No. 17-1245

In the Supreme Court of the United States

THYSSEN-BORNEMISZA COLLECTION FOUNDATION,
an agency or instrumentality of the Kingdom of Spain,
Petitioner,

v.

DAVID CASSIRER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

Sarah Erickson André
Counsel of Record
Thaddeus J. Stauber
Nixon Peabody LLP
300 South Grand Avenue
Suite 4100
Los Angeles, CA 90071
(213) 629-6076
sandre@nixonpeabody.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTRODUCTION

As the petition explains, this case presents a straightforward question – Whether a foreign sovereign's interpretation of its domestic law is entitled to conclusive deference (as held by the Second Circuit in *In re Vitamin C Antitrust Litigation*, 837 F.3d 175 (2d Cir. 2016)), significant deference, as recognized by the Seventh Circuit and as advocated now by the U.S. Solicitor General, or no deference, as implied by the Ninth Circuit's decision below? – and asks the Court for modest relief – to hold this petition pending resolution of *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., Ltd.*, No. 16-1220 (S. Ct. Jan. 3, 2017), and to grant, vacate, and remand following resolution of that case.

Respondents David and Ava Cassirer, and the United Jewish Federation of San Diego County acknowledge that the petition seeks only that modest relief and do not dispute that, however this Court resolves *Animal Science Products*, the decision in that case will establish a rule of law that would require the court of appeals to reconsider its decision in this case. In opposition, Respondents offer various procedural objections – resting largely on mischaracterizations of the record below – to Petitioner Thyssen-Bornemisza Collection Foundation's modest request for relief, and their amici quibble meritlessly with the authority of the author of the Kingdom of Spain's official interpretation of Spanish law. For the reasons stated in the petition and in this reply, the petition should be held pending resolution of *Animal Science Products* and then granted with a directive to the court of appeals to consider and give proper deference to the

Kingdom of Spain's official interpretation of Spanish law.

ARGUMENT

A. *The Court Should Hold This Petition Pending Resolution of* Animal Science Products

The brief in opposition does not question the validity or the importance of the question presented. Respondents do not assert that a foreign sovereign's statement of the proper application of its own law is not entitled to deference; nor do they assert that it should be ignored. Respondents do not contend that the Kingdom of Spain is not capable or unqualified to provide a U.S. court with a statement of the proper interpretation of Spanish law. Nor do they dispute that the relief sought – a hold pending resolution of the *Animal Science Products* petition – is narrow and limited. Instead, Respondents put forward a few technical challenges and attempt to distract this Court with hyperbole and a mischaracterization of the record below.

None of the arguments, however, counsel against the modest relief sought by Petitioner. Moreover, the question of deference to any foreign sovereign's interpretation of its own laws – let alone the interpretation offered by one of the United States' most important allies – is too important to brush aside when the primary objections offered by Respondents are procedural and seek to capitalize on their own gamesmanship below and the court of appeals' self-admitted lack of judicial restraint.

1. Respondents first assert that a hold is not "justified" because neither Petitioner nor the Kingdom

of Spain "argued to the Ninth Circuit, even on rehearing, that Spain's brief was entitled to any deference." Resp. Br. i; *see also id*. at 15-17. Critically, however, Petitioner was *not expected* to demand deference to the Spanish Government's official interpretation of Spanish law because Respondents waived their accessory-after-the-fact argument by not presenting it to the district court and the court of appeals resolved that issue – as it admitted – based largely on its own independent research. To this end, it was not until the court of appeals issued its decision that the Ninth Circuit's misinterpretation of Spanish law was laid bare. Thus, it is only now that the deference issue implicated in *Animal Science Products* is ripe.

But more importantly, Petitioner was *not required* to demand that the court of appeals afford deference to the Kingdom of Spain's statement of the proper interpretation of its domestic laws. Neither case law nor statute states that a sovereign's interpretation of its own law is entitled to deference only where the statement is accompanied by a "demand" of deference. As recognized by the Solicitor General, "[a] federal court should afford *substantial weight* to a foreign government's characterization of its own law." Brief for the United States as *Amicus Curiae* at 7, *Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co*., 2017 WL 5479477 (S. Ct. Nov. 14, 2017) (No. 16-1220) ("S.G. Brief") (emphasis added). The "substantial weight" afforded the statement of a sovereign is premised on the "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states," *id.* (quoting *Société Nationale Industrielle Aérospatiale v.*

United States Dist. Court, 482 U.S. 522, 543 n.27 (1987)), not on the inclusion (or absence) of a demand for respect.

