No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

v.

HEBEI WELCOME
PHARMACEUTICAL CO. LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

MICHAEL J. GOTTLIEB
Counsel of Record
KAREN L. DUNN
WILLIAM A. ISAACSON
AARON E. NATHAN
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue NW
Washington, DC 20005
(202) 237-2727
mgottlieb@bsfllp.com

DAVID BOIES
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners respectfully submit this supplemental brief in response to the Brief of the United States as Amicus Curiae. Petitioners agree with the United States that this Court should grant review of the second question presented by the petition, and further agree that the Court can and should review that question regardless of whether certiorari is granted on the other questions presented.

I. Petitioners and the United States Agree that This Court Should Review the Circuit Split on the Appropriate Standard of Deference Owed to Foreign Sovereign Legal Statements.

1. Petitioners and the United States agree that this Court should review the second question presented. Br. of United States as Amicus Curiae ("U.S. Br.") 6-13. That question addresses the dispositive legal issue in the Second Circuit's decision, and it represents the core of the parties' dispute in this case.

The decision below rested *entirely* on the legal position articulated by the Chinese Ministry of Commerce ("Ministry") in its amicus brief filed in support of Respondents' motion to dismiss. Relying upon that position alone, the Second Circuit displaced a jury verdict and three separate decisions by two district judges holding that the Chinese Government had not required Respondents to engage in price fixing or output restrictions.

Each of the District Court's decisions afforded substantial deference to the Ministry's views, but reached a different conclusion about the meaning of Chinese law as applied to Respondents' conduct in light of the underlying source materials appended to the Ministry's own brief. Further, at each stage of the litigation—from the motion to dismiss through trial—the District Court relied upon evidence that contradicted the Ministry's position, including public pronouncements from the Chinese Government to the WTO explaining its deregulation of vitamin C prices, Pet. App. 73a-74a, direct statements from Respondents describing the voluntary association that they had joined and their voluntary agreements, Pet. App. 176a, sworn testimony from a witness for the Chamber that it was "accurate" that "export prices were fixed by enterprises without government intervention" Pet. App. 293a, evidence that certain defendants had sold vitamin C at prices that were both below and above the purportedly "mandatory" price point, Pet. App. 84a-85a, 175a-176a, and statements from Respondents showing that the very notion of a "compulsion" defense had been manufactured for litigation as a way "to do many things in a more hidden and smart way," Pet. App. 178a.

The Second Circuit refused to analyze this evidence based upon its holding that it was "bound to defer" to the Ministry's brief; further, the panel held that it was not permitted to scrutinize the contradictions, gaps, and omissions in the Ministry's brief simply because the Ministry had appeared before the court. Pet. App. 25a-26a. That holding contradicts the law of at least

three other circuits. U.S. Br. 11-13; *cf.* Pet. 23-27 (noting a conflict with five other circuits).

2. The United States and Petitioners also agree that the decision below applied a rigid standard of "conclusive" deference, rather than some flexible standard of deference to only "reasonable" interpretations, as Respondents would have this Court believe. U.S. Br. 9-10; Opp. 19-20, 23, 26-27; Resp. Supp. Br. 4. This is so for at least three reasons.

First, the Second Circuit described its own standard as "conclusive deference." The court classified the potentially applicable precedents into two categories: (1) those that, following the decision in *United States* v. *Pink*, 315 U.S. 203 (1942), had concluded that "an official statement or declaration from a foreign government clarifying its laws must be accepted as 'conclusive'" and (2) those that, relying upon Fed. R. Civ. P. 44.1, "intimated that while the official statements of a foreign government interpreting its laws are entitled to deference, U.S. courts need not accept such statements as conclusive." Pet. App. 20a-21a. The Second Circuit rejected the second category of cases as having "no support," and held that it was relying upon the "conclusive" level of deference articulated by the cases in the first category. Pet. App. 22a-23a.

