No. 21-1283

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., ET AL.,
Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD, ET AL.,
Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

TYLER S. BADGLEY
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062

MICHAEL F. MURRAY
Counsel of Record
ROBERT M. OVERING
PAUL HASTINGS LLP
2050 M Street, N.W.
Washington, D.C. 20036
(202) 551-1700
michaelmurray@
paulhastings.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. International Comity Is an Important and Established Concept in U.S. Law 3

II. The Second Circuit's New Approach to International Comity Threatens to Upend a Wide Array of Doctrines 5

III. The Second Circuit Erred in Subordinating the Plain Meaning of U.S. Antitrust Law to a Policy-Laden Substantive Canon of Statutory Interpretation Largely of Its Own Creation 8

A. The Second Circuit Abdicated its Duty to Interpret and Apply U.S. Antitrust Law by Exalting a Substantive Canon in the Absence of Ambiguity 9

B. The Second Circuit's Ten-Factor International Comity Canon Is Ahistorical and Premised On Dubious Policy Considerations 16

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Access Telecom, Inc. v. *MCI Telecomms. Corp.*,
197 F.3d 694 (5th Cir. 1999) 20

Ackermann v. *Levine*,
788 F.2d 830 (2d Cir. 1986) 6

Animal Science Prods. Inc. v. *Hebei Welcome Pharm. Co. Ltd.*,
No. 16-1220 (U.S. May 5, 2018) 2, 8

Bostock v. *Clayton Cty., Georgia*,
140 S. Ct. 1731 (2020) 9, 16

Chickasaw Nation v. *United States*,
534 U.S. 84 (2001) 12

Colorado River Water Conservation Dist. v. *United States*,
424 U.S. 800 (1976) 14

Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. *Pemex-Exploracion Y Produccion*,
832 F.3d 92 (2d Cir. 2016) 6

Dellmuth v. *Muth*,
491 U.S. 223 (1989) 17

Disconto Gesellschaft v. *Umbreit*,
208 U.S. 570 (1908) 4

EEOC v. *Arabian Am. Oil Co.*,
499 U.S. 244 (1991) 22

Emory v. *Grenough*,
3 U.S. 369 (1797) 4

F. Hoffman-La Roche Ltd. v. *Empagran S.A.*,
542 U.S. 155 (2004) ....*passim*

Figueiredo Ferraz E Engenharia de Projeto Ltda. v. *Republic of Peru*,
665 F.3d 384 (2d Cir. 2011) 10

Finley v. *United States*,
490 U.S. 545 (1989) 19

First Nat'l City Bank v. *Banco Para el Comercio Exterior de Cuba* (*Bancec*),
462 U.S. 611 (1983) 6

Hartford Fire Ins. Co. v. *California*,
509 U.S. 764 (1993) 13, 21, 23

Hilton v. *Guyot*,
159 U.S. 113 (1895) 4, 7, 8, 20

Jennings v. *Rodriguez*,
138 S. Ct. 830 (2018) 12

Kisor v. *Wilkie*,
139 S. Ct. 2400 (2019) 10

Lauritzen v. *Larsen*,
345 U.S. 571 (1953) 18

Lawson v. *FMR LLC*,
571 U.S. 429 (2014) 9

Mannington Mills v. *Congoleum Corp.*,
595 F.2d 1287 (3d Cir. 1979) 17, 18

In re Maxwell Commc'n Corp. plc by Homan, 93 F.3d 1036 (2d Cir. 1996)... 10, 11, 21

McCulloch v. *Sociedad Nacional de Marineros de Honduras*,
372 U.S. 10 (1963) 18

McNary v. *Haitian Refugee Ctr., Inc.*,
498 U.S. 479 (1991) 19

Minn-Chem, Inc. v. *Agrium, Inc.*,
683 F.3d 845 (7th Cir. 2012) 14, 20

Morrison v. *Nat'l Australia Bank Ltd.*,
561 U.S. 247 (2010) 22

Murray v. *Schooner Charming Betsy*,
6 U.S. 64 (1804) 18, 21

Nestlé USA, Inc. v. *Doe*,
141 S. Ct. 1931 (2021) 22

Oetjen v. *Central Leather Co.*,
246 U.S. 297 (1918) 7

Pennsylvania Dept. of Corrections v. *Yeskey*, 524 U.S. 206 (1998) 16

In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC, 917 F.3d 85 (2d Cir. 2019), *cert. denied sub nom. HSBC Holdings PLC* v. *Picard*, 140 S. Ct. 2824 (2020) 10, 15

