and the dramatic shrinking of several U.S. industries. *See* Mastel, Szamosszegi, Magnus & Chimerine, *supra*. The study found that, in each case, the various costs of dumping and subsidies exceeded the pure increase in consumer benefits. *Id.* at ii. The costs tended to be significant and long lasting. For example, in the cement market, dumping caused the "lack of capital investment for new plant construction or capacity modernization and expansion." *Id.* at 60. This led to both a lack of new job creation, and the reduction of cement production jobs in the U.S. *Id.* In the ball bearing market, dumping "prevented domestic producers from increasing prices to deal with higher costs." *Id.* at 80. This ultimately led to shrinking employment levels and domestic capacity. *Id.*

Job loss from cheap foreign imports eviscerates skilled workers. Manufacturing workers tend to not fare as well as non-manufacturing workers post job loss. LORI KLETZER, JOB LOSS FROM IMPORTS: MEASURING THE COSTS 31 (2001). This is powerfully supported by economic literature. Economist Lori Kletzer studied

displaced workers and found that "[m]anufacturing . . . workers experience large earnings losses on average, 12 percent at the mean, in comparison of just under 4 percent for non-manufacturing ones." *Id.* at 32. "Approximately 25 percent of manufacturing workers report earnings losses of 30 percent or more." *Id.* This risk of "very large earnings losses is insensitive to business cycle and labor market fluctuations." *Id.* Manufacturing workers' losses are even larger when compared to what they would have earned had they not been displaced. These studies show average earnings losses of 40 percent in the first year after displacement and remaining at 25 percent five years after job separation. *Id.* at 33. Even worse, workers from industries in which there is high import-competition are reemployed in lower numbers – 63.4 percent – than in other manufacturing industries. *Id.* at 35. Women are disproportionately impacted by job loss in high import-competing industries due to greater levels of female employment in import-competing industries. *Id.*

For manufacturing workers in high import-competing industries, job loss also represents the loss of years of skill, experience, and training. Only about half of the manufacturing workers who find new employment are reemployed in manufacturing. *Id.* at 65. Only workers who are able to return to their old sector have the potential to "retain the value of some specific skills, keep earning union rents, and maintain their position in internal job ladders." *Id.* Even those workers who return to manufacturing "may find themselves

unfamiliar with [new] standards, processes, and procedures." *Id.* at 67.

Competition is severely harmed by job losses incurred from unfair competition. Each time a manufacturing facility is forced to close as a result of unfair competition, such as the case here, the pool of available skilled labor shrinks. Almost half of these workers will have to learn a new skill or trade, *id.* at 65, and the future growth of competitors in the industry will be slowed by the need to replenish the pool of skilled workers lost.

Furthermore, each time a manufacturing facility shutters its doors as a result of unfair competition, the local community is adversely impacted. A study by the Midwest Center for Labor Research of the Milwaukee Briggs & Stratton plant found that a sudden loss of 5,400 workers would lead to the loss of an additional 6,700 workers through ripple-effects. Robert Ginsburg, *What Plant Closings Cost a Community: The Hard Data*, Labor Research Review: Vol. 1: No. 22, Article 3 (1994).[7] The study estimated that even after two years, 24 percent of the plant workers and 13 percent of the ripple-effect workers would still be unemployed. *Id.* The loss of these workers would ultimately cost taxpayers $197.8 million or about $36,000 per laid-off plant worker. *Id.*

Finally, the loss of domestic industry has national security implications. Without domestic manufacturing,

[7] http://digitalcommons.ilr.cornell.edu/lrr/vol1/iss22/3.

the U.S. can become dangerously dependent on foreign sources for supply of vital goods used for infrastructure and defense. An example of this is steel, a market frequently targeted by dumping, and related anticompetitive pricing, which is necessary for military use in applications ranging from aircraft carriers and nuclear submarines to Patriot and Stinger missiles, armor plate for tanks and field artillery pieces, as well as every major military aircraft in production today. *See*, *e.g.*, Steel and the National Defense (January 2007).[8]

