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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a court determining foreign law under Federal Rule of Civil Procedure 44.1 is required to accept as legally binding a submission from a foreign government characterizing its own law.

PARTIES TO THE PROCEEDING

Petitioners are Animal Science Products, Inc. and The Ranis Company, Inc., plaintiffs-appellees in the court below.

Respondents are Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corp., defendants-appellants in the court below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Animal Science Products, Inc. states that it has no parent company, and no publicly-held company owns 10% or more of its shares. Petitioner The Ranis Company, Inc. states that it has no parent company, and no publicly-held company owns 10% or more of its shares.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is reported at 837 F.3d 175. The opinion of the United States District Court for the Eastern District of New York (Pet. App. 39a) denying Respondents' renewed motion for judgment as a matter of law is unreported but available at 2013 WL 6191945. The District Court's opinion denying Respondents' motion for summary judgment (Pet. App. 54a) is reported at 810 F. Supp. 2d 522. The District Court's opinion denying Respondents' motion to dismiss (Pet. App. 157a) is reported at 584 F. Supp. 2d 546.

JURISDICTION

The Court of Appeals entered judgment on September 20, 2016, and denied rehearing on November 4, 2016. On January 3, 2017, Justice Ginsburg extended the time to file a petition for certiorari to April 3, 2017. The petition for certiorari was filed on April 3, 2017. This Court has jurisdiction under 28 U.S.C. § 1254.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 44.1 provides that "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1.

STATEMENT OF THE CASE

This case concerns the authority of the federal courts to decide whether or not to accept an interpretation of foreign law offered by a foreign government when an arm of that government appears in court as *amicus curiae*. Prior to the decision below, the prevailing rule granted substantial deference to foreign sovereign legal submissions, but left courts wide discretion to scrutinize those submissions in order to ensure the accurate application of foreign law. Departing from that consensus, the Second Circuit held that federal courts are "bound to defer" to an appearing foreign sovereign's characterization of its own law. There is no legal basis for such a standard. Adopting it would threaten judicial independence, invite inaccurate applications of foreign law, and allow the enforcement of U.S. laws to turn on the whims of foreign governments that have every incentive to shield their citizens and companies from liability in U.S. courts.

Petitioners brought this antitrust class action on behalf of two classes of U.S.-based direct purchasers of vitamin C, alleging that Respondents and their co-conspirators fixed prices and restricted supply in their exports of vitamin C to the United States. Respondents' only defense was that Chinese law had required them to violate the U.S. antitrust laws, and therefore that the doctrines of foreign sovereign compulsion, act of state, and international comity required dismissal of the complaint.

Respondents' central claim—that Chinese law compelled them to fix prices—has always been false. The Chinese government regulated export prices and

volumes for vitamin C in the past, but it ceased doing so by the end of 2001 to facilitate China's entry into the World Trade Organization. The governing documents adopted in 2002 describe a system of voluntary industry coordination, and both the Chinese Government and the participants in the scheme sang the same tune prior to this litigation.

After this suit threatened China's leading vitamin C producers with U.S. antitrust liability, the Chinese Ministry of Commerce changed its story. Participating in a joint defense agreement with Respondents, the Ministry filed an *amicus* brief at the motion-to-dismiss stage asserting that Chinese law had compelled Respondents to fix prices and output. Two different district judges held that the Ministry's brief was entitled to "substantial deference," but was not conclusive because it failed to explain critical regulatory authorities, departed from the Ministry's own source materials and prior statements of the Chinese government, and could not be squared with Respondents' contemporaneous statements describing the governing legal regime.

The Second Circuit reversed based entirely on the Ministry's *amicus* brief. The panel held that the District Court's "careful and thorough treatment of the evidence before it . . . would have been entirely appropriate," Pet. App. 30a n.10, but for the Ministry's appearance in the litigation, which by itself convinced the panel that it was "bound to defer" to the Ministry's characterization of Chinese law.

This Court should reverse the Second Circuit's rigid and arbitrary deference rule. Courts do not surrender their duty or discretion to interpret foreign law

accurately simply because a foreign sovereign appears with an *amicus* brief. The District Court's respectful but inquisitive approach was correct.

A. Factual History

1. In the late 1990s, parallel private and government investigations revealed a now infamous cartel of thirteen European and Japanese vitamins manufacturers that had run a decade-long conspiracy to fix the prices of twelve different vitamin products, including vitamin C. It was, according to the Justice Department, "the most pervasive and harmful criminal antitrust conspiracy ever uncovered by the [Antitrust] Division."[1] *See* Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 Antitrust L.J. 711, 712-19 (2001).

In the early 1990s, a sub-cartel of four vitamin C producers—F. Hofmann-La Roche AG, BASF AG, Merck KgaA, and Takeda Chemical Industries Ltd.—controlled global vitamin C prices and supply. Commission Decision No. 2003/2 of 21 November 2001, 2003 O.J. (L 6) 1, 38-45 (EC).[2] Starting in the mid-1990s, Chinese vitamin C producers began to take advantage of lower manufacturing costs to challenge the cartel—ultimately, the Chinese companies replaced the cartel as the dominant player in the global market. Pet. App. 56a; Expert Report of B. Douglas Bernheim,

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[1] *Selected Criminal Cases*, *Antitrust Division*, U.S. Dep't of Justice, https://www.justice.gov/atr/selected-criminal-cases-antitrust-division.

[2] http://data.europa.eu/eli/dec/2003/2(1)/oj.

Ph.D., at 14, *In re Vitamin C Antitrust Litig.*, No. 06-md-1738 (E.D.N.Y. Nov. 23, 2009), ECF No. 397-3 ["Bernheim Report"].

2. In late 1997, Chinese trade authorities instituted a new regulatory regime for Chinese vitamin C production and export. China's Ministry of Commerce (the "Ministry")[3] issued a regulation known as the "1997 Notice," JA89-97, which declared that "[t]he scale of Vitamin C production shall be strictly controlled," JA90, and required the China Chamber of Commerce of Medicines & Health Products Importers & Exporters (the "Chamber") to establish a "Coordination Group" of vitamin C producers, JA92. That group became known as the "Vitamin C Subcommittee." The 1997 Notice required vitamin C companies to be members of the Subcommittee in order to export, and further required the Subcommittee to coordinate prices and output. JA92. Under the 1997 Notice, the Subcommittee could penalize any "enterprises competing at low price," JA92, by reducing export quota or revoking the violator's right to export. JA93.

The Vitamin C Subcommittee passed its first governing charter in late 1997 (the "1997 Charter"). JA81-88. The 1997 Charter provided that "[o]nly the members of the Sub-Committee have the right to export Vitamin C," JA83, and obligated members to "[s]trictly execute" the agreed-upon export price and

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[3] At this time, the Ministry of Commerce, or "MOFCOM" was still known by its former name, the Ministry of Foreign Trade and Economic Cooperation, or "MOFTEC." *See* Pet. App. 190a n.1.

keep it confidential. JA85. The 1997 Charter also authorized penalties in the event a member violated the Charter, including "warning, open criticism, and even revocation of its membership" in the Subcommittee, and "suspen[sion] and even cancel[lation of] the vitamin export right of such violating member." JA85-86.

Between May 2000 and December 2001, despite the purportedly strict provisions of the 1997 regime, Chinese vitamin C exporters relied upon market prices to engage in a sustained "price war," which resulted in the collapse of the export price of vitamin C from $5.0/kg to $2.8/kg. JA108. An internal report prepared by one of Respondents' co-conspirators lamented that throughout 2001, the Chinese vitamin C market was characterized by "brutally sharp competition, slacked performance, and sustained price decline." JA521.

By 2001, Chinese vitamin C producers had consolidated from more than twenty companies to the four "major manufacturers" who, along with their corporate affiliates, were the original defendants in this case. Pet. App. 159a.[4] Alongside this consolidation,

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[4] Those four manufacturers were Respondent Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei Welcome,"); and defendants Jiangsu Jiangshan Pharmaceutical Co. Ltd. ("JJPC"), later known as "Aland Neutraceutical Co., Ltd.," Pet. App. 54a; Northeast Pharmaceutical Group Co. Ltd. ("NEPG"); and Weisheng Pharmaceutical Co. Ltd. ("Weisheng"). Pet. App. 159a. During the class period—December 1, 2001 to June 30, 2006—these four companies constituted the corporate membership of the Vitamin C Subcommittee's "Council," its primary power-center and the "enforcement body" charged with implementing the Subcommittee's resolutions. JA197, JA189.

China's market dominance grew—by 2002, they accounted for more than 80% of vitamin C exports to the United States. Bernheim Report ¶ 43.

3. The internal price war within the vitamin C industry led the Subcommittee, including Respondents, to meet in November 2001, when they agreed to raise the export price of vitamin C to $3/kg, effective January 1, 2002. Pet. App. 79a. Contemporaneous accounts stated that Respondents reached this agreement voluntarily because "prices had reached rock bottom, and no one could sustain a further slide," and that the industry had acted on its own "because the country had opened up the commercial products business from a free competition aspect." Pet. App. 80a; Pet. App. 79a-82a. The Chamber announced the agreement on its website, stating that the Subcommittee members

> *were able to reach a self-regulated agreement successfully*, whereby they would *voluntarily control* the quantity and pace of exports to achieve the goal of stabilization while raising export prices. Such *self-restraint* measures, mainly based on 'restricting quantity to safeguard prices, export[ing] in a balanced and orderly manner and adjust[ing] dynamically' *have been completely implemented by each enterprises' own decisions and self-restraint, without any government intervention.*

Pet. App. 173a-174a; JA109.

