No. 21-1283

IN THE
Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC. AND
THE RANIS COMPANY, INC.,
Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD, AND
NORTH CHINA PHARMACEUTICAL GROUP
CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S.
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PROFESSORS WILLIAM S. DODGE AND PAUL B. STEPHAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

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INTEREST OF AMICI

Amici have academic expertise and a strong interest in the proper interpretation of U.S. law doctrines based on international comity.

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[1] Counsel for all parties received notice of amici's intention to file this brief at least 10 days prior to the due date, and all parties have consented to the filing of this brief. No counsel for any party has authored this brief in

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant the petition for certiorari to address whether U.S. courts may abstain on a case-by-case basis from applying federal law based on prescriptive comity. This is a question of exceptional importance on which the Second Circuit's decision conflicts with the decisions of this Court.

Petitioners alleged that respondents and their co-conspirators established a cartel to fix the prices of vitamin C exported to the United States in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1. Respondents did not deny the allegations but rather claimed that their actions were required by Chinese law. Respondents moved to dismiss the complaints under the act of state doctrine, the doctrine of foreign sovereign compulsion, and principles of international comity. The Ministry of Commerce of the People's Republic of China filed an amicus brief supporting respondents, which represented that under Chinese law all vitamin C legally exported during the relevant time had to be sold at coordinated prices. The district court rejected each of respondents' three defenses. After a jury found respondents liable for violating the Sherman Act, the district court awarded petitioners approximately $147 million in damages and permanently enjoined respondents from further violations of the Sherman Act.

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whole or in part, and no person other than amici or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

On appeal, the Second Circuit held that "principles of international comity required the district court to abstain from exercising jurisdiction in this case." *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 179 (2d Cir. 2016) [*Vitamin C I*]. "To determine whether to abstain from asserting jurisdiction on comity grounds," the court applied "the multi-factor balancing test set out in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976) and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979)." *Id.* at 185. The Second Circuit read this Court's decision in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993), as establishing a threshold requirement of a "true conflict" with foreign law—that complying with both U.S. and foreign law would be impossible. *Vitamin C I*, 837 F.3d at 185-86. In answering that threshold question, the court held that it was "bound to defer" to the Chinese Government's representations. *Id.* at 189. The court of appeals found that respondents could not comply with both U.S. and Chinese law, *id.* at 192, and after weighing nine other factors in its multi-factor test, the court concluded that "the district court abused its discretion by failing to abstain on international comity grounds from asserting jurisdiction." *Id.* at 194.

This Court granted certiorari limited to the question whether the court of appeals erred in treating the Chinese Government's representations as conclusive. In a unanimous opinion, this Court concluded that the Second Circuit was wrong, holding that "[a] federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements." *Animal Sci. Prods.,*

Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1869 (2018). This Court did not address the validity of the comity abstention doctrine adopted by the Second Circuit, noting that "[t]he effect of China's regime on the Chinese sellers' liability under the Sherman Act … is not an issue before the Court today." *Id.* at 1870 n.1.

On remand, the Second Circuit again held that "principles of international comity required the district court to dismiss this action." *In re Vitamin C Antitrust Litig.*, 8 F.4th 136, 143 (2d Cir. 2021) [*Vitamin C II*]. In addressing the threshold requirement of a "true conflict," the court held that foreign law must be taken "at face value." *Id.* at 147. "Taken at face value," the court concluded, "the applicable Chinese law during the relevant period … required the defendants, as Vitamin C manufacturers and exporters, to fix the price of Vitamin C sold on the international market." *Id.* at 151. The court then condensed the remaining nine factors into five: (1) the nationality of the parties and the site of the anticompetitive conduct; (2) the effectiveness of enforcement and alternative remedies; (3) foreseeable harms to American commerce; (4) reciprocity; and (5) the possible effect on foreign relations. *Id.* at 160-62. Although the Second Circuit acknowledged that "economic harm to American consumers was foreseeable" and that "[t]he United States undoubtedly has a substantial interest in the uniform enforcement of its antitrust laws," the court found these factors outweighed by the "Chinese nationality of all of the defendants, [the] extraterritorial nature of the anticompetitive conduct, and [the] potential impact upon foreign relations." *Id.* at 163.

The doctrine that the Second Circuit applied in this case is one of prescriptive comity abstention, as distinguished from doctrines of adjudicative comity abstention that this Court considered but did not pass upon last Term in *Federal Republic of Germany v. Philipp,* 141 S. Ct. 703 (2021).