### B. Retaining a skilled U.S. workforce is vital to competition and the continued prosperity of the U.S. economy

A healthy U.S. economy depends on a skilled workforce. A company needs a team of workers with the necessary skills to compete with its rivals, no matter the product or service it sells, and consumers need good-paying jobs in order to purchase goods and services. This creates a virtuous cycle that is essential to competition. The widespread and sustained loss of jobs, like those that occurred in the U.S. solar manufacturing industry, "can be as harmful to America's overall economic welfare as inflated prices." Richard M. Steuer, *Jobs and Antitrust*, 23 Antitrust Magazine 3, 98 (July 15, 2009).[9]

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[8] http://www.ssina.com/news/releases/pdf_releases/steel_and_national_defense_0107.pdf.

[9] http://ssrn.com/abstract=2175116.

A healthy market depends on a dynamic interplay of market forces, including a skilled work force and a free market. This is essential for long term competition and consumer welfare. In a healthy market that is unstifled by unfair competition, companies compete to hire talented individuals and then compete with each other to give individuals the training to produce the products and services demanded by consumers. Employees often move between companies and take their education and training with them to apply to new tasks and new positions. This cross-pollination of employees allows companies to continue to innovate and compete effectively. Companies also compete to retain their most talented workers by offering earned rewards such as promotions, raises, and increased benefits. The opportunities for advancement encourage workers to learn new skills and improve their existing ones. These are all signs of a healthy economy. However, if an industry's domestic workforce is significantly shrunk or eliminated, as was the case here, then there is no pool of skilled labor to draw from in order for this cross pollination to occur. In addition, there is no longer risk for existing employees to be hired away, which reduces the incentive to reward talented workers. This in turn reduces workers' incentives to improve while also lowering their ability to consume. Even worse, the lack of a pool of existing skilled workers can make it cost prohibitive for new entry because new companies will have to train a brand-new workforce from scratch.

Unlawful competition among competitors in the U.S. market threatens to erode American advantage in one fell swoop. Professor Michael Porter, founder of the Institute for Strategy and Competitiveness at Harvard Business School, has stated that one of the four determinants of national advantage is factor conditions, such as the skilled labor or infrastructure necessary to compete. Michael Porter, The Competitive Advantages of Nations 71 (1990). Most factor conditions cannot be created overnight but instead "must be developed over time through investment." *Id.* at 77. Advanced factors, such as skilled labor, are more significant for competitive advantage because they are scarcer and require sustained investment in human and physical capital – investments that not all countries are willing to make to be competitive. *See id.* at 77-78. For example, both educators and education facilities are required to produce skilled labor, yet not every country makes significant investments in the education of its workforce. The advantage that the U.S. holds with respect to the conditions of its skilled work force is rendered meaningless as a result of the Sixth Circuit's decision which allows foreign competitors to agree to eliminate an entire industry so long as they do not recoup their losses in the short term.

Steady employment is critical to a healthy functioning economy. Workers who have steady employment can become more efficient through both experience and learning new technologies. This helps the economy grow by increasing worker productivity. Nationwide, worker productivity grew by 75 percent

from 1980 to 2008. Madland & Walter, *supra*. This increased productivity translates into higher output and lowers costs, which in turn lowers prices. When workers leave an industry, productivity gains achieved through experience and training in new technologies are lost.

It goes without saying that job loss has a detrimental effect on competition. Prominent antitrust attorney and former professor Richard Steuer has remarked that "[m]aximizing consumer welfare for consumers who are out of work is an empty promise" and "[m]aximizing producer welfare for producers faced with shrinking consumer demand is equally hollow." Steuer, *supra*, at 98. Workers' prosperity requires stable employment in healthy competition and is a significant factor in the health of the U.S. economy and competition. David Madland & Karla Walter, *Unions are Good for the American Economy*, CENTER FOR AMERICAN PROGRESS ACTION FUND (Febr. 18, 2009).[10] Without both, the U.S. economy suffers. "Consumer activity accounts for roughly 70 percent of our nation's economy." *Id.* Yet "[i]ncome for the median working age household fell by about $2,000 between 2000 and 2007," shrinking the amount of money available for U.S. consumption. *Id.*