4. In 2002, China fundamentally reshaped the legal regime governing vitamin C exports. These changes were part of a larger deregulation project aimed at

advancing China's transition to a market economy in gaining entry into the World Trade Organization.

Among other reforms, the Ministry abolished the 1997 Notice. In its place, the Ministry issued a new "2002 Notice" that abolished the 1997 regime's key mandates, including (1) that "the scale of Vitamin C production shall be strictly controlled," (2) that the vitamin C Subcommittee must fix prices and output, (3) that all vitamin C exporters participate in and "subject themselves to the coordination of" the Subcommittee, and (4) that the Subcommittee penalize any "enterprises competing at low price and reducing price through any disguised means." *Compare* JA90-92 (1997 Notice), *with* JA98-101 (2002 Notice).

The 2002 Notice also instituted a new procedure for monitoring vitamin C exports called "price verification and chop." JA100. On paper, "verification and chop" required exporters to submit vitamin C export contracts to the Chamber, which was then supposed to affix a seal (or "chop") if the contract met or exceeded an industry-determined minimum export price. JA104-06. The exporter would then present the contract to Customs, which was supposed to permit only those export contracts with an affixed "chop." JA103. But the Notice did not prohibit exports in the event that the Subcommittee members declined to reach a price agreement in the first place. JA98-101. Further, the 2002 Notice made no mention of requiring or enforcing output restrictions. JA98-101.

Even on the face of the 2002 Notice, participation in verification and chop gave the Chamber's members the discretion to opt-out. Specifically, the Notice provided that "[g]iven the drastically changing international

market, the customs and chambers *may suspend export price review for certain products*" with approval of the relevant subcommittee. JA100 (emphasis added).

The Subcommittee, for its part, repealed and replaced the 1997 Charter with a new "2002 Charter." JA182-97. The 2002 Charter differed radically from its predecessor: it declared that the Subcommittee was an "organization jointly established on a *voluntary* basis," JA182 (emphasis added), eliminated the 1997 Charter's requirement that Subcommittee members "[s]trictly execute" the "coordinated price" set by the Chamber, JA182-97, and granted all members an express "[r]ight" to "freely resign from the Subcommittee," JA186. *See* JA593-98 (testimony of Qiao Haili, head of the Vitamin C Subcommittee, confirming those changes).

China's contemporaneous statements to the WTO confirmed that the new 2002 regime had repealed government-mandated vitamin C export price- and output-restrictions as part of a broader effort to liberalize and reform China's economy. Significantly, China represented to the WTO that, as of January 1, 2002, it "*gave up export administration of . . . vitamin C*." JA319 (emphasis added). In the same statement, China explained that it would still "maintain[] export administration of a small number of products," but vitamin C was *not* one of those products. JA319.

5. Consistent with the reforms to the Subcommittee Charter, the contemporaneous evidence showed that the Chinese Government did not force vitamin C exporters to manipulate prices or export volume after 2002.

a. Exporters decided and implemented prices independent of government direction or intervention. Qiao Haili, head of the Vitamin C Subcommittee, admitted in sworn testimony that it was "accurate" that "export prices are fixed by enterprises *without* government intervention," CAJA A1811; Pet. App. 293a (emphasis added), and further that, "on the whole, the government did not involve itself in price fixing," CAJA A1811. Meeting minutes documenting Respondents' voluntary price and output agreements showed no indicia of government compulsion. *See* CAJA A2161-A2162 (memorializing price and production agreement with no mention of legal requirement); JA407 (same); JA180-81 (same); CAJA A2100 (same); CAJA A2105-A2109 (same). Specifically as to price, the Chamber in 2003 distributed a list of agreed-upon export prices for certain key commodities, JA398-400, requesting that Chamber members "[p]lease abide by the list in implementation." JA398. While vitamin C was included on the price list, the column for "agreed price" was left blank. JA399. In contrast, each of the other "key commodities" had an "agreed price" listed. JA399.

b. When Respondents reached price agreements, compliance with those agreements was entirely voluntary—exporters routinely sold at prices both below and above the purportedly-mandatory floors. CAJA A2091-A2098 (even though the verification and chop price was $3.35, Respondents reached agreements to charge *higher* prices during the class period); JA491-92 (exporters "felt free to quote prices lower than the agreed floor price" of $9.20/kg, which made the effect of the price floor "very limited"); JA407 (exporters knew that the price limitation would have a "very limited"

effect because everyone went below it); JA512 (companies "were able to sell vitamin C for less than the verification and chop price . . . because of the highs and lows of the pricing"); JA550 (the Chamber's "price could not be implemented" when there was "a big fluctuation" and the price floor "was not consistent with the market price"); JA535-36 (Weisheng sold vitamin C in the U.S. at prices "less than the minimum price of $3.35," because "by that time $3.35 was not the market price").

c. The verification and chop process was not treated as mandatory. For example, contracts Respondents produced revealed that virtually all of the exports to the U.S. in the class period were shipped without a chop. JA512-17; CAJA A2267-A2539, A2565-A2970, A3020-A3375, A3431-A3669.

d. Exporters faced no sanctions for exporting at independently-determined prices, or for misrepresenting price levels in their contracts. JA501 (witness from a co-conspirator admitting that "[n]obody's going to force" the exporters to "go along with the common understanding"); Pet. App. 249a (Qiao admitting that "[n]o company was ever punished for charging less than $3.35.").

e. Output was not regulated by the Ministry or Chamber at all after 2001. JA182-97. Instead, Respondents coordinated output restrictions by agreement when doing so was convenient, and by 2003, the Chamber had abandoned even the pretense of regulating output. JA526 (in a 2003 meeting, it was decided that "there would be no limits on volume of vitamin C"); JA581 (the Chamber "did not use

verification and chop" or provide "any directions at all" for export volume between March 2003 and July 2006).

6. The leadership of the Chamber acknowledged in contemporaneous writings that Respondents' cartel behavior was voluntary. In a 2003 memo addressed to the Ministry, Qiao bragged that industry "self-regulation" had increased vitamin C exports, but further observed:

> Building a credibility system cannot be separated from industry self-regulation and the industry's self-regulation can't do without the chambers of commerce. However, the legal standing of chambers of commerce is still not clear. Regulations and rules formulated by companies in the industry organized by the chambers of commerce lack legal basis and are difficult to gain support from government departments. These rules and regulations simply become formality and only 'honest fellows will follow.' Therefore . . . we need legislation to define the legal status of the chambers of commerce. We also need support from relevant government departments to assist chambers of commerce in asserting their authority, so that [the chambers] can punish companies who engage in smuggling, tax evasion or who have little credibility, and can honor those who are trustworthy, thereby creating an environment for a credibility industry.

JA454-55.[5]

By 2004, the Chamber and Subcommittee could not count on all Chinese producers and exporters of vitamin C being members under the 2002 Notice and Charter. JA182-97. Vitamin C exporters described the governing regime of "self-regulation" as a series of "gentlemen's agreements." JA384. A Chinese official said in a 2005 speech that although "the [vitamin C] enterprises, mediated by [the Chamber], took measures last year to limit production to protect price and to ensure a 'soft-landing' of the price plunge, but in the long run, such allegiance is vulnerable and will easily succumb to the temptation of profit . . . ." JA409.

7. Respondents' post-filing conduct also supported the district court's conclusion that the anticompetitive conduct was voluntary. After Petitioners filed their complaint in January 2005, the Subcommittee decided to stop keeping records of their meetings, and then *stopped meeting altogether*—despite the supposed legal requirement that they meet to coordinate prices and output. JA592; CAJA A1712. Other evidence suggested that the compulsion defense was manufactured in

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[5] At trial, Qiao claimed for the first time (in a radical departure from his deposition testimony) that this memo referred to a breakdown of coordination in the penicillin industry. That claim was shown to be fabricated, not just because of Qiao's failure to mention penicillin at any point during his deposition, or the memorandum's failure to mention the word "penicillin" even once, but also because the industry breakdown to which Qiao referred did not occur until *months after* he had written his memorandum. JA601-03.

response to the litigation: an employee of one of the conspiring companies wrote in a November 2005 email that, "[e]ven if we lost the case, government would take the foremost part of the responsibility. After all, *we need to do many things in a more hidden and smart way*." Pet. App. 88a n.19.

B. **Procedural History**

1. On January 26, 2005, Petitioners filed a complaint against Respondents and several co-conspirators in the Eastern District of New York. JA52. The Joint Panel on Multidistrict Litigation consolidated two other pending actions with Petitioners' and assigned the consolidated action to Judge David Trager in the Eastern District. JA13.

2. Respondents moved to dismiss based on the doctrines of act of state, foreign sovereign compulsion, and international comity. Pet. App. 6a. In support of that motion, the Ministry filed an *amicus* brief asserting that Chinese law had compelled Respondents' conduct. Pet. App. 190a. The Ministry described itself as the "highest administrative authority in China authorized to regulate foreign trade," and "the equivalent in the Chinese governmental system of a cabinet level department in the U.S." Pet. App. 190a. The Ministry made no representation that it had authority to *interpret* Chinese law.

The Ministry asserted that the Chamber's system of "self-regulation" was the product of a "regulatory pricing regime mandated by the government of China." Pet. App. 197a. For these propositions, the Ministry cited repeatedly to an outdated 1991 regulation, as well as the 1997 Charter, which the Ministry failed to

disclose had been repealed. Relying on the repealed 1997 Charter, the Ministry misleadingly asserted that "only Sub-Committee members 'have the right to export Vitamin C and are simultaneously qualified to have Vitamin C export quota.'" Pet. App. 202a-203a. The Ministry's brief cited additional provisions of the 1997 Charter as though they were still in force, including repealed penalties for noncompliance with Subcommittee directives and, "[m]ost significantly for purposes of this case," the (abolished) obligation to "'*[s]trictly execute export coordinated price set by the Chamber and keep it confidential*.'" Pet. App. 203a (emphasis in original). In sum, the Ministry failed to disclose that its legal theory relied upon regulatory provisions that were defunct by 2002.

