No. 16-1220

IN THE

Supreme Court of the United States

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

Petitioners,

—v.—

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

Respondents.

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

BRIEF *AMICI CURIAE* OF PROFESSORS SAMUEL ESTREICHER AND THOMAS LEE IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

PAGE(S)

Other Authorities

INTEREST OF *AMICI CURIAE*

Amici curiae are law professors who teach and write about international litigation, U.S. foreign relations law, and the U.S. judicial system. They have no interest in this case or the parties except in their capacities as teachers and scholars; this brief represents the individual views of *amici* and not necessarily the views of any institution with which they are affiliated. They are filing this brief in support of neither party to call the Court's attention to the continuing importance of principles of international comity in helping U.S. courts tread carefully in cases implicating U.S. relations with foreign states.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Sup. Ct. R. 37.6. The parties have given consent to the filing of this brief.

Thomas H. Lee is the Leitner Family Professor of International Law at Fordham University School of Law and director of its international and graduate programs. He has taught and lectured on matters of federal jurisdiction, U.S. foreign relations law, international arbitration, and international litigation in U.S. courts. He has published many articles and book chapters about the federal courts, international litigation in U.S. courts, international law, and international arbitration.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Second Circuit ruled below that "principles of international comity" required the district court to abstain from exercising jurisdiction in this case. *In re Vitamin C Antitrust Litigation*, 837 F.3d 175, 179 (2d Cir. 2016). In so doing, the court of appeals applied a 10-factor balancing test originated by the Third and Ninth Circuits in the late 1970s. *See id.*, at 184-85 (citing *Timberlane Lumber Co. v. Bank of Am., N.T., & S.A.*, 549 F.2d 597, 614-115 (9th Cir. 1976)*; Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979)). If this Court decides the court below erred by treating the Chinese government's view of Chinese law as conclusive and binding, then on remand the lower court will likely replay the *Timberlane* international comity analysis, albeit with more searching inquiry into relevant Chinese law.

International comity—according due respect to the public acts or interests of foreign sovereigns—has been a longstanding basis for judicial abstention in sensitive foreign relations cases. The role of international comity has diminished with the development of specific judicial doctrines and statutes like the Foreign Sovereign Immunities Act to mitigate the risk that litigation in U.S. courts might damage this country's relations with other nations. Nevertheless, given the breadth of U.S. courts' adjudicative jurisdiction, and the myriad ways in which litigation in the United States touches upon foreign relations concerns, principles of international comity will continue to inform judicial analysis in these sensitive cases.

This Court did not grant *certiorari* on the question whether a freestanding doctrine of international comity abstention exists. Every court of appeals to have addressed the question has answered in the affirmative. Accordingly, we submit, this Court should not resolve the question it left open in *Hartford Fire Insurance Co. v. California*, "whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity." 509 U.S. 764, 798 (1993). Should the Court nevertheless reach that issue, it might use this case as a vehicle for providing much needed guidance to the lower courts, which have developed an unpredictable, malleable 10-factor balancing test.

I. INTERNATIONAL COMITY IS AN IMPORTANT BASIS FOR JUDICIAL ABSTENTION IN SENSITIVE CASES IMPLICATING THE PUBLIC ACTS OR INTERESTS OF FOREIGN STATES.

Although the basic idea of "international comity" is simple—to accord respect to the public acts or interests of foreign sovereigns—it has three overlapping legal usages that have sown confusion in U.S. courts. First, comity is sometimes invoked as a rule of statutory construction by which "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). This usage is a cousin of the presumption against extraterritoriality, which in significant part is motivated by a desire "to avoid the international discord that can result when U.S. law is applied to

conduct in foreign countries." *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016). The latter usage of the term does not apply in the present case, because this Court has ruled that the Sherman Antitrust Act, 26 Stat. 209, 15 U.S.C. §§ 1-7, as amended ("Sherman Act"), applies extraterritorially to price-fixing activities abroad that affect "imports to the United States". *Empagran*, 542 U.S. at 161.

Second, comity is an umbrella term or animating principle for a number of related doctrines this Court has developed to ensure restraint or respect for foreign state parties or interests in suits in U.S. courts. For instance, this Court has recognized that "under principles of comity governing this country's relations with other nations, sovereign states are allowed to sue" in U.S. courts. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-409 (1964). The *Sabbatino* Court also acknowledged that the "act of state" doctrine—"the principle that the conduct of one independent government cannot be successfully questioned in the courts of another"—rests upon "the highest consideration of international comity and expediency." *Id.* at 417 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-304 (1918)). Other prominent doctrines implicating international comity are found in cases dealing with conflict of laws, *see Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (one country's laws "will, by the comity of nations, be recognized an executed in another"); recognition of foreign judgments in American courts, *see Hilton v. Guyot*, 159 U.S. 113, 163-4 (1895) ("The extent to which the law of one nation, as put in force within its territory . . . by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon . . . 'the comity of nations'"); and constitutional limitations on personal jurisdiction over foreign corporations, *see Daimler AG*

v. Bauman, 134 S. Ct. 746, 763 (2014) (U.S. courts' "expansive view of general jurisdiction" poses "risks to international comity").