Second, the Second Circuit's decision stands for the proposition that deference is required whenever a foreign government appears before a court and

articulates a standard that is not facially implausible.[1] At the motion-to-dismiss phase, the only relevant "circumstances" informing the purported reasonableness of the Ministry's position were : (a) the Ministry was the arm of the Chinese Government vested with the authority to regulate trade (but *not* an agency with the authority to *interpret* Chinese law, Pet. 11); and (b) the Ministry had appeared as an amicus with a sworn proffer from one of its attorneys at Sidley Austin LLP (but *not* a sworn declaration from any Chinese Government official, Pet. 17-18 n.5; Pet App. 8a). According to the panel, but for those two circumstances alone, the District Court's conclusions about the meaning of Chinese law would have been "entirely appropriate." Pet. App. 30a n.10.

The reasonableness of the Ministry's legal position was irrelevant under the panel's deference standard. As the panel explained: "If deference by any measure is to mean anything, it must mean that a U.S. court not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations . . . ." Pet. App. 25a-26a. The inability to question the Ministry's legal position is what the Second Circuit meant when it said it was "bound to defer" to that position. Pet. App. 25a. Whatever label

---

[1] For example, the Second Circuit noted that deference might be "inappropriate" if "there is no documentary evidence or reference of law proffered to support a foreign sovereign's interpretation of its own laws." Pet. App. 25a n.8. This is distinguishable from a situation in which a legal reference *is* proffered but is inapposite or inoperative.

may be applied to such a standard, it is more deferential than either *Chevron* deference or a "substantial deference" standard.

Although the panel analyzed certain of the District Court's evidentiary findings and legal conclusions, Pet. App. 29a-33a, it refused to question the reasonableness of the Ministry's legal position. For example, the District Court found that the text of the regulatory regime cited by the Ministry's brief (the 2002 "PVC Notice") appeared to create voluntary rather than mandatory price coordination objectives, Pet. App. 179a, 185a-86a, and observed that the same notice contained a "suspension provision," which expressly authorized the Chamber to "suspend export price review," Pet. App. 66a, 123a-126a. Neither the panel nor the Ministry ever explained why compliance with both Chinese and U.S. law was "impossible" under the comity doctrine, *see Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 799 (1993), given Respondents' legal authority to "suspend export price review" of vitamin C. Similarly, the panel admitted that the "documentary evidence" showed that the regulatory organization for vitamin C exporters (the "Vitamin C Subcommittee" of the Chamber) had by 2002 "changed from a governmental group whose membership was mandatory to a non-governmental trade organization whose membership was voluntary." Pet. App. 28a n.9. In the face of a voluntary trade organization—which was governed by a voluntary regulatory regime—and evidence that Respondents' actual behavior confirmed the voluntary nature of the

regime,[2] the panel's only answer was that the Ministry's appearance as amicus required the court to accept the Ministry's assertion that the regime mandated price fixing. *See id.*

Third, the panel's inclusion of the phrase "reasonable under the circumstances," Pet. App. 25a, in its holding does not change the mandatory nature of the deference standard. The panel's formulation of its standard is similar to *Chevron* deference, which also requires courts to defer to an agency interpretation of a statute that is reasonable. *Compare, e.g.*, *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."), *with Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (the weight given to an agency construction of law "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

Petitioners thus agree with the United States that the Second Circuit adopted a rule of conclusive deference. Only such a standard could have rendered irrelevant "the Chamber's public statement that

---

[2] The evidentiary record confirmed the District Court's legal interpretation of the 2002 PVC Notice and Vitamin C Subcommittee Charter—Respondents regularly exported vitamin C at prices *both below and above* the purportedly mandatory price. *See, e.g.*, Pet. App. 84a-85a, 175a-176a.

respondents had 'voluntarily' agreed on prices and quantities 'without any government intervention,'" the Ministry's failure in its amicus brief to "'address key provisions' of the governing legal regime," and "China's representation to the WTO that it had 'given up export administration of . . . vitamin C." U.S. Br. 10. As the United States explained, "[t]hose circumstances are, at minimum, relevant to the weight that the Ministry's brief should receive," and "[a] standard that does not permit a court even to consider such information is inconsistent with federal courts' responsibility to 'determine foreign law' based on 'any relevant material or source.'" *Id.* (quoting Fed. R. Civ. P. 44.1).