The United States' ability to foster stable industries both for workers and consumers is critical. There can be no competition without consumption. "[T]he

[10] http://www.americanprogressaction.org/issues/labor/news/2009/02/18/5597/unions-are-good-for-the-american-economy-2/.

growth of America's economic welfare," which drives consumption, "depends heavily on domestic jobs." Steuer, *supra*, at 98. Because economic welfare and consumer welfare are closely intertwined, competition law must take into account its impacts on domestic economy. "American producers continue to depend far more on domestic wages than on exports to drive consumption." *Id.* Therefore, each nation's antitrust laws have a responsibility "to help expand job growth and avoid aggravating unemployment" in its own country. *Id.* Following these principles does not mean that the U.S. is resorting to protectionism. The key is to "sustain efficient domestic jobs." *Id.* at 99. Collusive dumping at artificially low levels from government supported foreign companies disrupts our ability to sustain such jobs.

Industries are only as competitive as their workforce allows. When domestic companies existing in a free market economy cannot compete against foreign competitors engaged in horizontally fixed, below cost prices from non-market economies, then the resulting loss of jobs has a very real long term deleterious effect on consumer welfare.

## III. A De Facto Antitrust Exemption for Certain Illegal Behavior Would Be Inappropriate and Catastrophic to U.S. Competitiveness

Petitioner's brief does an excellent job of explaining the longstanding antitrust precedent that is threatened if the Sixth Circuit's decision is allowed to

stand. We agree with Petitioner's arguments, and therefore will not repeat them. However, it is critical that the Court understands the limited remedies available to an injured competitor for antitrust violations.

As the Sixth Circuit decision stands, injured competitors who are harmed by a scheme to sell product at horizontally fixed, below-cost prices have no private cause of action. Such victims are forced to rely on insufficient government protections. Antitrust law itself recognizes that the government has neither the ability nor the resources to remedy every harm. This is why antitrust law has both public and private causes of action. Antitrust law even rewards private plaintiffs with treble damages to encourage private enforcement out of recognition that private enforcement benefits the public as well as the plaintiff.

But it gets worse – the Sixth Circuit's decision also governs every governmental enforcement action in claims of Section 1 below-cost price fixing. This reduces even the public avenues where such harms to industry can be remedied.

### A. A Private Cause of Action Under Section 1 of the Sherman Act is Necessary to Protect American Interests

Enforcement of U.S. anti-dumping and countervailing duty ("AD/CVD") laws has proven to be ineffective in preventing harm to U.S. industry. For example, a 2010 report from Senator Ron Wyden's office shows that when AD/CVD duties are imposed, they are often

evaded. Staff Report, Duty Evasion: Harming U.S. Industry and American Workers (Nov. 8, 2010).[11] These problems have not diminished in the intervening years. *See*, *e.g.*, Terence Stewart, *How The US Can Make Trade Remedies More Effective*, Law360 (Apr. 1, 2015, 10:15 AM).[12]

AD/CVD duties are also a political remedy that cannot be allowed to replace the enforcement of antitrust law, which prohibits certain unlawful behavior in addition to illegal dumping. Price fixing is one such unlawful behavior that is prohibited by Section 1 of the Sherman Act. The Supreme Court has "not wavered in [its] enforcement of the *per se* rule against price fixing." *Arizona v. Maricopa County Medical Soc*., 457 U.S. 332, 347 (1982). This is because "[t]he per se rule 'is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.'" *Id.* at 348 (citation omitted) (quoting Rahl, Price Competition and the Price Fixing Rule – Preface and Perspective, 57 Nw. U. L. Rev. 137, 142 (1962)). Nothing in the AD/CVD laws justifies creating an exception to this Court's longstanding *per se* enforcement of price fixing, nor is it an adequate substitute as it is subject to a number of political forces, including the U.S. membership in the World Trade Organization and calls for repeal.

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[11] https://www.wyden.senate.gov/download/staff-report-duty-evation_-harming-us-industry-and-american-workers.

[12] https://www.law360.com/articles/637766/how-the-us-can-make-trade-remedies-more-effective.