Third, and most relevant for present purposes, various courts of appeals have recognized international comity as an independent basis for judicial abstention in sensitive foreign relations cases, as the Second Circuit did in this case. *See, e.g., Mannington Mills, Inc. v. Congoleum Corp.,* 595 F.2d 1287, 1297-1298 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613-615 (9th Cir. 1976). No federal appeals court has held that international comity cannot be the basis for abstention in appropriate cases. Although the circuits have not developed a uniform international comity analysis, it is generally agreed that U.S. courts "should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity." *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884 & n.7 (5th Cir. 1982), *vacated on other grounds,* 460 U.S. 1007 (1983).

This Court has not decided the question "whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity." *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 798 (1993). The *Hartford Fire* majority explicitly left the question open. This Court's holding in *United States. F. Hoffmann-La Roche Ltd. v. Empagran S.A.* 542 U.S. 155 (2004), did not purport to address the comity abstention question left open in *Hartford Fire.* Rather, the *Empagran* Court construed Section 402 of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 18 Pub. L. No. 97-290, Tit. IV, 96 Stat 1246, 15 U.S.C. § 6a, to not reach "commercial activities taking place abroad, unless those activities adversely affect domestic

commerce" or "imports to the United States". *Empagran* 542 U.S. at 161. In other words, *Empagran* involved a construction of the Sherman Act's extra-territorial reach (what some call "prescriptive comity"), not the issue of whether a U.S. court having adjudicative jurisdiction should dismiss or stay a case on international comity grounds (what might be termed "adjudicative comity"). In fact, the legislative history of the FTAIA openly acknowledges that these amendments to federal antitrust laws "would have no effect on the courts' ability to employ notions of comity." H.R. Rep. No. 686, 97th Cong., 2d Sess. 13 (1982).

The role of international comity as a freestanding doctrine has diminished with the development of judicial doctrines (like act-of-state) and statutes developed to mitigate the risk that litigation in U.S. courts might damage this country's relations with other nations. For instance, foreign state immunity, historically the flagship issue of international comity in national courts, has been regulated by statute for the past few decades—the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Publ. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-11). Chief Justice Marshall's holding for this Court that a federal district court could not exercise "ordinary jurisdiction" over a ship alleged to be "a national armed vessel . . . of the emperor of France, *The Schooner Exchange v. McFaddon*, 8 U.S. (7 Cranch) 116, 146 (1812), was an early example of adjudicative comity. Under *The Schooner Exchange*, "foreign sovereign immunity is a matter of grace and comity on the part of the United States. . . ." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

But given the breadth of U.S. courts' adjudicative jurisdiction, and the myriad ways in which litigation

in the United States touches upon foreign relations, principles of abstention on international comity grounds in sensitive cases continue to inform judicial analysis in such cases. The availability of international comity abstention is particularly important in cases falling outside the limits of specific doctrines or statutory provisions but where, nonetheless, especially at the suggestion of the Executive Branch, foreign relations considerations call for the U.S. court to stay its hand.

II. THE LOWER COURTS WOULD BENEFIT FROM FURTHER GUIDANCE ON THE PRINCIPLES THAT SHOULD GOVERN ABSTENTION ON INTERNATIONAL COMITY GROUNDS.

Despite the importance and continuing need for a freestanding doctrine of international comity abstention, criticism of the doctrine has understandably focused on the malleable 10-factor *Mannington Mills-Timberlane* test which most of the courts of appeals, including the court below, have applied to implement it. These factors include:

> (1) Degree of conflict with foreign law or policy; (2) Nationality of the parties, locations or principal places of business of corporations; (3) Relative importance of the alleged violation of conduct here as compared with conduct abroad; (4) The extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief

> is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) Whether a treaty with the affected nations has addressed the issue.

In re Vitamin C Antitrust Litigation, 837 F.3d 175, 184-85 (2d Cir. 2016); *see also Timberlane*, 549 F.2d at 614; *Mannington Mills*, 595 F.2d at 1297-98.