2. Respondents also argue that the petition should be denied because the Kingdom of Spain submitted a "tardy" amicus brief at the rehearing stage, "despite ample opportunity" to submit it earlier. Resp. Br. i, 16, 21. But it was not until the court of appeals considered Respondents' waived argument and misinterpreted Spanish law that the Kingdom of Spain had reason to develop a "deep[] concern[] about the Panel's failure to correctly interpret and apply provisions of the Spanish Civil Code." Pet. App. 188a. More importantly, however, there are no temporal qualifications or limitations associated with the deference to which a sovereign is entitled. Respondents identify no case law to suggest that a sovereign's statement is entitled to less deference – or no deference – at a later stage in the case. Respondents can offer no support for their position. Thus, regardless of when the Kingdom of Spain's statement was filed, it is entitled to some level of deference.

3. Contrary to Respondents' assertions, Resp. Br. i, 21-22, the interlocutory nature of this petition does not undercut the importance of the issue presented, nor does it render consideration by this Court premature. Petitioners acknowledge that, in run-of-the-mill civil disputes, this Court ordinarily will not grant a petition for a writ of certiorari before a final judgment is rendered. But this case – which implicates the propriety of an agency of a foreign sovereign having to participate in litigation in a U.S. court – is no run-of-the-mill civil dispute. As this Court has recognized,

the conditions under which foreign sovereigns can – or must – participate in litigation in U.S. courts *are* issues of great importance. *See, e.g., Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017); *Republic of Philippines v. Pimentel*, 553 U.S. 851, 865-866 (2008); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983); *National City Bank of New York v. Republic of China*, 348 U.S. 356, 361-362 (1955).

4. Respondents further contend that a hold is not "justified" because "[the Kingdom of] Spain's brief is not an independent or impartial assessment of Spanish law." Resp. Br. i, 22-23. They do not assert that the amicus brief offers an erroneous interpretation of Spanish law, but that the brief is "biased" because the Kingdom of Spain "is [the Petitioner's] 100% owner." Resp. Br. 22. While the Kingdom of Spain is not the "100% owner of Petitioner," Petitioner is, as defined by the Foreign Sovereign Immunities Act, an "agency or instrumentality" of the Kingdom of Spain. But the Kingdom of Spain's inherent connection to its agencies and instrumentalities does not render it biased or unable to provide to a U.S. court an objective interpretation of its own laws. Nor does this connection undermine or limit the deference to which the Kingdom of Spain's amicus brief is entitled.[1] It is

[1] If the Kingdom of Spain was still a party to this action, its statement of the proper interpretation of its laws would be entitled to deference. *See, e.g., Karaha Bodas Co. L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002); *In re Oil Spill by the Amoco Cadiz off the coast of France on March 16, 1978*, 954 F.2d 1279, 1312 (7th Cir. 1992). The Kingdom of Spain's dismissal exempted it from the "burdens

the Kingdom of Spain's *sovereignty*, not its status (as a party or non-party) – nor its relationship to an existing party – to which the concept of deference is tied.

Comity requires respect for the knowledge that foreign sovereigns have about their own laws. *See, e.g., Karaha Bodas Co. L.L.C.*, 313 F.3d at 92; *In re Oil Spill by the Amoco Cadiz*, 954 F.2d at 1312. It would be inconsistent to respect a foreign government while disrespecting the formal representations it makes to a U.S. court. Because the Kingdom of Spain is a foreign sovereign, its statement of the proper interpretation of its laws is entitled to deference and respect. *See Société Nationale*, 482 U.S. at 546 ("[W]e have long recognized the demands of comity in suits involving foreign states, *either as parties or as sovereigns with a coordinate interest in the litigation*." (emphasis added)).