This doctrine conflicts with the decisions of this Court, which have repeatedly rejected a case-by-case approach to prescriptive extraterritoriality as "too complex to prove workable." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004); *see also Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247, 259-60 (2010); *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 349 (2016).

The Second Circuit's doctrine of prescriptive comity abstention also threatens to supplant more narrowly tailored doctrines of international comity, such as foreign sovereign compulsion and the act of state doctrine. Foreign sovereign compulsion requires that the defendant face severe sanctions for failing to comply with foreign law and has sought to avoid the conflict in good faith. *Restatement (Fourth) of the Foreign Relations Law of the United States* § 442 (Am. L. Inst. 2018). Prescriptive comity abstention requires neither of these things. The act of state doctrine is limited to cases that would require the court to declare invalid the official act of a foreign sovereign. *W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990). The Second Circuit's version of prescriptive comity abstention applies even where the validity of a foreign official act is not at issue. If the decision below is allowed to stand, the more specific doctrines that this Court has developed to mediate relationships with foreign legal

systems will increasingly find themselves replaced by a "vague doctrine of abstention." *Id.* at 406.

The Second Circuit's doctrine of prescriptive comity abstention requires courts to perform tasks beyond their institutional capabilities, like weighing the interests of the United States against those of foreign countries and assessing potential effects on foreign relations. As formulated by the Second Circuit, the test is also weighted in favor of abstention, which is likely to become common whenever a foreign country encourages its companies to coordinate prices. This Court should take this opportunity to review and reject the case-by-case balancing approach to extraterritoriality adopted by the Second Circuit.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT HAS ADOPTED TWO DISTINCT DOCTRINES OF INTERNATIONAL COMITY ABSTENTION.

The Second Circuit has adopted two "distinct doctrines" of international comity abstention—one based on adjudicative comity, and one based on prescriptive comity. *In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Securities LLC*, 917 F.3d 85, 101 (2d Cir. 2019). It is prescriptive comity abstention that is at issue in this case.

International comity "is deference to foreign states that is not required by international law." *Restatement (Fourth)*, pt. IV, ch. 1, intro. note. U.S. law contains many doctrines based on international comity. *See* William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071 (2015)

(surveying doctrines). Adjudicative comity doctrines defer to foreign courts, for example by recognizing foreign judgments, *see, e.g.*, *Hilton v. Guyot*, 159 U.S. 113, 163 (1895), or by dismissing a suit in favor of foreign courts, *see, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 246 (1981). Prescriptive comity doctrines defer to foreign lawmakers, for example by recognizing foreign law, *see, e.g.*, *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839), or by limiting the reach of U.S. law, *see, e.g.*, *Empagran*, 542 U.S. at 165.

A. Adjudicative Comity

In the Second Circuit, a court may abstain on grounds of adjudicative comity only if there is a parallel foreign proceeding pending and a showing of "exceptional circumstances" warranting abstention. *Royal & Sun All. Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 93 (2d Cir. 2006). This doctrine of adjudicative comity abstention extends to foreign courts the abstention doctrine that this Court recognized for state courts in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976). Several other circuits have similar abstention doctrines based on adjudicative comity. *See Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 467-69 (6th Cir. 2009); *AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 517-23 (7th Cir. 2001); *Al-Abood v. El-Shamari*, 217 F.3d 225, 232 (4th Cir. 2000); *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187, 191-94 (3d Cir. 1994). The Ninth Circuit has a broader doctrine of adjudicative comity abstention that does not require either a parallel proceeding or exceptional circumstances. *Mujica v. AirScan Inc.*, 771 F.3d 580, 603-08 (9th Cir.

2014). Last Term, this Court considered whether to adopt a form of adjudicative comity abstention in *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021). But the Court decided that case on another ground and therefore did "not address Germany's argument that the District Court was obligated to abstain from deciding the case on international comity grounds." *Id.* at 715. This case involves no parallel foreign proceeding and presents no opportunity to address abstention based on adjudicative comity.