The Ministry submitted the repealed 1997 Charter, but *not* the 2002 Charter, as an exhibit to its *amicus* brief, and neither the Ministry nor Respondents disclosed the existence of the 2002 Charter to the court. Instead, the Ministry's brief erroneously asserted that the 2002 transition to "verification and chop" was a continuation of the earlier mandatory price and output regime. In characterizing the "verification and chop" regime, the Ministry relied only on those authorities it deemed helpful to its argument, such as the 2002 Notice and a separate 2003 Ministry "Announcement," but declined to mention or explain either the 2002 Charter or the 2002 Notice's provision that gave the Subcommittee the power to suspend price review. Pet. App. 208a-209a; JA98-101.

After Petitioners filed their opposition to Respondents' motion to dismiss, the Ministry filed another statement with the court. JA131. In that statement, the Ministry repeated that it had

"specifically charged the [Chamber] with the authority and responsibility, subject to Ministry oversight, for regulating, through consultation, the price of vitamin C manufactured for export," JA133, but omitted any reference to any regulatory authority, and failed to cite a single instance of government-mandated price-fixing. Further, the Ministry's statement made no mention of output restrictions, even in the abstract. The Ministry continued to omit any mention of the 2002 Charter. JA131-33.

3. After reviewing the Ministry's *amicus* briefs, documentary submissions, and some limited discovery, the District Court denied Respondents' motion to dismiss. Pet. App. 188a. The court considered evidence including post-2002 documents showing that the Subcommittee members reached several voluntary agreements on price, and occasionally defected from those agreements without suffering any penalty. Pet. App. 175a-176a. The court also reviewed testimony from "the person responsible for negotiating export contracts" for one of the defendants who "suggest[ed] that the hand of government was not weighing as heavily on defendants as defendants and the Ministry would have th[e] court believe." Pet. App. 176a-177a. And the court reviewed the email from Wang Qi (of co-conspirator JJPC), in which he mused that in light of the pending lawsuit, the defendants needed to act "in a more hidden and smart way." Pet. App. 178a.

The District Court recognized that the "authority of the Ministry's brief [was] critical to defendants' motion" to dismiss. Pet. App. 179a. The court concluded that the Ministry's brief was "entitled to substantial deference, but [would] not be taken as conclusive evidence of compulsion, particularly where,

as here, the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position." Pet. App. 181a. The court explained that "the record as it stands is simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions," and, accordingly, denied the motion to dismiss. Pet. App. 186a & n.12.

4. Following the close of discovery, Respondents renewed their compulsion, act of state, and comity defenses in a motion for summary judgment. Pet. App. 55a.[6] The Ministry filed yet another statement (the "2009 Statement"), this time asserting without citations that "[d]uring the relevant period in the present case, the Ministry required vitamin C exporting companies to coordinate among themselves on export price and production volume," and that "[n]o vitamin C exporter could ignore these policies" lest they face "penalties for failure to participate in such coordination." JA249-50. The statement characterized China's statements to the WTO as mere "*general descriptions* of the current status of China's market economy" that had nothing to do with vitamin C, JA250, but declined to explain the portion of China's WTO statement that explicitly referenced vitamin C exports, JA319.

The District Court denied the motion for summary judgment. Pet. App. 56a. Considering Respondents' comity defense, the court concluded that dismissal

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[6] By this time, Judge Trager had passed away, and the consolidated action had been reassigned to Judge Brian M. Cogan. Pet. App. 58a n.4; JA34.

would not be justified under *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), "[u]nless [Respondents'] price-fixing was compelled by the Chinese government" creating a "true conflict" with U.S. law. Pet. App. 102a-103a.

On the question of Chinese law, the District Court carefully considered the Ministry's motion-to-dismiss-stage *amicus* brief and 2009 Statement. Pet. App. 118a-122a. The court found that the Ministry's statements were entitled to respect, and deferred to the Ministry's "explanation of the relationship between the Ministry and the Chamber." Pet. App. 118a-119a & n.37. But the District Court declined to grant conclusive deference to the Ministry's submissions, because they contained gaps and ambiguities, and failed to address "critical provisions" of the relevant legal regime. Pet. App. 119a. The court also found that certain of the Ministry's statements were directly contradicted by the documentary evidence before the court. Pet. App. 121a-122a.

The court found the Ministry's 2009 Statement to be "particularly undeserving of deference" because the statement: (1) failed to cite to any regulatory or statutory sources "to support its broad assertions about the regulatory system governing vitamin C exports"; (2) "contain[ed] numerous ambiguous terms and phrases, particularly with regard to the penalties under self-discipline"; and (3) failed to offer any explanation of the differences between the 1997 and 2002 regimes. As such, the Ministry's statement did "not read like a frank and straightforward explanation of Chinese law," but rather "like a carefully crafted and phrased litigation position." Pet. App. 119a-120a.

The District Court also noted that the Ministry made "no attempt to explain China's representations [to the WTO] that it gave up export administration of vitamin C, which appear to contradict the Ministry's position in the instant litigation." Pet. App. 120a-121a. The court further noted that "the factual record contradicts the Ministry's position," including evidence relating to departures from price floors and production agreements. Pet. App. 121a. In sum, the court concluded that the Ministry's legal position appeared to be a "post-hoc attempt to shield [Respondents'] conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period." Pet. App. 121a-122a.

Having declined to treat the Ministry's submissions as conclusive, the District Court relied on "what may be considered the more traditional sources of foreign law—primarily the governmental directives themselves as well as the charter documents of the [Vitamin C] Subcommittee and the Chamber"—in reaching a Rule. 44.1 determination "that the [post-2001] regime did not compel [Respondents'] conduct." Pet. App. 119a.

5. Trial was held over three weeks in 2013. JA478-603. After the close of evidence, Respondents made an oral Rule 50(a) motion for judgment as a matter of law, in which they pressed their act of state and foreign sovereign compulsion defenses (but omitted their comity defense). Pet. App. 250a-275a; Pet. 15. The District Court denied judgment as a matter of law on each ground. Pet. App. 273a-275a.

The jury found for Petitioners and awarded $54.1 million in damages before trebling.[7] Pet. App. 276a-279a. In a special verdict, the jury found that Respondents had failed to prove that their conduct had been "actually compelled" by the Chinese government during the class period of December 1, 2001 to June 30, 2006. Pet. App. 278a.

Respondents moved again for judgment as a matter of law, this time on the grounds that the act of state, foreign sovereign compulsion, and international comity doctrines barred liability. Pet. App. 41a. The District Court denied that motion. Pet. App. 53a.

6. Respondents appealed, pressing the same three arguments. The Ministry filed another *amicus* brief in which it asserted for the first time, and without any supporting citation, that it "has unquestioned authority to interpret applicable Chinese law." Br. for *Amicus Curiae* Ministry of Commerce of the People's Republic of China at 14 ("2014 Ministry Amicus Br."), Dkt. 105, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014). The Ministry again failed to discuss the substantive content of the 2002 Charter, but for the first time attempted to justify this omission by saying that "[the Ministry's] reliance on its own regulation rather than a statement promulgated by its subordinate simply reflects [the Ministry's] legal view

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[7] Defendants Weisheng and NEPG settled prior to trial, and defendant JJPC settled during trial. The court eventually entered final judgment in an amount of approximately $147.8 million against Respondents. *In re Vitamin C Antitrust Litig.*, No. 06-md-1738 (E.D.N.Y), ECF Nos. 816, 834.

that its own regulatory act was key," *id.* at 26—eliding the fact that the Ministry had previously relied heavily on the *repealed* version of its "subordinate's" statement (the 1997 Charter) in its *amicus* brief before the District Court. *Supra* at 15-16; Pet. App. 202a-203a.

The Ministry also argued for the first time that China's 2002 statement to the WTO referred only to "export quotas and licenses," and, separately, that "the United States adopted exactly the same position in WTO dispute settlement proceedings that MOFCOM has urged in this case: after 2002, China was still requiring exporters to abide by a price-setting regime." 2014 Ministry Amicus Br. at 28. But this claim, too, was misleading. At the proceeding in question, the United States had accused China of maintaining a system of "minimum export pricing" specifically over "bauxite, coke, fluorspar, manganese, magnesium, silicon carbide, yellow phosphorus, and zinc," but *not* vitamin C. Opening Oral Statement of the Complainants, *China—Measures Related to the Exportation of Various Raw Materials*, DS394/DS395/DS398, ¶ 31 (Aug. 31, 2010).[8]

Ignoring the trial that had occurred, the Second Circuit reversed the District Court's initial order denying Respondents' motion to dismiss, and remanded with instructions to dismiss Petitioners'

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[8] https://ustr.gov/sites/default/files/uploads/ziptest/WTO%20Dispute/New_Folder/Pending/Jt.Oral1_.as%20delivered.fin_.(pdf%20version).pdf

complaint with prejudice. Pet. App. 3a.[9] The panel acknowledged that the Sherman Act applied to Respondents' price and output restraints, but also noted that Respondents could not have complied with U.S. antitrust law if, as the Ministry had claimed, Chinese law required Respondents to "fix the price and quantity of vitamin C sold abroad." Pet. App. 19a. Given that the "2002 Notice does not explicitly mandate price fixing," the panel explained that "[o]ur interpretation of the record as to Chinese law thus hinges on the amount of deference that we extend to the Chinese Government's explanation of its own laws." Pet. App. 19a-20a.