3. The United States is correct that the *Chevron* standard is inappropriate as applied to a foreign government's amicus submission in federal court. U.S. Br. 11-12; *see also* Reply Br. 8. The notion that federal courts are "bound to defer" to foreign sovereign legal interpretations is inconsistent with courts' responsibility to analyze and determine the meaning of foreign law under Rule 44.1. For example, a foreign government might proffer a facially plausible interpretation of a domestic blocking statute that would prohibit the production of foreign documents in U.S. courts, but that position, even if "reasonable under the circumstances," might be unworthy of deference where a federal court determines that the law was not ordinarily enforced, or was enacted in order to frustrate U.S. law. *Cf. Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 527 (1987). Here, the panel's treatment of the Ministry's position as conclusive

caused it to disregard an overwhelming volume of evidence disproving the Ministry's assertion of compulsion. Pet. App. 25a-27a.

4. The consequences of the Second Circuit's rule are unacceptable and warrant this Court's review. Under the Second Circuit's holding, even where a foreign government affirmatively misrepresents its own laws, a federal court would be required to accept those misrepresentations as binding.

The risk of a federal court being presented with a misleading foreign legal statement is not hypothetical—it happened in this case. One of the central authorities on which the Ministry's amicus brief relied was the 1997 Vitamin C Subcommittee Charter. Pet. App. 202a-203a. Citing the 1997 Charter, the Ministry's brief claimed that "defendants were compelled to become participating members" of the Vitamin C Subcommittee, and "would not have been eligible to export vitamin C at all if they failed to participate in these price-setting and production-limiting activities." Pet. App. 212a-213a. That is false—the 1997 Charter was repealed and replaced with a new Charter in 2002. Pet. App. 132a n.45; Pet. App. 68a. And, contrary to the Ministry's representations, the operative Charter by 2002 had eliminated all prior references to mandatory price setting, and made membership in the Vitamin C Subcommittee completely voluntary. Pet. App. 69a,

131a.[3] In other words, by 2002, Respondents could have exported vitamin C without being members of the Subcommittee, and even Subcommittee members could have exported vitamin C without fixing prices. Once this misrepresentation became apparent, the District Court observed that "[t]he Ministry's amicus brief was less than straightforward in its presentation of the 1997 Charter" by implying "that the 1997 Charter was still controlling under the 2002 Regime." Pet. App. 132a n.45.

5. The standard of deference adopted by the Second Circuit was outcome-determinative. The "sole question at issue for comity purposes" below was not simply "whether Chinese law conflicted with U.S. law," Resp. Supp. Br. 11, but rather whether compliance with both

---

[3] *Compare* 1997 Charter of Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters, Dkt. 70-8, No. 1:06-md-01738-BMC-JO (E.D.N.Y. Sept. 22, 2006) (Exhibit G to Respondents' Motion to Dismiss) (providing for mandatory price setting in Articles 7, 10, 15(6), 18, and 19, including that "[t]he Sub-Committee shall coordinate and administrate market, price, customer and operation order of Vitamin C export," art. 7, and that the Sub-Committee "[m]ember's obligations" to "[s]trictly execute export coordinated price set by the Chamber and keep it confidential," art. 15(6)); *with* 2002 Charter of the Vitamin C Subcommittee of the China Chamber of Commerce of Medicines and Health Products Importers and Exporters, Dkt. 394-5 at 172-82, No. 1:06-md-01738-BMC-JO (E.D.N.Y. Nov. 23, 2009) (Exhibit 36 to Respondents' Motion for Summary Judgment) (completely eliminating any mention of price-fixing requirements, including from the "Obligations of Members" section, art. 17, and making membership in the Subcommittee fully voluntary, art. 16).