B. Prescriptive Comity

This case does present the question whether U.S. courts may abstain from applying federal law based on prescriptive comity. *See Vitamin C II*, 8 F.4th at 142 n.7 (describing its doctrine as "a form of prescriptive comity"). As described above, the Second Circuit employs the multi-factor balancing test first adopted by the Ninth Circuit's 1976 decision in *Timberlane*. *Id.* at 144; *see also Timberlane*, 549 F.2d at 614 (articulating six-factor test). In *Mannington Mills*, the Third Circuit followed *Timberlane*, increasing the number of factors to ten. *Mannington Mills*, 595 F.2d at 1297-98. Although the D.C. Circuit rejected this balancing approach in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-55 (D.C. Cir. 1984), the Second Circuit adopted it in *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 451-52 (2d Cir. 1987). Significantly, these court of appeals decisions, all dealing with extraterritorial application of U.S. antitrust law, preceded *Empagran*, in which this Court gave clear and authoritative guidance on this issue.

In the present case, the court applied a ten-factor test in *Vitamin C I*, 837 F.3d at 184-85, and condensed these factors to five in *Vitamin C II*, 8 F.4th at 160-62. In a footnote, the panel characterized its doctrine as "a form of statutory interpretation" rather than an "abstention-based doctrine." *Id.* at 143 n.8. But it is difficult to see how this case-by-case approach can properly be called anything other than abstention, which is precisely how the prior Second Circuit panel characterized the doctrine. *See Vitamin C I*, 837 F.3d at 184 ("To determine whether to abstain from asserting jurisdiction on comity grounds we apply the multi-factor balancing test set out in [*Timberlane* and *Mannington Mills*].."). Regardless of how the doctrine is characterized, this case presents the question whether U.S. courts have discretionary authority to decline to apply federal law based on prescriptive comity.

II. THE SECOND CIRCUIT'S PRESCRIPTIVE COMITY ABSTENTION DOCTRINE CONFLICTS WITH THIS COURT'S DECISIONS

The Second Circuit concluded that this Court's decision in *Hartford* did not reject its multi-factor balancing test. *Vitamin C II*, 8 F.4th at 145 ("[O]ur Circuit has favored the view that *Hartford Fire* did not mean to … extinguish the remaining comity factors *sub silentio*."). But this Court's extraterritoriality jurisprudence has evolved substantially in the nearly three decades since *Hartford* was decided.

This Court did not endorse prescriptive comity abstention in *Hartford*. It was unnecessary to decide

whether a federal court may decline to exercise jurisdiction "under the principle of international comity," *id.* at 797, the Court concluded, because the petitioners in *Hartford* did not claim that compliance with both U.S. and foreign law was "impossible." *Id.* at 799.[2]

In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), this Court relied on "principles of prescriptive comity" to interpret the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a, noting that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164-65. But those principles of comity led the Court to adopt a bright-

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[2] In dissent, Justice Scalia argued that customary international law requires balancing factors in each case to determine if the exercise of jurisdiction is reasonable, relying on Section 403 of the *Restatement (Third) of Foreign Relations Law*. *See Hartford*, 509 U.S. at 818-19 (Scalia, J., dissenting). This understanding of customary international law, however, was controversial at the time of the *Restatement (Third)*'s publication and no longer enjoys the endorsement of the American Law Institute. The contemporary consensus recognizes that customary international law does not require case-by-case balancing to determine the reasonableness of exercising jurisdiction. *See Restatement (Fourth)* § 407 reporters' note 3 (noting that "state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of international law"). In a later case, Justice Scalia rejected a case-by-case approach to extraterritoriality, noting that "[t]he fine tuning of legislation … through the process of case-by-case adjudication is a recipe for endless litigation and confusion." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 158 (2005) (Scalia, J., dissenting).

line test rather than a discretionary case-by-case approach.

Empagran held that the Sherman Act, as amended by the FTAIA, did not apply when plaintiffs' claims were based on anticompetitive effects outside the United States. By contrast, the Court also observed that applying U.S. antitrust law to foreign conduct is "reasonable, and hence consistent with principles of prescriptive comity, … to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Id.* at 165. Respondents in *Empagran* had argued instead for case-by-case balancing, suggesting that courts should "take … account of comity considerations case by case, abstaining where comity considerations so dictate." *Id.* at 168. This Court expressly rejected that argument, concluding that such an approach was "too complex to prove workable." *Id.* As an example of this unworkable, balancing approach, the Court cited *Mannington Mills*, *see id.*, one of the two cases from which the Second Circuit expressly drew its multi-factor test. *See Vitamin C II*, 8 F.4th at 144 (citing *Mannington Mills*, 595 F.2d at 1297-98).