B. The Brief Amici Curiae *Supports Petitioner's Request that the Court Hold This Petition Pending Resolution of* Animal Science Products

The brief *Amici Curiae* filed by the Comunidad Judía de Madrid and the Federación de Comunidades Judías de España (collectively, the "Jewish Community Organizations") supports Petitioner's argument that, at a minimum, it is appropriate for this Court to hold the petition. First, the brief does not challenge the basic premise of the petition that a foreign sovereign's statement of its own laws is entitled to deference. Nor

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of time and expense upon the foreign nation" associated with litigation in U.S. courts, *Bolivarian Republic of Venezuela*, 137 S. Ct. at 1315; it did not render the Kingdom of Spain biased and unable to explain the proper application of *its own* civil code.

does it challenge the substance of the Kingdom of Spain's amicus brief – either its straightforward explanations of Spanish Civil Code provisions, its interpretation of those provisions, or its citations to relevant judicial authority – which explains why, as a matter of law, Article 1956 cannot apply to abrogate Article 1955's extraordinary acquisitive prescription where, as here, the statute of limitations for the now-alleged criminal liability has long since passed.

The sole assertion raised by the Jewish Community Organizations is that this Court (and the court of appeals) should ignore and disregard the formal statement put forward by the Kingdom of Spain because "a State Attorney for Spain does not have the power to issue *binding* interpretations of Spanish law." Amicus at 6 (emphasis added). But the standard advocated by the Jewish Community Organization is not the appropriate standard for deference. Neither case law nor statute holds that a sovereign's statement interpreting its own laws must be "binding," nor must the statement come from the sovereign's highest court, presumably in the form of an advisory opinion.[2] As the brief *Amici Curiae* concedes, "[t]he State Attorney, in its representative capacity for the Spanish Government, regularly makes representations concerning the interpretation of Spanish law" in courts and tribunals. Amicus at 8. It is the prerogative of the Spanish Government to select the vehicle through which it advises the U.S. courts of its position on its

[2] By analogy, a statement of the U.S. Solicitor General on the proper interpretation of U.S. law is not "binding" on this or other courts, but it conveys the official position of the U.S. Government and is entitled to respect and deference, whether wholly accepted or not.

own laws. Because the Kingdom of Spain's amicus brief is a formal statement of the Kingdom of Spain's position, that statement is entitled to deference.

C. Respondents Mischaracterize the Record to Distract This Court

Respondents' assertion that the petition is "based largely on a false characterization of the record below," Resp. Br. i, is specious; it is Respondents' revisionism that mischaracterizes the facts in an effort to muddy and obscure the clear, narrow issue put forward in the petition – an issue already recognized as worthy of review.

1. On appeal, Respondents argued briefly – and *for the first time* – that the district court erred in defining "accessory" in accordance with the 1973 Criminal Code,[3] rather than the superseded 1870 Criminal Code, Resp. C.A. Br. 19, although it was Respondents' expert who advised the district court that the 1973 Criminal Code definition must apply.[4] Respondents advocated

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[3] Respondents did not allege that 1870 Criminal Code defined accessory liability until the appeal and their assertion that this argument was raised "at length . . . [before] the District Court," Resp. Br. 4-5, is without foundation. The court of appeals *recognized* that Respondents' argument was new, but excused their failure to raise it properly, reasoning that "[u]nder this Court's precedent, we may consider a new argument on appeal which presents a pure issue of law even though it was not raised below," Pet. App. 35a (citing *In re Mercury Interactive Corp. Sec. Lit.*, 618 F.3d 988, 992 (9th Cir. 2010)).

[4] Respondents' expert opined that the 1973 Criminal Code must provide the definition of "accessory." D. Ct. Doc. 279 (Exh. 55 at 31-32); D. Ct. Doc. 298-1 (Exh. 1 at 17-18).

that, back in 1950, when the Spanish legislature removed the lesser offense of "accessory-after-the-fact" from the definition of "accessory," from the 1870 Criminal Code, it did not intend to alter the definition of "accessory" in Article 1956 of the Civil Code. Resp. C.A. Br. 23. This would mean that while the criminal definition of "accessory" no longer includes accessory-after-the-fact (or receiver of stolen property liability) the civil definition of "accessory" continues to assign liability for both accessory and the lesser accessory-after-the-fact liability.