Finally, enforcement of U.S. antitrust laws is necessary because governmental protections are not enough. American manufacturing industries are still being driven out of business even though the U.S. government provides its own remedies for violation of federal dumping statutes. In this case, many American manufacturers closed their doors even though they sold technologically superior products. American companies need the protection of both a private cause of action to protect themselves from massive illegal price-fixing at below-cost levels, and government enforcers that can police such conduct under Section 1 of the Sherman Act. The remedies offered by the Department of Commerce and International Trade Commission, although important, are insufficient.

### B. A Recoupment Requirement is Inappropriate for Section 1 Claims

American manufacturers cannot rely on the ordinary function of the U.S. market to resolve below-cost price fixing from foreign competitors backed by non-market economies. This is because U.S. manufacturers who are forced to lower their prices to below-cost levels to compete cannot do so indefinitely. At some point, they will be forced out of business. Companies in non-market economies that receive substantial state support, including subsidies, do not face this problem. Government subsidies enable them to absorb what would be losses and fix prices below cost indefinitely. This makes it perfectly rational for non-market foreign companies to price below cost, while it is completely

irrational for domestic companies to attempt to compete with them at these prices.

Thus, the case law cited by the Sixth Circuit for the proposition that recoupment is required for a Section 1 claim is inapplicable for several reasons. First, they are inapplicable for the reasons cited in petitioner's brief. And second, the cases are distinguishable because they all concern defendant companies based in the U.S. and subject to traditional market forces. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (defendant Kentucky based); *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, 127 S. Ct. 1069 (2007) (defendant Washington based); *Pacific Bell Telephone v. Linkline Comm.*, 129 S. Ct. 1109 (2009) (concerning internet service in California).[13] In market economies, below-cost pricing tends to result in either one of two outcomes, companies engaging in fixed, below-cost pricing will either be forced out of business or will be forced to move their prices upward to avoid bankruptcy. Not so in non-market economies. Government subsidies can allow conspirators to engage in below-cost pricing indefinitely, leading to a sustained contraction of competition until conspirators' competitors are all eliminated, as was the case here.

[13] Petitioner argues that *Matsushita* is not a recoupment case. We tend to agree, as it appears the Court was most concerned with a lack of evidence showing conspiracy that tended to exclude the possibility that defendants were simply competing amongst each other.

The long-term effects of coordinated price-fixing at below-cost levels are substantial. Capitalism is successful because market forces pressure companies to innovate, become more efficient, successfully manage their input costs, and look for cheaper and higher quality alternatives to every part of the manufacturing process. Companies must always seek to deliver more quality at a lower price or have their sales scooped up by competitors. These are fundamental aspects of competition that benefit consumers. Companies in non-market economies do not face these pressures and therefore do not evaluate the same considerations. Worse, the replacement of American manufacturers with non-market foreign competitors deprives U.S. consumers of all of the innovations and manufacturing process improvements that would have occurred in a capitalist market. Once non-market actors have overtaken a U.S. industry, they can sit idle without ever having to innovate. This loss is greater in industries with nascent technologies.

That is exactly what happened here. Among the companies that were put out of business were U.S. companies that had a history of innovation and relied on newer technologies. As the Sixth Circuit recognized, Petitioner used superior technology to Respondents' polysilicon panel technology. Compared to Respondents' panels, Petitioner's panels "produce more electricity, are easier to install, and maintain their performance longer after the sun sets or is eclipsed by clouds." Petitioner App. 3a. The Respondents use traditional polysilicon technology from the 1970s.

Petitioner 6. Consumers have now been robbed of this choice.

For these reasons, a recoupment requirement is inappropriate for coordinated below-cost price fixing claims under Section 1 of the Sherman Act. Such a requirement would create a *de facto* exemption for coordinated foreign dumping, leading to substantial long-term consumer harm and enabling the replacement of American industry with government supported non-market companies.

## CONCLUSION

The Court should grant certiorari in order to clarify that price fixing is *per se* illegal and that recoupment is not necessary in a Section 1 coordinated below-cost price fixing claim. It is essential that the Court address this issue as coordinated foreign dumping has a significant deleterious effect on American industry, jobs, and competitiveness.

Respectfully submitted,

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