The panel held that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is *bound to defer* to those statements." Pet. App. 25a (emphasis added). Despite that holding's apparent qualifications, the panel did not explain how the "reasonableness" of the Ministry's statement was to be

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[9] Even though the Second Circuit purported to confine its review to the motion-to-dismiss record, Pet. App. 2a-4a nn.2-3, this Court's review is not so limited. On appeal from Respondents' post-trial motion for judgment as a matter of law, the appropriate record is the full record as developed through discovery and trial. *See Ortiz v. Jordan*, 562 U.S. 180, 184 (2011) ("Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the [interlocutory] motion," and "at that stage" and on appeal, a "defense must be evaluated in light of the character and quality of the evidence received in court.").

assessed, declined to examine contradictory evidence in the record undermining the statement's reasonableness, made no finding that the Ministry's *amicus* brief constituted a "sworn evidentiary proffer," and ignored whether the Ministry was an authoritative interpreter of Chinese law. Pet. App. 25a, 27a-33a.

Instead, the panel applied a legal standard that turned on the bare fact of the Ministry's appearance in the litigation. The panel explained 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. But because the Ministry had appeared, the panel held that the *amicus* brief was conclusive as to the meaning of Chinese law. Even so, at no point did the panel explain how its finding of compulsion with respect to price fixing applied to, and therefore required dismissal of, Petitioners' claims based upon output restrictions.

Having found a "true conflict" between Chinese and U.S. law, the panel performed a cursory analysis of the remaining comity factors. Pet. App. 33a-37a. The panel found that the relevant parties and claims were in China, that relief would be ineffective given China's insistence that its companies engage in anticompetitive conduct, and that the jury verdict risked upsetting U.S.-China relations. *Id.* The panel did not weigh the interests of U.S. businesses (including Petitioners) and consumers, the interests of the United States in enforcing its antitrust laws, or the Executive Branch's failure to corroborate China's claims in the case.

7. Petitioners sought panel rehearing and rehearing *en banc*, arguing among other things that the panel had erred in granting conclusive deference to the Ministry's *amicus* brief, and in only reviewing (after a full trial on the merits) the District Court's interlocutory order denying Respondents' motion to dismiss. Pet. App. 280a-297a. The Second Circuit denied rehearing and rehearing *en banc*. Pet. App. 298a. Following briefing on the petition for certiorari, including a recommendation by the Solicitor General to grant the petition, this Court granted review limited to the second question presented. Misc. Order (Jan. 12, 2018).

SUMMARY OF ARGUMENT

There is no legal basis for requiring federal courts to accept as legally binding an appearing foreign sovereign's characterization of its own law. Mandating that courts grant binding deference to any particular source is the antithesis of the broad discretion Rule 44.1 commits to courts, and the arbitrary nature of the Second Circuit's rule would interfere with courts' ability to reach accurate determinations of foreign law. No precedents from this Court, alternative deference doctrines, or international norms support the adoption of such a standard.

I. As a threshold issue, a standard of binding deference cannot be squared with Rule 44.1, which was designed to afford federal courts maximum flexibility in determining foreign law. Rule 44.1 protects federal courts' discretion by instructing courts to treat the determination of foreign law as a legal question, and by permitting courts to "consider any relevant material or source." The Second Circuit's binding deference

standard undermines each of these principles. A court cannot meaningfully consider and resolve a question of foreign law if it is forbidden from questioning or challenging a foreign government's legal statement. Nor is there any legal justification for mandating that U.S. courts adopt interpretations of foreign law that, while reasonable on their face, prove on close examination to be unpersuasive or inaccurate.

II. A standard of binding deference standard does not follow from any prior decision of this Court or other legal authority. Specifically, the panel's reliance on this Court's decision in *United States v. Pink* was misguided. *Pink* is a narrow decision that did not adopt a broad prospective rule of deference. Moreover, *Pink* was primarily concerned with protecting the Executive Branch's foreign policy prerogative against state intrusion—a concern not implicated here.

A binding deference standard further conflicts with principles of international comity and settled international practice. Foreign courts, as well as the operative international treaties that speak to the issue, universally give preference to accuracy over respect for a statement's advocate. The Second Circuit's standard abandons the principle of accuracy by demanding that U.S. courts accept foreign legal statements even when scrutiny reveals that statement to be unpersuasive or inaccurate.

III. The deference that the federal courts have traditionally afforded to federal and state administrative agencies counsels against the adoption of a binding deference standard. Further, the analogy to this Court's decisions in *Chevron* and its progeny does not support such a standard. *Chevron* deference is

rooted in separation-of-powers concerns, which are absent in the relationship between the judiciary and foreign government agencies. Even if *Chevron* were instructive, the deference it counsels is more nuanced and less stringent than what the Second Circuit's standard would require. *Chevron* carves out a gatekeeping role for courts to decide whether deference is legally appropriate, but that inquiry would be prohibited by the Second Circuit's standard. And while *Chevron* doctrine permits courts to challenge an agency's "convenient litigation position," the Second Circuit's rule would forbid such a conclusion as offensive to comity. An attempt to analogize to federal-court deference to state agencies leads to the same conclusion—the ordinary standards applied are far less deferential to states than the Second Circuit's rule is to foreign governments.

IV. In the absence of blind deference to the Ministry's *amicus* brief, no court could plausibly hold that Chinese law required Respondents to engage in price fixing and output restrictions. Only if all of Respondents' unlawful conduct was compelled under Chinese law would dismissal pass this Court's threshold "true conflict" inquiry in *Hartford Fire*. 509 U.S. at 798-99. Given the lack of any such conflict, the District Court's judgment should have been affirmed.

ARGUMENT

I. A Binding Deference Standard Conflicts with the Federal Courts' Discretion and Responsibility to Reach an Accurate Determination of Foreign Law Under Rule 44.1.

Consistent with the judiciary's independent role as the authoritative interpreter of law in our constitutional order, Federal Rule of Civil Procedure 44.1 provides courts broad discretion to reach an independent determination of foreign legal issues by reference to "any relevant material or source." The Court of Appeals' "binding deference" standard would turn Rule 44.1 on its head by privileging foreign sovereign submissions above all other sources of foreign law, without respect to the accuracy, merit, or persuasiveness of the submission. Granting binding deference to foreign sovereigns' legal statements would therefore degrade the accuracy and independence of foreign-law determinations, and undermine the enforcement of a host of U.S. laws. That result finds no support from the text or purpose of Rule 44.1, or any of this Court's precedents.

A. Rule 44.1 Protects Courts' Substantial Discretion to Reach an Independent and Accurate Determination of Foreign Law.

1. Rule 44.1 provides that "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." The Rule was adopted "to furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of

a foreign country." Fed. R. Civ. P. 44.1 advisory committee's notes (1966) (Adoption).

Prior to the enactment of Rule 44.1, foreign law was considered to be a question of fact that had to be alleged and proved by the parties. *See Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 397 (1949); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 38 (1801). Courts were generally at the mercy of parties' submissions, and the resulting determinations could only be as accurate as the materials provided. Meanwhile, if a party alleged but failed to prove an issue of foreign law, the consequences could include defaulting to the law of the forum, application of generic "principles of law," or dismissal of the action altogether. Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 Mich. L. Rev. 613, 692-94 (1967).

2. This Court recognized courts' independent duty to reach accurate determinations of foreign law long before Rule 44.1. Chief Justice Marshall's opinion for the Court in *Church v. Hubbart* explained that foreign law inquiries should be guided by "[t]he principle that the best testimony shall be required which the nature of the thing admits of." 6 U.S. (2 Cranch) 187, 236-37 (1804). A century later, in a case concerning the "foreign law" of a state, this Court found that courts have an independent duty to construe and interpret state law even where those laws have been "proved" via testimony or documents. *Eastern Bldg. & Loan Ass'n v. Williamson*, 189 U.S. 122, 126-27 (1903) (citation omitted) ("While statutes and decisions of other States are facts to be proved . . . their construction and meaning are for the consideration and

judgment of the courts in which they have been proved," and "[n]o witness can conclude a court by his opinion of the construction and meaning of statutes and decisions already in evidence."). Applying this concept to the law of foreign nations, Justice Story observed that "the object of the proof of foreign laws is to enable the Court to instruct the jury what, in point of law, is the result from foreign law to be applied. . . ." Joseph Story, Conflict of Laws § 638, at 895 (2d ed. 1841). Reviewing courts "are therefore to decide what is the proper evidence of the laws of a foreign country . . . [and] to judge of their applicability, when proved, to the case at hand." *Id.*

In *Fremont v. United States*, 58 U.S. (17 How.) 542 (1854), this Court confronted claims to land grants founded on the law of former Mexican territories. The Court noted that although the territorial laws in question "were never treated by the court as foreign laws, to be decided as a question of fact," it was nevertheless

> undoubtedly often necessary to inquire into [foreign] official customs and forms and usages. . . . And it may sometimes be necessary to seek information from individuals whose official position or pursuits have given them opportunities of acquiring knowledge. But it has always been held that *it is for the court to decide what weight is to be given to information obtained from any of these sources*. It exercises the same discretion and power, in this respect, which it exercises when it refers to the different reported decisions of state courts, and compares them together, in order to make up an opinion

> as to the unwritten law of the State, or the construction given to one of its statutes.

Id. at 557 (emphasis added).