Chinese and U.S. law was "impossible." *Hartford Fire*, 509 U.S. at 799. The District Court carefully examined the Ministry's brief, the legal materials appended to that brief, and the full evidentiary record before it, and concluded that Respondents had failed to carry their burden of demonstrating that compliance with both Chinese and U.S. law was impossible. Reviewing that decision, the Second Circuit conceded that "if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required at both the motion to dismiss and summary judgment stages would have been entirely appropriate." Pet. App. 30a n.10. The entire case, therefore, turns on whether the standard of deference triggered by the Ministry's appearance as amicus foreclosed the inquiry that the District Court undertook and resolved in favor of Petitioners.

Respondents once again offer an out-of-context quote from Petitioners' brief below in a desperate effort to suggest that Petitioners conceded that Chinese law required price coordination. Resp. Supp. Br. 10. As Petitioners have explained, the quoted sentence referred to Respondents' legal position, but did not concede the correctness of Respondents' position. Reply Br. 10 n.1. From the start of this case, Petitioners have argued and proved that the Chamber acted voluntarily, without government intervention or compulsion, and that Chinese law did not compel price fixing or output restrictions.

6. The United States and Petitioners agree that the circuit split on the second question presented

implicates an "important question of federal law." U.S. Br. 6, 12; Pet. 27. The question matters for this Court as well as the lower courts. Between 1978 and 2016, foreign sovereigns filed 30 amicus briefs in this Court addressing the content of their own law. Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 Va. L. Rev. 289, 318 (2016). This Court should therefore grant certiorari on the second question presented.

II. This Court Should Grant Review of the Second Question Presented Regardless of Whatever Action It Takes on the First and Third Questions Presented.

Although Petitioners maintain that the Second Circuit erred in ruling on the District Court's order denying respondents' motion to dismiss, and that the doctrine of international comity is an inappropriate basis for dismissal of a claim validly within a federal court's Sherman Act jurisdiction, Petitioners agree with the United States that this Court could limit a grant of certiorari to the second question presented.

With respect to the first question presented, the United States and Petitioners agree that the Second Circuit erred "in focusing on the denial of [respondents'] motion to dismiss and ignoring the subsequent stages of th[e] litigation." U.S. Br. 15 (internal quotation marks omitted) (alterations in original). The United States, however, argues that review of the first question in this Court is not necessary, because "if this Court grants review and holds that the Ministry's brief is not entitled to

conclusive weight, the court of appeals can reconsider the foreign-law issue on remand in light of all of the pertinent record materials." *Id.*

Although the first question presented implicates the Second Circuit's jurisdiction over the pre-trial motion to dismiss under 28 U.S.C. § 1291, it does not implicate *this* Court's jurisdiction under 28 U.S.C. § 1254, or the jurisdiction of the District Court under 28 U.S.C. § 1331. The United States is accordingly correct that this Court can review the second question presented without reviewing the first. Further, in reviewing the second question, this Court would have discretion to consider the full record that was before the Second Circuit, including all evidence developed through discovery and trial, *see, e.g.*, *Ortiz* v. *Jordan*, 562 U.S. 180, 190 nn. 8-9 (2011) (citing excerpts from the trial record to highlight the material that the Sixth Circuit had erroneously ignored by reviewing only the order denying summary judgment), and by undertaking such a review this Court could effectively remedy the Second Circuit's error. Similarly, by vacating the judgment below and remanding for further proceedings, this Court would erase and supersede the Second Circuit's appellate jurisdiction error. Thus, while Petitioners believe that this Court should address the applicability of the rule in *Ortiz* to a post-trial adjudication of a pre-trial motion to dismiss, Petitioners agree that the second question can be reviewed standing alone.

As to the third question presented, the United States disagrees with Petitioners both with respect to whether the question warrants review in this Court and on the merits. U.S. Br. 17-22. Petitioners have

previously explained why the third question warrants review in this Court, Pet. 30-31, Reply Br. 11-13, but agree that this Court could grant review of the second question presented without granting the third.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MICHAEL J. GOTTLIEB
Counsel of Record
KAREN L. DUNN
WILLIAM A. ISAACSON
AARON E. NATHAN
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue NW
Washington, DC 20005
(202) 237-2727
mgottlieb@bsfllp.com

DAVID BOIES
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

Counsel for Petitioners

NOVEMBER 28, 2017