Republic of Philippines v. *Westinghouse Elec. Corp.*, 43 F.3d 65 (3d Cir. 1994) 20

RJR Nabisco, Inc. v. *Eur. Cmty.*, 579 U.S. 325 (2016) 21, 22

Romero v. *Int'l Terminal Operating Co.*, 358 U.S. 354 (1959) 18

Royal & Sun All. Ins. Corp. of Can. v. *Century Int'l Arms, Inc.*, 466 F.3d 88 (2d Cir. 2006) 8

Sanchez Osorio v. *Dole Food Corp.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009), *aff'd sub nom. Osorio* v. *Dow Chemical Corp.*, 635 F.3d 1277 (11th Cir. 2011) 7

Sebelius v. *Cloer*, 569 U.S. 369 (2013) 9

Second Russian Ins. Corp. v. *Miller*, 268 U.S. 552 (1925) 4, 18

Societe Nationale Industrielle Aerospatiale v. *U.S. Dist. Court of S. Dist. of Iowa*,
482 U.S. 522 (1987) 7

Timberlane Lumber Co. v. *Bank of Am., N.T. & S.A.*,
549 F.2d 597 (9th Cir. 1976) 11, 14, 17, 18

United States v. *Aluminum Co. of Am.*,
148 F.2d 416 (2d Cir. 1945) 17

United States v. *Nippon Paper Indus. Co.*,
109 F.3d 1 (1st Cir. 1997) 14

United States v. *Palmer*,
16 U.S. 610 (1818) 21

United States v. *Pink*,
315 U.S. 203 (1942) 4

United States v. *Turkette*,
452 U.S. 576 (1981) 12

Wooden v. *United States*,
142 S. Ct. 1063 (2022) 12

Statutes

Clayton Antitrust Act,
15 U.S.C. §§ 12–27 8

Chapter 2 of the Federal Arbitration Act,
9 U.S.C. §§ 201–208 6

Foreign Sovereign Immunities Act,
28 U.S.C. §§ 1330, 1441, 1602–1611 5

Foreign Trade Antitrust Improvements
Act (“FTAIA”).. *passim*

Sherman Antitrust Act,
15 U.S.C. §§ 1–7... *passim*

Other Authorities

Antonin Scalia & Bryan A. Garner,
Reading Law 268–72 (2012) 23

Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*,
40 Case W. Res. L. Rev. 581, 583
(1989) 16

Brief for the Chamber of Commerce of
the United States of America as
Amicus Curiae in Support of
Petitioners.. 1, 8

Convention on the Recognition and
Enforcement of Foreign Arbitral
Awards, June 10, 1958, 330 U.N.T.S.
38, Art. V(1)(e) 6

Department of Justice & Federal Trade
Commission, Antitrust Guidelines for
International Enforcement and
Cooperation § 4.1 (2017) 16

Donald E. Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. Davis L. Rev. 11, 47–53 (2010) 3

Eleanor M. Fox, *Antitrust: Updating Extraterritoriality*, Italian Antitrust Rev. 1, 6, 10 (2019) 20

Joseph Story, Commentaries on the Conflict of Laws § 25 (4th ed. 1852) 4

Michael D. Ramsey, *Escaping 'International Comity'*, 83 Iowa L. Rev. 893, 893–97 (1998)..3

Restatement (Second) of the Foreign Relations Law of the United States § 40 (1965) 18

Restatement (Third) of the Foreign Relations Law of the United States § 482 (1987) 7

Robert A. Katzmann, *Judging Statutes* 70–81 (2014) 23

Ulrich Huber, *De Jure Civitatis*, bk. 3, s. 4, c. 1, n. 42 (1694) 4

Uniform Foreign-Country Money Judgments Recognition Act (Nat'l Conference of Comm'rs on Unif. State Laws 2005) 7