After *Fremont*, and until the enactment of Rule 44.1, lower courts generally understood that judges had an independent duty to "find the meaning of the foreign law as [they] would if the meaning to be ascertained were that of a deed or an agreement." *Petrogradsky Mejdunarodny Kommerchesky Bank v. Nat'l City Bank of New York*, 170 N.E. 479, 483-84 (N.Y. 1930) (Cardozo, C.J.). That said, many lower courts struggled to apply consistent or efficient procedural standards in determinations of foreign law. Miller, 65 Mich. L. Rev. at 616-17. Rule 44.1 was designed to eliminate the antiquated procedural fiction that labeled foreign legal questions as factual issues, and to replace formalistic evidentiary rules with "maximum flexibility about the material to be considered and the methodology to be employed." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2444, at 349 (3d ed. 2008).

3. The desire to enhance the accuracy of the federal courts' interpretations of foreign law animated the decision to shift from a fact- to a law-based approach. *See* Miller, 65 Mich. L. Rev. 613. Arriving at a correct interpretation of foreign law may be straightforward in some cases given the wealth of primary and secondary materials regarding the forum country's laws, *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 633-34 (7th Cir. 2010) (Posner, J., concurring), whereas in other cases the court may need to engage in a more detailed examination of the "day-to-day realities of the practice of law" in a given country, including "the way

in which one branch of the other country's law interacts with another," *id. at* 638-39 (Wood, J., concurring). In all cases, the object of a Rule 44.1 inquiry is to arrive at an accurate interpretation of foreign law.

Rule 44.1 protects courts' discretion to reach accurate interpretations by allowing the consideration of "any relevant material, including testimony, without regard to its admissibility," and authorizing courts to "engage in [their] own research and consider any relevant material thus found." Fed. R. Civ. P. 44.1 Advisory Committee's Notes (1966) (Adoption); *see also* 9A Wright & Miller, *Federal Practice and Procedure* § 2444 (3d ed. 2008) (Rule 44.1 "dissipates former inhibitions on judicial inquiry" and allows judges to "accept these materials and give them whatever probative value he or she thinks they deserve"). Courts have considered judicial precedents, statutes, regulations, enforcement actions, statements of public officials, treatises and law review articles, expert testimony, and articles in the popular press. *See, e.g., United States v. Mitchell*, 985 F.2d 1275, 1280 (4th Cir. 1993) (collecting cases). In reviewing any of these materials, the trial court has broad discretion to accept or disregard arguments based on their relative merit and persuasive value. 9A Wright & Miller, *Federal Practice and Procedure* § 2444.

B. Binding Deference is Incompatible with Rule 44.1 and Judicial Discretion to Reach an Independent and Accurate Determination of Foreign Law.

The Second Circuit's deference standard is incompatible with the text and purpose of Rule 44.1.

Federal courts are not obliged to subordinate their authority to interpret foreign law to an arm of a foreign government simply because that government chooses to appear as *amicus curiae* in pending litigation. To hold, as the Second Circuit did, that the District Court lacked discretion to "challenge [the Ministry's] official representation to the court regarding its laws or regulations" plainly misapprehends the responsibility of the federal courts under Rule 44.1 and undermines the longstanding interests in independence and accuracy that the Rule was designed to protect. Pet. App. 26a.

As nearly all courts had held prior to the decision below, a foreign sovereign's statement interpreting its own law is entitled to respect, but such a statement need not (and should not) be given "binding" or "conclusive" effect as a matter of law. *See United States v. McNab*, 331 F.3d 1228, 1241 (11th Cir. 2003) (courts may, but are not required to, defer); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1108-09 (D.C. Cir. 2001) (same); *Access Telecom, Inc. v. MCI Telecomms. Corp.,* 197 F.3d 694, 714 (5th Cir. 1999) (same). Courts have almost uniformly declined to apply conclusive or "binding" deference for several reasons.

1. The text of Rule 44.1 authorizes trial courts to "consider any relevant material or source" in reaching a determination of foreign law. Binding deference, by contrast, would sometimes require courts to disregard materials that contradict a foreign sovereign's statement, rendering any consideration of such materials meaningless. A binding deference standard would therefore re-impose the "inhibitions on judicial inquiry" that Rule 44.1 sought to dismantle, and interfere with a judge's prerogative to give foreign legal

materials "whatever probative value he or she thinks they deserve." 9A Wright & Miller, *Federal Practice and Procedure* § 2444.

The discretion Rule 44.1 commits to the federal courts cannot be overridden by a categorical rule imposed via judicial fiat. The Federal Rules are promulgated pursuant to an express congressional delegation of authority, which provides that any "laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b). As this Court has held in other contexts, where Congress has enacted a discretionary regime, courts should not replace that discretion with judge-made categorical rules. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392-94 (2006). That principle applies with equal force to the decision below, which imposed its categorical deference rule based upon principles of comity that are plainly not "a matter of absolute obligation." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

2. A rule that requires binding deference to foreign sovereign statements regardless of persuasiveness or accuracy is in tension with the mandate in Rule 44.1 that courts engage in a legal (rather than factual) inquiry. Factual inquiries are limited— the factfinder (be it a jury or judge) cannot introduce new facts into the record, and is therefore dependent upon the parties to identify the relevant witnesses and documents to establish the truth or falsity of relevant allegations. By contrast, legal inquiries, including the one required by Rule 44.1, require the reviewing court to construe law accurately—subject to *de novo* review on appeal—but grant courts considerable discretion to consider and give weight to whatever sources of law best address the

question presented. Thus, courts applying Rule 44.1 should not be constrained by whether a legal interpretation is offered by a plaintiff, defendant, expert witness, or foreign government *amicus* brief—the rule grants courts the discretion to perform research *sua sponte* and "to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail." Fed. R. Civ. P. 44.1 advisory committee's notes (1966) (Adoption).[10] Because the Second Circuit's standard turns on the *identity* of the party offering the foreign legal interpretation, rather than the *content* of the offered interpretation, it upends the purpose of Rule 44.1. *amicus*

The Second Circuit compounded its error by holding that the *mere appearance* of a foreign sovereign before the court mandates greater deference than is owed to statements of sovereigns that do not appear.[11] That rule is incoherent: a legal statement offered by a

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[10] To be sure, there are circumstances in which certain deference regimes operate to cabin legal inquiries, but those circumstances are the exception rather than the rule, and courts have eschewed conclusive or binding deference standards except where they are necessary to satisfy constitutional separation of powers principles. *See infra*, at 47-55.

[11] Pet. App. 30a n.10 (the District Court's holding would have been "entirely appropriate" had the Chinese Government "not appeared in this litigation"); Pet. App. 23a (distinguishing an earlier case because the "Chilean Government did not appear before the court in that case," so the "deference [that] court afforded the Chilean affidavit does not guide our application here"); Pet. App. 25a (courts are "bound to defer" where a foreign government "directly participates in U.S. court proceedings").

foreign government prior to, or outside the context of, ongoing litigation is far *less* likely to be biased, and *more* likely to be accurate, than a statement offered by a sovereign that is seeking to influence ongoing litigation. *Cf.* Pet. App. 236a-237a (disclosing the Ministry's joint defense agreement and "very strong interest aligned with the defendants in the case"); Pet. App. 120a (noting that the Ministry's 2009 statement "reads like a carefully crafted and phrased litigation position"). Yet courts following the panel's rule would be more inclined to defer to a slanted legal interpretation contained in a litigation statement than one appearing in an independent statement made prior to litigation. If affirmed, this deference-on-appearance rule will incent the submission of foreign-sovereign *amicus* briefs asserting novel or unsupported legal positions whenever U.S. litigation threatens favored foreign companies with liability.

A separate but related incoherence in the Second Circuit's standard was its repeated reference to the importance of the "sworn evidentiary proffer" provided by the Ministry. Pet. App. 25a. The only "proffer" in this case was a declaration from the Ministry's outside counsel at a U.S. law firm, the "sworn" component of which amounted to representations relating to the authenticity of documents. *See* Declaration of Joel M. Mitnick in Support of the Brief of *Amicus Curiae* the Ministry of Commerce of People's Republic of China, *In re Vitamin C. Antitrust Litig.*, 06-md-1738, (E.D.N.Y. Sept. 22, 2006), ECF No. 70; *compare, e.g., Mitchell*, 985 F.2d at 1280 (considering, but not deferring to, the sworn affidavit of a Pakistani official offering an interpretation of Pakistani law). It is impossible to discern why the submission of a declaration from an

attorney at a foreign government's U.S. law firm should be relevant, let alone dispositive, to the level of deference provided to that government's legal interpretation.

3. Granting "binding" deference to foreign sovereign legal statements risks undermining the enforcement of U.S. laws. Most obviously, the standard would undermine both government and private enforcement of the antitrust laws against foreign cartels selling products in the United States. The panel's approach would immunize plain violations of U.S. antitrust laws anytime a foreign government appears in U.S. court and asserts that their laws compelled the anticompetitive conduct. Such a regime would permit opportunistic foreign governments to misconstrue their laws to shield their citizens and businesses from U.S. litigation. Liability for foreign anticompetitive conduct can turn on whether the foreign government merely encouraged or allowed the conduct, in which case there is liability, or actually compelled the conduct, in which case there is not. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706–07 (1962). Under the panel's approach, foreign governments could dictate dismissal of an otherwise valid claim by asserting for the first time in an *amicus* brief that foreign laws compel anticompetitive conduct even where those laws, on their face, do nothing more than *permit* it. *Cf. Hartford Fire*, 509 U.S. at 798-99.