This Court has rejected a case-by-case approach to determine the geographic scope of other statutes as well. Considering the scope of Securities Exchange Act § 10(b) in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), the Court criticized the lower courts' "methodology of balancing interests," *id.* at 259, which had led to "the unpredictable and inconsistent application of § 10(b) to transnational cases." *Id.* at 260. Instead, this Court adopted a "clear test" that simply asks "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id.* at 269-70.

In *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325 (2016), this Court considered the geographic scope of RICO, holding that two of its substantive provisions apply extraterritorially to the same extent as RICO's underlying predicate acts, *id.* at 338-41, and that RICO's private right of action requires proof of domestic injury to business or property, *id.* at 354. The European Community asked this Court to consider the absence of international friction in cases where foreign governments themselves were plaintiffs, but the Court refused to "permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign." *Id.* at 349.

Focusing only on *Hartford*, the Second Circuit ignored this Court's rejection of case-by-case balancing in subsequent extraterritoriality cases such as *Empagran*, *Morrison*, and *RJR Nabisco*. This Court has made it clear that the geographic scope of federal statutes is to be determined by using tools of statutory interpretation like the presumption against extraterritoriality rather than by vesting case-by-case discretion in the district courts.[3]

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[3] This Court has not applied the presumption against extraterritoriality to the Sherman Act, treating as precedential its prior decisions that held the act to apply to foreign conduct that causes substantial effects in the United States. *See Hartford*, 509 U.S. at 796 ("[I]t is well established by now 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.") (citing *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582, n. 6 (1986), and *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) (L. Hand, J.)));

The question of whether federal courts should decline to exercise the prescriptive jurisdiction enacted by Congress based on a discretionary, multi-factor analysis is one of general importance. This practice seems inconsistent with the "virtually unflagging" obligation of the federal courts to exercise the jurisdiction to which Congress has assigned them. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Colorado River*, 424 U.S. at 817) (scope of prescriptive jurisdiction based on federal statute turns on statute, not prudential concerns). It is the source of considerable confusion on the part of the lower courts. This case provides this Court with an opportunity to resolve the issue and end this confusion.[4]

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see also id. at 814 (Scalia, J., dissenting) (noting that the geographic scope of the Sherman Act was "governed by precedent"). *Hartford*'s effects test is nevertheless "consistent with the approach taken in *RJR Nabisco* and *Morrison*" because the focus of U.S. antitrust laws is preventing anticompetitive effects. *Restatement (Fourth)* § 404 reporters' note 7.

[4] Another petition for certiorari pending before this Court invokes the inconsistent approaches taken to the extraterritorial application of the Lanham Act. *Abitron Austria GmbH v. Hectronic Int'l Inc.*, No. 21-1043, petition filed Jan. 21, 2022. Some of the courts of appeals have used a *Timberlane*-based balancing test to limit the extraterritorial scope of that statute, others have used different balancing tests, while the First Circuit has rejected balancing entirely in favor applying the Lanham Act in all cases where a U.S. person is accused of violating the statute and any case where an alleged violation by a foreign person has a substantial effect on U.S. commerce.

III. THE SECOND CIRCUIT'S DOCTRINE OF PRESCRIPTIVE COMITY ABSTENTION THREATENS TO SUPPLANT MORE NARROWLY TAILORED COMITY DOCTRINES

The Second Circuit's doctrine of prescriptive comity abstention threatens to supplant more narrowly tailored doctrines of international comity, such as foreign sovereign compulsion and the act of state doctrine, that were raised before the district court in this case. This Court has carefully placed limits on each of those doctrines, limits that prescriptive comity abstention effectively renders irrelevant.

This Court recognized the doctrine of foreign sovereign compulsion in the context of U.S. court orders for the production of evidence. *See Societe Internationale pour Participation Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). *Rogers* held that dismissal of a complaint was too harsh a sanction for noncompliance with a pretrial production order "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." *Id.* at 212. This Court has not found it necessary to decide whether foreign sovereign compulsion is a valid defense to antitrust claims, *see Hartford*, 509 U.S. at

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Compare Int'l Café, S.A.L. v. Hard Rock Café Int'l (U.S.A.), Inc., 252 F.3d 1274 (11th Cir. 2001) (applying three-factor test to Lanham Act); *Star-Kist Foods, Inc. v. P.J. Rhodes & Co.*, 769 F.2d 1393 (9th Cir. 1985) (applying *Timberlane* balancing test to Lanham Act); *Wells Fargo & Co. v. Wells Fargo Express, Co.*, 556 F.2d 406 (9th Cir. 1977) (same), *with McBee v. Delica Co.*, 417 F.3d 107 (1st Cir. 2005).