William N. Eskridge, *Interpreting Law* 351–53 (2016) 23

William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2078–80 (2015) 3

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members and the broader business community have a substantial interest in the level of judicial deference U.S. courts give to a sovereign's interpretation of its law—whether that sovereign is domestic or foreign. This case, which presents the doctrine of international comity, is a species of the genus. Although the issue here arises in an antitrust dispute between private parties and concerns a particular foreign sovereign's interpretation of its law, the Chamber is of the view that free enterprise does not benefit from an uncritical and reflexive deference by the courts to a sovereign regulator's interpretation of its own laws. *See* Brief for the Chamber of

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, the parties were given timely notice and have consented to this filing.

Commerce of the United States of America as *Amicus Curiae* in Support of Petitioners, *Animal Science Prods. Inc.* v. *Hebei Welcome Pharm. Co. Ltd.,* No. 16-1220 (U.S. May 5, 2018).

This may be particularly so where a foreign state does not operate with regulatory impartiality regarding state-owned enterprises and private actors, regularly provides "informal" or "non-binding" mandates that can influence the behavior of state-owned and state-favored enterprises to the detriment of U.S. business, and offers subsidies intended to subvert competition in the U.S. market. This Court should be circumspect, lest deference to a foreign country's litigating positions regarding the scope of its laws becomes carte blanche to justify violations of U.S. law, for example, by creating a price cartel in pursuit of an industrial policy objective.

SUMMARY OF ARGUMENT

This Court should grant the petition for a writ of certiorari to address whether courts may reinterpret U.S. statutes on a case-by-case basis by exclusively consulting an "international comity" canon of statutory interpretation. The Second Circuit's novel approach is a dubious outlier that contravenes U.S. antitrust law, controlling precedent, and the concept of comity as applied in other doctrines. The result will be significant uncertainty in U.S. antitrust enforcement, deepening the wounds of American companies and consumers victimized by foreign anticompetitive conduct.

Specifically, the Second Circuit erred in subordinating the plain meaning of U.S. law to a policy-laden substantive canon largely of its own

creation. According to the decision below, the ten-factor canon of international comity requires interpreting the meaning of the Sherman Antitrust Act of 1890 in light of contemporary Chinese law and the court's speculation about how U.S.-China relations will fare if it rules one way or another. The court erred when it invoked this canon without first identifying any ambiguity in the law and without exhausting any other tools of statutory interpretation.

ARGUMENT

I. *International Comity Is an Important and Established Concept in U.S. Law.*

International comity is a multifarious concept in U.S. law. *See generally* William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2078–80 (2015); Donald E. Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. Davis L. Rev. 11, 47–53 (2010); Michael D. Ramsey, *Escaping 'International Comity'*, 83 Iowa L. Rev. 893, 893–97 (1998) ("*Ramsey*"). The term can refer to deference to foreign law, deference to foreign courts, or deference to foreign sovereigns as litigants. Doctrines of international comity specify the conditions that call for deference and the degree to which courts should defer.

The doctrine of international comity is a tool for U.S. courts to mediate the legal issues that arise when a particular case implicates the sovereign interests of a foreign state. The concept of comity traces to conflict-of-laws jurisprudence of the late Middle Ages. Seventeenth-century Dutch academic Ulrich Huber later opined that comity calls on a state to recognize

and enforce rights created by other states, provided that such recognition does not prejudice the state or its subjects. Ulrich Huber, *De Jure Civitatis*, bk. 3, s. 4, c. 1, n. 42 (1694). As early as 1797, this Court acknowledged the doctrine of comity among nations by explicit reference to Huber's treatise. *See Emory* v. *Grenough*, 3 U.S. 369 (1797). Relying on Huber, Justice Story wrote that "there would be extreme difficulty in saying, that other nations were bound to enforce laws, institutions, or customs, of that nation, which were subversive of their own morals, justice, or polity." Joseph Story, *Commentaries on the Conflict of Laws* § 25 (4th ed. 1852) ("*Story*").