When, as here, some or all of a cartel's members are directly or indirectly state-owned,[12] or partly owned by government officials, foreign companies are likely to find willing sovereign partners to provide legal cover. Pet. App. 88a n.19 (employee of conspiring company noting, with respect to this litigation, that "[e]ven if [defendants] lost the case, the government would take the foremost part of the responsibility"). As the District Court found, the cartel of Chinese exporters in this case, having persuaded the Ministry to take a self-interested position at odds with the text of the relevant regulatory authorities and China's prior public statements, represents this fear fully realized. Pet. App. 122a ("Although the Ministry encouraged defendants' cartel and now fervently desires that defendants be dismissed from this suit, those policy preferences do not establish that Chinese law 'required' defendants to follow their anti-competitive predilections.").

The risks of a "binding deference" standard extend beyond the antitrust context. Foreign sovereigns are often sued under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*, and questions of foreign law frequently arise under that act. U.S. courts also decide foreign law questions in a wide variety of other contexts such as the recognition of foreign judgments, *e.g., de Fontbrune v. Wofsy*, 838 F.3d 992 (9th Cir. 2016) (applying French law to decide whether a foreign judgment was compensatory, and therefore

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[12] *See* Br. in Opposition at iii (June 5, 2017) (corporate disclosure statement).

enforceable, under California law), and private transnational disputes in which foreign governments have a strong interest, *e.g. Republic of Turkey v. OKS Partners*, 797 F. Supp. 64 (D. Mass 1993) (denying defendants' motion to dismiss suit by Turkey to recover ancient coins over which Turkey claimed ownership under Turkish law). All of these areas would be vulnerable to mischief under the decision below.

4. A "binding deference" standard also would invite manipulation of the federal courts. Foreign sovereigns may sue as plaintiffs in federal courts, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964), and questions of foreign law (and deference to foreign governments' interpretations of that law) frequently arise in such suits, *e.g. McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066 (D.C. Cir. 2012); Pet. 24. The Second Circuit's standard could invite foreign governments to sue in U.S. court knowing that the U.S. standard of binding deference to its legal position would allow them to engineer a result in our courts that could not be assured in their own. Further, foreign companies could bring claims involving novel or unsupported applications of foreign law, but prevail in U.S. court simply by convincing a friendly government agency to file an *amicus* brief supporting the interpretation.

This case demonstrates the accuracy costs that would be imposed by a binding deference standard. By accepting, without scrutiny, the Ministry's statement as binding, the panel embraced a statement that the District Court had found to be ambiguous, inconsistent with and contradicted by the record, and less than fully honest. *Supra* at 16-19. The Second Circuit's binding deference standard undermines the central task

afforded to courts by Rule 44.1: to determine and apply the *correct* foreign law.

II. There Is No Legal Basis for Requiring the Application of Binding Deference.

Neither of the two bases on which the Second Circuit relied—this Court's decision in *United States v. Pink* and the doctrine of international comity—supports a standard of binding deference to foreign governments' legal statements.

A. This Court's Precedents Do Not Support the Application of a "Conclusive" Deference Standard Under Rule 44.1.

The Second Circuit misread this Court's decision in *United States v. Pink*, 315 U.S. 203 (1942), to require the application of "conclusive" deference to "an official statement or declaration from a foreign government clarifying its laws." Pet. App. 20a, 25a. *Pink* announced no such rule, and even if it had, the rule would not control the outcome of this case.

1. *Pink* arose out of the nascent Soviet government's 1918 nationalization of Russian insurance companies. At that time, the New York superintendent of insurance took possession of the assets of First Russian Insurance Company, which had operated in New York before nationalization, and still held the funds as of 1933, when the United States recognized the USSR and executed the "Litvinov Assignment," in which the USSR assigned claims for "amounts . . . that may be found to be due it, as the successor of prior Governments of Russia . . . from American nationals, including corporations" to the U.S. government. *Id.* at 212. Accordingly, in 1934 the United States brought suit to recover First Russian's assets from New York's

then-Superintendent, Louis Pink, claiming an entitlement under the Litvinov Assignment to the funds. *Id.* at 211.

Among other defenses, Pink claimed that the 1918 nationalization decree "had no extraterritorial effect, according to Russian law." *Id.* at 214. While the litigation was pending, the U.S. government requested that the Russian "Commissariat for Foreign Affairs" obtain and transmit through "diplomatic channels" an "official declaration by the Commissariat for Justice" clarifying the decree's intended extraterritorial effect. *Id.* at 218-19.

The Commissariat for Justice responded to the Executive Branch's request by producing an official declaration that the decree did have extraterritorial effect under Russian law. *Id.* at 219-220. And, crucially, this Court noted that "the referee in" an earlier case, *Moscow Fire Ins. Co. v. Bank of N.Y. & Trust Co.*, 20 N.E.2d 758 (N.Y. 1939), had found, "*and the evidence supported his finding*, that the Commissariat for Justice ha[d] power to interpret existing Russian law." *Id.* at 220 (emphasis added). "*That being true*," this Court found the Commissariat's official declaration "conclusive so far as the intended extraterritorial effect of the Russian decree." *Id.* at 221 (emphasis added).

2. This Court in *Pink* determined that it did not need to review "all the evidence in the voluminous record of the Moscow case." *Id.* at 218. This was not because the Court was obliged to defer to the Commissariat as a matter of law, but because the "expert testimony tendered by the United States gave great credence to its position" about the effect of the

nationalization decree and Commissariat's power to interpret it. *Id.* At no point did this Court hold that a foreign government's declaration of foreign law is always conclusive; nor did this Court announce a rule that such declarations should presumptively be treated as such. Because *Pink* offered no prospective rule of deference, its acceptance of the Commissariat's interpretation of Russian law cannot be separated from the case's context, including: (1) the Court's finding that the Commissariat had power to interpret Russian law; (2) the recognition that the Commissariat had submitted its interpretation in response to an explicit invitation from the U.S. Executive Branch; and (3) a wealth of record evidence that confirmed that interpretation. *See id.* at 241 (Frankfurter, J., concurring) ("The controlling history of the Soviet regime and of this country's relations with it must be read between the lines of the Roosevelt-Litvinov Agreement. One needs to be no expert in Russian law to know that the expropriation decrees intended to sweep the assets of Russian companies taken over by that government into Russia's control no matter where those assets were credited.").

Further, the substantive dispute in *Pink* involved weighty separation-of-powers concerns, including the President's power as the "sole organ" of foreign affairs to recognize the validity of foreign governments. *See Pink*, 315 U.S. at 229, (explaining that the Executive's active participation in the litigation, on the heels of granting diplomatic recognition to the USSR and negotiating a comprehensive treaty with its government, implicated the President's Recognition power and his status as the "sole organ" of foreign affairs) (citing *United States v. Curtiss-Wright Export*

Corp., 299 U.S. 304, 320 (1936)). This case, by contrast, does not implicate the Executive's recognition power or a foreign legal statement solicited and endorsed by the U.S. government in the course of its diplomatic activities. Instead, the United States has urged this Court to hold that the Ministry's legal statement should not be granted conclusive deference, just as the United States does not receive conclusive deference for its legal statements offered in foreign courts. Br. for the United States as *Amicus Curiae* at 11-12 (certiorari stage) (Nov. 14, 2017) ("U.S. Invitation Br.").

3. To the extent *Pink* could be read to stand for a general proposition regarding the standard of deference owed to foreign sovereigns, that standard could not apply absent a threshold showing that the specific arm of foreign government "has power to interpret" the foreign law at issue. Yet even that reading of *Pink* would produce an unworkable standard given that the antecedent inquiry of *who* has the power to issue an authoritative interpretation of foreign law is itself a question of foreign law. A doctrine of conclusive deference to authoritative foreign legal statements would thus send courts into an interpretive hall of mirrors that this Court's decision in *Pink* did not contemplate, let alone intend.

Here, unlike *Pink*, there was no evidence, and certainly not "well supported" evidence, that the Ministry has the power to interpret Chinese law. From the time this litigation was filed until it was appealed to the Second Circuit, the Ministry made no such claim—instead, the Ministry claimed only that it is the highest Chinese authority empowered to regulate foreign trade, Pet. App. 6a, 168a, 190a. When the Ministry eventually claimed for the first time on

appeal to possess law-*interpreting* power, the Ministry cited no authority in support of its claim. Br. for *Amicus Curiae* Ministry of Commerce of the People's Republic of China at 14, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014), ECF No. 105. Thus, even under the panel's expansive interpretation of *Pink*, the Ministry would not be entitled to binding deference.

B. International Comity Does Not Support a Standard of Binding Deference to a Foreign Government's Legal Statements.

International comity, which is the basis for deference to foreign law in the United States, William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2072 (2015), neither requires nor supports a standard of binding deference to foreign sovereign legal statements.

1. Despite its name, international comity doctrines are a matter of domestic law, and "are generally not required by international law." *Id.* at 2074 & nn.22-24. Thus, even at the apex of comity-based deference to foreign law, such deference remains a "voluntary act of the nation by which it is offered." *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839). A U.S. court may, for example, decline to apply foreign law that choice-of-law principles would otherwise mandate if the foreign law contravenes a strong public policy of the forum. *Id.* ("The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests."); Joseph Story, Commentaries on the Conflict of Laws § 25, at 31 (2d ed. 1841).