Relying on its own "independent research," Pet. App. 28a, and deferring to an amicus brief submitted by the Jewish Community Organizations, the court of appeals did more than *consider* whether the 1870 criminal code definition should apply, as Respondents' asserted. The court of appeals engaged in a lengthy discussion of Spanish rules of statutory construction – an analysis neither sought by nor advocated for by Respondents – and *held* that the 1870 criminal code definition applied. Pet. App. 33a-44a. But in doing so, it misapplied Spanish law.

Petitioner explained to the court of appeals that for Article 1956 to bar acquisitive prescription, three requirements must be satisfied:

(1) there must be a crime of theft or robbery (or other similar crime relating to the misappropriation of movable property);
(2) the possessor of the movable property must be a principal, accomplice, or accessory of the crime committed; and

> *(3) the statute of limitations for the crime committed or an action claiming civil liability arising from that crime must not have expired.*

Resp. Br. 20 (emphasis added) (quoting Pet. C.A. Br. 66). The court of appeals reasoned that the first two factors could be satisfied, as there was an allegation of theft and Petitioner could, theoretically, be found to be an accessory-after-the-fact based on the 1993 public purchase of *Rue Saint-Honoré, après-midi, effet de pluie*, oil on canvas, 81 x 65 cm (1897) by Camille Pissarro (the "Painting") and 772 other, unchallenged artworks. Noting that the statute of limitations for criminal liability is five years and the limitations period for derivative civil liability is fifteen years, the court of appeals combined these figures with Article 1955's six-year acquisitive prescription period and found that Petitioner "would need to possess the Painting for twenty[-]six years after 1993, until 2019, to acquire the title via acquisitive prescription." Pet. App. 31a.

2. In its zeal to craft its own expert opinion on Spanish statutory construction, the court of appeals failed entirely to address the third *mandatory* factor, which provides that for Article 1956 to bar application of acquisitive prescription "the statute of limitations for the crime committed or an action claiming civil liability arising from that crime *must not have expired*." Because the criminal limitations period expired in 1998 – five years after Petitioner's purchase – Petitioner cannot *as a matter of law* be found criminally liable as an accessory-after-fact. And because the civil limitations period expired in 2008 – fifteen years after

Petitioner's purchase – Petitioner cannot *as a matter of law* be found civilly liable. Moreover, without a prior finding of criminal liability, there can be no *derivative* civil liability, as recognized by all of the cases cited by the court of appeals and the parties, and as explained in detail by the Kingdom of Spain. Pet. App. 121a, 141a-160a.

Petitioner filed a Petition for Rehearing and Rehearing En Banc to alert the panel of these foundational errors and to explain why, as a matter of law, Respondents' new accessory-after-the-fact *allegations* cannot trigger Article 1956. Pet. App. 112a-131a. "[D]eeply concerned about the panel's failure to correctly interpret and apply provisions of the Spanish Civil Code," Pet. App. 188a, as articulated by a court *for the first time*, the Kingdom of Spain filed its own statement to explain the proper interpretation and application of Spanish law.

3. Finally, Respondents assert that the petition "does not even seek review of the accessory issue." Resp. Br. 20. That assertion, however, ignores that this Court's decision in *Animal Science Products* will render the Ninth Circuit's failure to give any deference to the Kingdom of Spain's interpretation of Spanish law erroneous, requiring a grant, vacatur, and remand. Once that occurs, the court of appeals will be able to correct its error with respect to the accessory issue. Petitioner's failure to challenge the "accessory issue" is therefore of no moment and is no barrier to granting Petitioner the modest relief it seeks.

CONCLUSION

Because this Court is poised to resolve the "important and recurring question," S.G. Brief 12, of what degree of deference a court owes to a foreign government's characterization of its own law, Petitioners respectfully request that this Court hold this petition pending its resolution of *Animal Science Products*, and then grant, vacate, and remand to allow the court of appeals to reconsider the Kingdom of Spain's official statement providing the proper interpretation of Spanish law.

Respectfully submitted,

Sarah Erickson André
Counsel of Record
Thaddeus J. Stauber
Nixon Peabody LLP
300 South Grand Avenue
Suite 4100
Los Angeles, CA 90071
(213) 629-6076
sandre@nixonpeabody.com

Counsel for Petitioner