799 (noting that compliance with both U.S. and foreign law was not "impossible"); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 598 (1986) ("Our decision makes it unnecessary to reach the sovereign compulsion issue."); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962) (noting that there was "nothing to indicate that [Canadian] law in any way compelled discriminatory purchasing"), but lower courts have recognized the doctrine as a defense in antitrust cases. *See, e.g., Mannington Mills*, 595 F.2d at 1293-94; *Trugman-Nash, Inc. v. N.Z. Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1304 (D. Del. 1970); *see also* Department of Justice & Federal Trade Commission, Antitrust Guidelines for International Enforcement and Cooperation § 4.2.2 (2017) (recognizing foreign sovereign compulsion defense to antitrust claims).

Where courts have recognized the doctrine of foreign sovereign compulsion, they have generally imposed two requirements: (1) that "the person in question appears likely to suffer severe sanctions for failing to comply with foreign law"; and (2) that "the person in question has acted in good faith to avoid the conflict." *Restatement (Fourth)* § 442. With respect to the requirement of a severe sanction, this Court noted in *Rogers* that "that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." *Rogers*, 357 U.S. at 211; *see also Mannington Mills*, 595 F.2d at 1293 ("It is necessary that foreign law must have coerced the defendant into violating American antitrust law."). With respect to

the requirement of good faith, *Rogers* emphasized "petitioner's extensive efforts at compliance," showing that its noncompliance "was due to inability fostered neither by its own conduct nor by circumstances within its control." *Rogers*, 357 U.S. at 211; *see also Interamerican*, 307 F. Supp. at 1304 (citing "uncontradicted evidence" that defendants "acted in good faith before and after the ban").

The Second Circuit's prescriptive comity abstention doctrine makes irrelevant the more narrowly tailored doctrine of foreign sovereign compulsion. The decision below expressly states that "international comity does not feature consideration of the threat of compulsive sanctions" but rather considers only whether the laws of each country taken "at face value" impose conflicting requirements. *Vitamin C II*, 8 F.4th at 147. Neither does the prescriptive comity abstention doctrine require a showing that the defendants acted in good faith to avoid the conflict. Applying the same doctrine in *Vitamin C I*, the panel stated that "[w]hether Defendants had a hand in the Chinese government's decision to mandate some level of price-fixing is irrelevant." *Vitamin C I*, 837 F.3d at 191. By making dismissal of an antitrust claim as a matter of international comity available without a showing of either severe sanctions or good faith, the Second Circuit's abstention doctrine effectively makes the doctrine of foreign sovereign compulsion obsolete.

This Court has also emphasized the limits of the act of state doctrine. That doctrine provides that, "[i]n the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will assume the validity of an official act of a foreign sovereign performed within

its own territory." *Restatement (Fourth)* § 441. This Court unanimously held in *Kirkpatrick* that the act of state doctrine applies only when a suit "requires the Court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." 493 U.S. at 405 (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918)). *Kirkpatrick* emphasized that "[t]he act of state doctrine is not some vague doctrine of abstention." *Id.* at 406. "Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them," this Court noted, without "an exception for cases and controversies that may embarrass foreign governments." *Id.* at 409.

The Second Circuit's comity balancing test is precisely the sort of "vague doctrine of abstention" that this Court rejected in *Kirkpatrick*. *Id.* at 406. First, it is not limited to cases that challenge the validity of a foreign act of state. Second, it allows U.S. courts to dismiss cases based in part on whether foreign governments object to them. The Second Circuit's doctrine of prescriptive comity abstention considers the possible effect on foreign relations as a factor, *Vitamin C II*, 8 F.4th at 161-62. Noting that "China has already taken umbrage" over this case and that "the enforcement of a sizeable damages award and permanent injunction against defendants is likely to prove a considerable further irritant," *id.* at 161 (internal quotation marks omitted), the court of appeals concluded that "this factor tips in favor of dismissal for reasons of international comity," *id.* at 162. In short, the limits that *Kirkpatrick* carefully placed around the act of state doctrine are rendered

meaningless by the Second Circuit's broad abstention doctrine.