2. International comity is satisfied by a standard of deference that prioritizes accuracy, reliability, and judicial independence. *See* 3 Imre Zajtay, *The Application of Foreign Law,* International Encyclopedia of Comparative Law, Private International Law 14-24 (Kurt Lipstein ed., 2011) ("When the rules of the conflict of laws of the *lex fori* require the application of foreign law, they clearly require that it should be applied correctly . . . ."). Comity among the several States, as expressed through U.S. conflict-of-laws principles, requires only that the States endeavor to apply one another's laws accurately. *E.g., Lauritzen v. Larsen*, 345 U.S. 571, 591 (1953) ("The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum."). And this Court has recognized that the States, as "members of the same great political family" owe one another a "greater degree of comity" than international comity requires among foreign nations. *Bank of Augusta*, 38 U.S. (13 Pet.) at 590; *cf. Nevada v. Hall*, 440 U.S. 410, 424-26 (1979). International comity should not require more. *See* Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. Davis L. Rev. 11 (2010) ("[I]nternational comity encourages U.S. courts to apply foreign law in appropriate cases . . . .").

Although international comity incorporates principles of "reciprocal tolerance and goodwill," *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for S. Dist. Of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part), there is no reciprocity interest in adopting a

binding deference standard. To the contrary, such a standard would be an international outlier. As the Solicitor General has explained, the U.S. "is not aware of any foreign-court decision holding that the Department's representations" about the meaning of U.S. law are entitled to "conclusive" deference, U.S. Invitation Br. at 11-12, and the Justice Department expects a standard of deference in step with the accuracy principle underlying conflict-of-laws doctrine. *Id.*; *supra*, at 44.

3. None of the dominant international agreements support a binding deference standard. Large majorities of European nations and of North, Central, and South American nations have formalized their respective practices in two major treaties, each of which establishes a system for requesting opinions on foreign legal questions from the appropriate government while explicitly providing that those opinions do not bind the receiving country.[13] Notably, both treaties also require their signatories to establish a single, centralized authority to receive and act on requests from other nations' tribunals, to ensure that each country speaks

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[13] The European Convention on Information on Foreign Law, art. 8, June 7, 1968, 720 U.N.T.S. 154 ("European Convention"); Inter-American Convention on Proof of and Information on Foreign Law, art. 6, May 8, 1979, O.A.S.T.S. No. 53, 1439 U.N.T.S. 111 ("Inter-American Convention") (countries receiving statements about the meaning of another country's law "shall not be required to apply the law, or cause it to be applied, in accordance with the content of the reply received"); *see also* Explanatory Report to the European Convention on Information on Foreign Law ¶ 34, E.T.S. No. 062.

with one voice on questions of its domestic law.[14] Although the United States is not party to either treaty, it has recommended to the Hague Conference on Private International Law that any new instrument for cross-border co-operation concerning the treatment of foreign law should provide responses that are

> non-binding in the context of the specific proceeding for which the foreign law was sought (in other words, the information provided would constitute prima facie evidence subject to potential rebuttal). The usefulness of any opinion on foreign law could depend on the persuasiveness of the reasoning in the opinion and the sources on which the opinion relies.

Response of the United States of America to Feasibility Study on the Treatment of Foreign Law Questionnaire, Preliminary Doc. No. 25 of Oct. 2007 for the attention of the Council of Apr. 2008 on Gen. Affairs and Pol'y of the Hague Conference on Private Int'l Law.[15]

Independent of treaty obligations, Petitioners are aware of no foreign courts that consider themselves

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[14] European Convention art. 2 (each party must "set up or appoint a single body . . . to receive . . . [and] take action on" requests for information on the party's domestic law"); Inter-American Convention arts. 6, 9 ("[E]ach State Party shall designate a Central Authority" and "shall reply to . . . requests from the other States Parties through its Central Authority."); *cf.* European Convention art. 2 (a party "*may* set up . . . one *or more* bodies" to "transmit" requests from its courts to a foreign country's designated central authority) (emphasis added).

[15] https://assets.hcch.net/upload/wop/genaff_pd09us.pdf.

legally "bound to defer" to another country's submission asserting a particular interpretation of its own law. On the contrary, foreign courts generally retain their independent authority to decide foreign legal questions for themselves. *See generally* Yuko Nishitani, *Treatment of Foreign Law – Dynamics Towards Convergence?* (2017) (compiling national reports on the treatment of foreign law in more than thirty countries).

Collectively, by emphasizing judicial independence and their privileging of a central interpretive authority, these longstanding international practices show the Second Circuit's binding deference standard to be an outlier.

III. Analogous Deference Doctrines Counsel Against Application of "Binding" Deference to Foreign Sovereign Legal Statements.

The Second Circuit's rigid rule of binding deference cannot be squared with the more flexible deference standards that courts have applied to legal interpretations offered by federal and state agencies, and even state courts. Unlike foreign sovereigns, the Executive Branch and organs of state governments are entitled to respect not just as a matter of comity—instead, the deference they are owed derives from the Constitution's allocation of powers between and among federal and state governments. However important "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states" may be, *Société Nationale*, 482 U.S. at 543 n.27, that spirit cannot justify privileging the representations of foreign

governments over the official representations of U.S. federal and state governments.

A. Principles of *Chevron* Deference Do Not Support a Rule of Binding Deference.

Some courts have attempted to analogize to deference principles deriving from *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), in articulating the standard of deference due to foreign government legal interpretations. *E.g.*, *Access Telecom*, 197 F.3d at 714; *In re Oil Spill*, 954 F.2d 1279, 1312 (7th Cir. 1992). But the *Chevron* doctrine cannot be sensibly applied to foreign government statements offered under Rule 44.1 and, in any event, firmly-established *Chevron* principles would preclude the application of "binding" deference to the Ministry's statement in this case.

1. *Chevron* requires courts to defer to an administrative agency's reasonable interpretation of an ambiguous statute that Congress has charged the agency with administering. 467 U.S. at 843-44 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). The rule gives effect to Congress's decision to allocate interpretive authority to federal agencies. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Deference is not required because agencies have superior expertise in statutory interpretation, but because courts respect Congress's constitutional authority to decide that "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administrative agency." *City of Arlington, Tex. v. FCC*,

569 U.S. 290, 296 (2013). As such, "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *Id.* at 306 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

The deference that the Judicial Branch owes to its coordinate branches of government under the Constitution is different, in both degree and kind, than the respect that U.S. courts must show to foreign sovereigns. The judiciary's obligation to refrain from usurping Congress's law-making role is a constitutional command that derives from the powers allocated under Articles I and III, as well as the Supremacy Clause of Article VI. By contrast, the respect owed to foreign sovereigns derives from discretionary principles of international comity. *See Hilton*, 159 U.S. at 163-64. In the context of a foreign sovereign's legal statement, Congress has made no delegation to the sovereign that could plausibly require an Article III court to refrain from exercising its duty to answer a question of law. *Chevron* thus fails to provide a useful guide for evaluating foreign sovereign legal statements.

2. Even on its own terms, *Chevron* counsels against a rule of "binding" deference to foreign legal submissions. *Chevron* has several distinct steps, all of which the Second Circuit's standard would discard in favor of a standard that is far more deferential than the respect that is owed to U.S. agencies.

a. Deference cannot even be considered under *Chevron* unless it is first established that "Congress delegated authority to the agency generally to make

rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226. If that requirement has been satisfied, a reviewing court must then engage in a statutory interpretation exercise to determine whether the relevant statute is "silent or ambiguous with respect to the specific issue," and if so, whether the agency's interpretation is a "permissible construction of the statute." *Chevron*, 467 U.S. at 843. The reviewing court—which remains the "final authority on issues of statutory construction"—must first employ "traditional tools of statutory construction" to determine whether the statute is ambiguous on the "precise question at issue," and that Congress has thereby implicitly delegated interpretive authority to the agency. *Id.* at 843 n.9. This step of the *Chevron* inquiry is often outcome-determinative. *See, e.g.*, *Kingdom Tech., Inc. v. United States*, 136 S. Ct. 1969, 1979 (2016).

Chevron's threshold inquiries do not fit within the Second Circuit's standard. Though the Court of Appeals allowed that a foreign government's evidentiary "proffer" must be "reasonable under the circumstances presented," Pet. App. 25a, it held that 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." *Id.* at 25a-26a. The inability to "challenge" a foreign government's construction of a foreign statute is incompatible with a court's duty under *Chevron*, and would leave courts

with far less discretion than they possess when reviewing the legal interpretations of the U.S. Executive Branch.[16]

The Second Circuit compounded its error by holding that the mere fact of a foreign sovereign's appearance (as *amicus*) automatically triggers a stronger form of deference. Pet. App. 30a n.10. That holding cannot be squared with the principle that deference is appropriate only when "the agency interpretation claiming deference was promulgated in the exercise of . . . authority," granted by Congress, "to make rules carrying the force of law." *Mead*, 533 U.S. at 226-27. Under *Mead*, the fact that an agency shows up in court does not mean its interpretation is worthy of deference—the relevant question is whether the agency's submission relies upon legally-binding rules that the agency was authorized to issue. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (holding that interpretations promulgated in "opinion letters . . . policy statements, agency manuals, and enforcement guidelines" are instead "entitled to respect . . . , but only to the extent that those interpretations have the 'power to persuade.'" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The question

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[16] For example, this Court has explained that "the meaning attributed to treaty provisions by [executive] agencies charged with their negotiation and enforcement is entitled to great weight," but is "not conclusive." *Sumimoto Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). The Second Circuit's rule would accordingly grant foreign agencies more deference than the U.S. Department of State receives on the same question of treaty-interpretation.

whether an agency has appeared (as a party or an *amicus*) is irrelevant to whether the agency's proposed legal interpretation carries the "force of law."[17]

b. Beyond *Chevron*'s threshold inquiries, there are many scenarios under which the Second Circuit's standard would require deference when *Chevron*'s framework would refuse it. For example, *Chevron* permits courts to consider "the consistency of an agency's position [as] a factor in assessing the weight that position is due," *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993), and "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view," *INS v. Cardoza-Fonseca*, 480 U.S. 421,

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[17] Even under a framework relying upon *Auer* deference, *see Auer v. Robbins*, 519 U.S. 452 (1997), the Second Circuit's "binding deference" standard is inappropriate. *Auer* deference is "undoubtedly inappropriate, for example, when [1] the agency's interpretation is plainly erroneous or [2] inconsistent with the regulation" being interpreted, "[3] when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question," as when "[4] the agency's interpretation conflicts with a prior interpretation, or [5] when it appears that the interpretation is nothing more than a convenient litigating position, or [6] a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (citations and internal quotation marks omitted). The "binding deference" standard would forbid the kind of inquiry that any court must perform under *Auer*, and the inquiry that this Court described in *Christopher* is precisely the kind of inquiry in which the District Court engaged. *Supra*, at 16-19.