This 10-factor test is too indeterminate and gives virtually limitless discretion to lower courts to reach any desired outcome, even to the point of shirking their adjudicative responsibility. But that does not mean that this Court should throw the proverbial baby out with the bathwater. Rather, it could emphasize the most important factors in international comity analysis and require courts to engage in a principled application of those factors. This Court's iconic decision in *The Schooner Exchange* is a good place to start identifying what those factors are.

That case involved a libel filed in federal court by two American citizens on a ship in Philadelphia under Section 9 of the Judiciary Act of 1789, which provided that the district courts "shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789). The American citizens claimed that they were the rightful owners of the ship which had been "seized by certain persons, acting under the decrees and orders of Napoleon, Emperor of the French." *The Schooner Exchange*, 11 U.S. at 117 (statement of facts). They alleged that the ship had

never been taken to a French port for condemnation of title after capture as required under the maritime law of prize, an assertion this Court did not challenge.

No one timely appeared to challenge the U.S. libellants' claim of good title to the ship. Instead, the U.S. Attorney for the District of Pennsylvania appeared to make a "suggestion" to the effect that the ship was a "public vessel" of the French Emperor that had taken shelter in the port of Philadelphia during a storm. *Id.* at 117-18. The U.S. Attorney offered affidavits from the local French consul and ship's captain in support of his suggestion. *Id.* at 119.

Chief Justice Marshall, writing for a unanimous Court, held that public vessels "entering the port of a friendly power . . . are to be considered as exempted by the consent of that power from its jurisdiction." *Id.* at 146. The Court thus adopted the U.S. Attorney's "suggestion"—despite the statement of the libellants to the contrary and, more importantly, despite the absence of any statement by the U.S. Attorney rebutting the libellants' factual assertion that the ship had not been condemned by a French prize court as required by the maritime law of prize.

As indicated by *The Schooner Exchange*, a critically important factor in determining whether a U.S. court should dismiss (or stay) a case implicating foreign sovereign interests is the position of the Executive Branch in the matter. Although the Government in this case did not urge this Court to decide the international comity abstention question, its briefing in support of the petitioners strongly suggests its approval of the view that international comity remains an important ground for federal courts to abstain in sensitive cases implicating foreign affairs concerns. See Br. for the United States as *Amicus*

Curiae, No. 16-1220, at 18 ("Comity-based dismissals [in Sherman Act cases] should be rare . . . But, in the United States' view, federal courts may, in extraordinary circumstances, dismiss private Sherman Act claims based on principles of comity."). The Executive Branch is the essential branch in the conduct of this nation's foreign relations, and courts should not "second-guess the executive branch's judgment as to the proper role of comity concerns" in government antitrust enforcement actions. *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C. 1990).

Another point of concern is that the 10-factor *Mannington Mills-Timberlane* test does not give adequate weight to U.S. regulatory interests in enforcing laws having an undisputed extraterritorial reach and implicating serious U.S. domestic effects from claimed international wrongdoing.

This Court has clearly held that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the *United States." Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993). And it is an axiom of U.S. federal courts law that the courts "have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990). But that obligation, as Chief Justice Marshall's holding in *The Schooner Exchange* teaches, is not absolute. And despite the welter of statutes and doctrines that operationalize comity, there may be instances in which a federal court should abstain from hearing a case over which it plainly has adjudicative jurisdiction.

What might such cases be? Two examples where international comity abstention seem particularly

appropriate are when: (1) the Executive Branch appears and suggests dismissal in a private Sherman Act action, or (2) a U.S. court determines that a foreign plaintiff should first exhaust available remedies in other forums where the underlying events occurred before proceeding here, *cf. Sosa v. Alvarez–Machain*, 542 U.S. 692, 733 n. 21 (2004), or in a lawsuit against a foreign state or official not covered by the FSIA, *cf. Samantar v. Yousuf*, 560 U.S. 305, 325-326 (2010) (noting that the FSIA "did not deprive the District Court of subject-matter jurisdiction" over a suit against a foreign ex-official but that he "may be entitled to immunity under the common law" or "have other valid defenses").

In sum, it should be emphasized that judicial abstention on international comity grounds should be exceedingly rare. For instance, if the United States, not private litigants, had brought the Sherman Act challenge in this case, a federal court should never abstain. The government's decision to bring an enforcement action "represents a determination that the importance of antitrust enforcement outweighs any relevant foreign policy concerns." U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation § 4.1, at 28 (2017).

CONCLUSION

For the reasons set forth above, this Court should not address the question it left open in *Hartford Fire* "whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity." 509 U.S. 764, 798 (1993). If it does reach that question, it might use this case as a vehicle for announcing principles of international comity abstention that U.S. courts could invoke in sensitive foreign relations cases.

Respectfully submitted,

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