IV. THE SECOND CIRCUIT'S DOCTRINE REQUIRES COURTS TO PERFORM TASKS BEYOND THEIR INSTITUTIONAL CAPACITIES.

The Second Circuit's doctrine of prescriptive comity abstention is just as unworkable as the case-by-case approaches this Court has rejected in the past. As described above, the court of appeals considered five factors. First, the court considered the fact that the respondents are Chinese companies whose anticompetitive conduct occurred in China, *Vitamin C II*, 8 F.4th at 160, factors that will always weigh against applying U.S. antitrust law to foreign companies acting abroad. Second, the court considered the effectiveness of enforcement and alternative remedies, speculating that China "may not tolerate" enforcement of the district court's judgment and that the U.S. government might have "[r]ecourse to the WTO or another international forum." *Id.* Third, the court considered the foreseeable harm to American commerce, which "likely weighs against dismissal for reasons of international comity." *Id.* at 161. Fourth, the court considered reciprocity. Despite not knowing of "any circumstances under which the U.S. Government mandates price-fixing by American export companies," the court reasoned that *if* the United States were to do so, it "would undoubtedly expect the Chinese court to recognize as a valid defense that U.S. law required the American exporter's conduct." *Id.* "This factor," the court

concluded, "weighs heavily in favor of dismissal on comity grounds." *Id.*

Finally, the court considered the possible effect of the district court's judgment on U.S. foreign relations. The court acknowledged that it was "ill-equipped to assess the numerous, cross-cutting bilateral and multilateral issues properly informing such decisions" and was "somewhat in the dark" because the State Department had not expressed a view. *Id.* Nevertheless, the court "discern[ed] that China has already taken umbrage" over the case and that enforcing the judgment was "likely to prove a considerable further irritant." *Id.* (quotation marks omitted). While quoting this Court's observation that "[t]he Judiciary does not have the institutional capacity to consider all factors relevant to creating a cause of action that will inherently affect foreign policy," *id.* at 162 (quoting *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1940 (2021)), the court of appeals nonetheless relied on *its own* foreign policy speculations to override a cause of action that *Congress* created.

If the Second Circuit's doctrine of prescriptive comity abstention is not rejected, abstention on this basis will become a frequent occurrence. It will not be difficult for China and other countries to immunize their companies from liability for price-fixing under U.S. antitrust law by enacting laws that—taken "at face value"—encourage those companies to coordinate their export prices. *Vitamin C II*, 8 F.4th at 147. Having cleared the "true conflict" hurdle, abstention will become common because the Second Circuit's test is weighted in favor of abstention. The first factor (the nationality of the parties and the site of the anticompetitive conduct) will always weigh in favor of

abstention in cases involving foreign companies acting abroad. The fourth factor (reciprocity) which the Second Circuit weighed "heavily," *id.* at 161, will also favor abstention any time a foreign country has induced its companies to coordinate prices. The second factor (effectiveness of enforcement and alternative remedies) did not tip in either direction for the panel below, but it is difficult to imagine a case in which a foreign country directs its companies to coordinate prices in which these factors would favor retaining the case. The fifth factor (possible effect on foreign relations) will also weigh in favor of abstention if the foreign country files an amicus brief in support of its country or otherwise expressed "umbrage" about the case. *Id.*[5] This combination of factors will almost always outweigh the third factor (foreseeable harms to American commerce) even when those harms are substantial, as they were in this case. The Second Circuit's doctrine also ignores *Empagran*, which made the presence or absence of harms to American commerce the exclusive test for recognizing extraterritorial jurisdiction under U.S. antitrust laws.

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[5] The Second Circuit suggested that a foreign country's views might be outweighed by those of the U.S. government, but as the panel also noted, the United States generally does not take positions in litigation between private parties. *Id.* at 161 n.34. The clear implication of this suggestion is that the U.S. government should pick winners and losers in private antitrust litigation regardless of the actual harm suffered by U.S. consumers from the collusive behavior of foreign actors. It is not, however, the role of the judiciary to thrust that discretionary power on the executive without clear endorsement by Congress.

The fundamental problem with the Second Circuit's doctrine of prescriptive comity abstention is that it exceeds the institutional capacity of courts. Summarizing its analysis near the start of the opinion, the Second Circuit said that its decision to dismiss the plaintiffs' antitrust claims was based on "balancing the United States' interest in adjudicating antitrust violations alleged to have harmed those within its jurisdiction with the PRC's interest in regulating its economy within its borders." *Id.* at 143. Whether a court considers five factors, or ten, or twenty, weighing the interests of the United States against those of foreign nations is not something that the court can do with any degree of competence or consistency.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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