446 n.30 (1987). Though an agency may shift positions, it must "cogently explain why it has exercised its discretion in a given manner," as with any other agency decision, and "the basis articulated by the agency itself," not "appellate counsel's *post hoc* rationalizations," must satisfy the court, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 50 (1983). By contrast, the Second Circuit's standard would foreclose the examination of a sovereign's prior statements when those statements appear outside the four corners of the sovereign's brief. *See* Pet. App. 28a-30a & n.9 (holding that the District Court abused its discretion by examining and weighing evidence of prior Ministry statements and policies evincing voluntariness, as well as contradictory statements such as China's statement to the WTO that it "gave up export administration of . . . vitamin C" as of January 1, 2002, Pet. App. 74a).

Further, this Court's *Chevron* cases have held that "[d]eference to what appears to be nothing more than an agency's convenient litigating position" would be "entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). As the *Bowen* Court explained:

> We have never applied [*Chevron* deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. . . . 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'

Id. at 212 (quoting *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)). Yet the Second Circuit held that

the District Court abused its discretion in holding that the Ministry's interpretation of Chinese law amounted to a "carefully crafted and phrased litigating position." Pet. App. 120a.

3. To the extent that this Court's *Chevron* cases inform the question presented, the relevance is limited to cases where this Court has considered how to weigh materials to which there is no legal obligation to defer. In such circumstances, this Court has recognized the value in "[t]he well-reasoned views of the agencies implementing a statute," which "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Mead*, 533 U.S. 227 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)).

This Court has highlighted certain guideposts for reviewing courts: absent an obligation to defer, 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." *Skidmore*, 323 U.S. at 140. Even before *Skidmore*, courts adopted similar reasoning in the context of determining foreign law. *E.g., Petrogradsky Mejdunarodny Kommerchesky Bank*, 170 N.E. at 483-84 (Cardozo, C.J.).

Petitioners agree with the United States that among the factors articulated above, other factors that give a foreign government's statement the "power to persuade" include the statement's "clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency

with past statements; and any other corroborating or contradictory evidence." Br. of the United States as *Amicus Curiae*, at 8.[18] That is precisely the inquiry in which the District Court engaged in this case. Pet. App. 119a-122a.

B. The Level of Deference Granted to State Entities Counsels Against Binding Deference to Foreign Governments.

A standard of "binding deference" also finds no support in the tradition of federal-court deference to arms of state governments, and would result in foreign governmental entities receiving *more* deferential treatment than a sovereign state. The Constitution requires the opposite balance. *Bank of Augusta*, 38 U.S. (13 Pet.) at 590; *see Bond v. Hume*, 243 U.S. 15, 22 (1917) ("It is certain" that the principles of comity "which govern as between countries foreign to each other apply with greater force to the relation of the several states to each other . . . and exact a greater degree of respect for each other than otherwise by the principles of comity would be expected.").

Federal courts owe states and state instrumentalities significant respect, as "courts of a common country," *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916), whose mutual relationships with the federal government are governed by the Constitution and federal law. *See*

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[18] The United States has endorsed this sensible approach for at least the past fifteen years. *See* Br. for the United States in Opposition at 17-18, *McNab v. United States*, Nos. 03-622 & 03-627 (Dec. 29, 2003).

Claflin v. Houseman, 93 U.S. 130, 136-37 (1876). Despite the respect that sovereign states are owed, including the principle that states are the final arbiters of their own law, this Court has long held that only the highest court in a given state is entitled to conclusive deference to the interpretation of that state's own laws—by contrast, the decisions of lower and intermediate state courts receive only "some weight" and are not "controlling" in federal court. *See Comm'r of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 153, 160-61 (1948). By analogy to that practice, courts have long held that the decisions of foreign intermediate courts should not be taken as authoritative statements of foreign law in U.S. court. *Yone Suzuki v. Cent. Argentine Ry.*, 27 F.2d 795, 800 (2d Cir. 1928) (holding that the court was not bound by an Argentinian intermediate appellate court's interpretation of Argentinian maritime law).

Similarly, federal courts have long held that state administrative agencies are entitled to "substantial deference" when interpreting their own regulations, but not "binding deference" that would preclude any challenge to a state's proffered interpretation. *E.g. City of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70, 94 (1st Cir. 2008) (noting that federal courts "generally defer to a state agency's interpretation of those statutes it is charged with enforcing"); *Pharm. Research & Mfrs. of Am. v. Meadows*, 304 F.3d 1197, 1207-08 (11th Cir. 2002) (granting "substantial deference" to a state agency's interpretation of state law). Even under such a standard, agency interpretations that fail to offer a "reasoned and consistent view" of the agency's regulations are not

entitled to deference, and "no deference" need be granted "to an interpretation put forth merely as a litigation position." *Idaho Dep't of Health & Welfare v. U.S. Dep't of Energy*, 959 F.2d 149, 152-53 (9th Cir. 1992).

When a state's attorney general files an *amicus* brief asserting a particular interpretation of state law, this Court has maintained that a federal court need not defer to that interpretation. *See Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960) (the Court of Appeals appropriately concluded that "it could not, on the available materials, make a confident guess how the Florida Supreme Court would construe the statute" despite the Florida Attorney General's participation as *amicus* asserting an interpretation, *see id.* at 216 (Black, J., dissenting)); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30 (1959) (the District Court did not abuse its "fair and well-considered judicial discretion" when, "[c]aught between the language of an old but uninterpreted statute and the pronouncement of the Attorney General of Louisiana," it declined to adopt the Attorney General's view). There is no justification for granting greater deference to the representative of a foreign trade ministry than is owed to the highest law enforcement officials of a state, yet that is precisely the result of the decision below.

IV. The Second Circuit's Judgment Should Be Reversed.

At every stage of this litigation, the District Court evaluated the Ministry's legal claims in light of the developing record, and determined that Chinese law did not compel all of Respondents' anticompetitive conduct. Pet. App. 118a-155a, 168a-186a. That

determination was correct. This Court should reverse the panel's subsequent resuscitation of Respondents' comity defense.[19]

Based solely on the standard of "binding deference" that it imposed, the Court of Appeals reversed the District Court's otherwise "entirely appropriate" analysis of Chinese law that governed the case to final judgment. Pet. App. 30a n.10. Then, finding for the first time in the litigation that a "true conflict" between Chinese and U.S. law had existed, the panel devoted five paragraphs to applying a ten-factor "comity balancing test," after which it vacated the District Court's judgment and the jury's verdict, and reversed the District Court's order denying Respondents' motion to dismiss. Pet. App. 33a-38a. As the Second Circuit

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[19] The breadth of the Court of Appeals' error is evident in its indefensible decision to order the dismissal of Petitioners' complaint, with prejudice, without any explanation of how the comity doctrine barred adjudication of Petitioners' distinct claims for liability under the Sherman Act. Petitioners' advanced two claims, each of which was undisputed: that Respondents (1) unlawfully fixed export prices, including above the verification and chop price of $3.35; and (2) unlawfully colluded on output and export volume. Pet. App. 56a. To warrant dismissal, Respondents were required to show that Chinese law compelled them to engage in *both* categories of unlawful conduct. Pet. App. 126a (explaining that "even if Chinese law did involve some compulsion, summary judgment would still be denied because Chinese law assuredly did not compel all of defendant's illegal conduct"). The panel did not explain how Chinese law compelled output restrictions, or Respondents' numerous agreements to fix prices at specific levels *above* the supposed minimum price of $3.35. This same error infected the panel's finding regarding Petitioners' request for injunctive relief. Pet. App. 36a-37a.

acknowledged, that disposition was compelled entirely by its conclusion that the District Court had applied the incorrect standard of deference, which was dispositive of the panel's analysis of Chinese law and its "true conflict" analysis in general. Pet. App. 30a n.10, 27a.

Stripped of its erroneous holding that the Ministry's appearance mandated conclusive deference, all that remains of the panel's conclusion is its concession that the District Court's analysis of Chinese law was "entirely appropriate." Pet. App. 30a n.10. Accordingly, should this Court agree that the Second Circuit should not have applied "binding deference," there could be no plausible basis for comity-based abstention from jurisdiction over petitioners' antitrust claims. *See Hartford Fire*, 509 U.S. at 798 (comity-based abstention, if ever appropriate, is inappropriate absent a "true conflict" between foreign and U.S. law); *In re Icenhower*, 757 F.3d 1044, 1051-52 (9th Cir. 2014) (same); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006) (same); *see also Société Nationale*, 482 U.S. at 555 (Blackmun, J., concurring in part and dissenting in part) ("whether there is in fact a true conflict between domestic and foreign law" is "the threshold question in a comity analysis"); U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for International Enforcement and Cooperation*, § 4.2.2 at 32 (2017). This Court should reverse the Second Circuit's judgment as to Respondents' comity defense, and remand for further proceedings as to Respondents' remaining defenses.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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