Although the application of comity in a particular case may implicate several different issues, the framework for weighing those issues is well settled. Per *Hilton* v. *Guyot*, U.S. courts must balance "international duty and convenience" against "the rights of its own citizens or of other persons who are under the protections of its laws." 159 U.S. 113, 163–64 (1895). Both considerations must be weighed against each other to properly account for the unexpected, sensitive, and complex issues that often arise in cases involving transnational litigation. Over the past century, this Court has applied *Hilton*'s balancing exercise to cases involving foreign legislative, executive, or judicial authorities. *See, e.g.*, *United States* v. *Pink*, 315 U.S. 203, 221–23 (1942); *Second Russian Ins. Corp.* v. *Miller*, 268 U.S. 552, 561 (1925); *Disconto Gesellschaft* v. *Umbreit*, 208 U.S. 570, 578–79 (1908).

II. *The Second Circuit's New Approach to International Comity Threatens to Upend a Wide Array of Doctrines.*

In this case, the Second Circuit deferred to Chinese law by interpreting U.S. antitrust law such that it did not "reach" the controversy. The court below "center[ed]" its analysis "on the existence of a true conflict" between the Sherman Act and a Chinese law that supposedly mandated price-fixing. App.15a. In doing so, the court paid "[e]xclusive attention to what foreign law facially requires." App.18a. Additional factors favoring the defendants, according to the Second Circuit, included: their nationality and the site of the anticompetitive conduct; the expectation of reciprocity that the U.S. government might have; and the possible effects on foreign relations of a judgment for the plaintiffs. *See* App.46a–51a. It is unclear whether U.S. interests in enforcing antitrust laws had any weight, as the court considered only whether harm to American commerce was foreseeable. *See* App.48a.

The Second Circuit's test is a clear departure from the articulation of comity in *Hilton* and its progeny and would materially restrict the scope of substantive review that U.S. courts typically exercise when applying the doctrine. As a result, it threatens to upend many vital areas of law that call on courts to balance foreign and domestic interests under the rubric of international comity.

1. Under the Foreign Sovereign Immunities Act, U.S. courts may exercise jurisdiction over foreign sovereigns and their agencies and instrumentalities with respect to certain commercial activity. *See* 28 U.S.C. § 1605(a)(2). When determining the legal status of a foreign entity, international comity dictates

that courts should consider foreign laws. Yet this Court has declined to afford "conclusive effect to the law of the chartering state" in determining whether an entity has a juridical status separate from the foreign state. *See First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611, 619, 621–23 (1983). In *Bancec*, rather than allow Cuba "to violate with impunity the rights of third parties . . . while effectively insulating itself from liability" in the U.S., *id.* at 622, this Court applied American law, corporate theory, and equitable principles, *id.* at 621–23, 628–33. In contrast, the Second Circuit's version of international comity pays "[e]xclusive attention to what foreign law facially requires," App.18a–19a, enabling the precise result the *Bancec* Court sought to avoid.

2. Under Article III of the New York Convention, U.S. courts may exercise discretion to enforce a foreign arbitral award that has been set aside at the seat of arbitration by a foreign court applying its own law. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, Art. V(1)(e); *see also* 9 U.S.C. §§ 201–208 (implementing the New York Convention). International comity requires balancing deference to the foreign judgment against fairness to the litigants. *See, e.g.*, *Ackermann* v. *Levine*, 788 F.2d 830, 842 (2d Cir. 1986). U.S. courts may refuse to enforce a judgment that would be unjust in the U.S. or otherwise "contrary to the policies or prejudicial to the interests of the United States." *Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V.* v. *Pemex-Exploracion Y Produccion*, 832 F.3d 92, 106 (2d Cir. 2016). On the comity theory adopted below, however,

neither fundamental fairness nor U.S. public policy plays a meaningful role (if any).

3. The enforcement of foreign judgments in U.S. courts necessarily "touche[s] the comity of nations" because "no nation will suffer the laws of another to interfere with her own to the injury of her citizens." *Hilton*, 159 U.S. at 164 (quoting *Story*, § 28). U.S. courts have long held that it is consistent with comity to recognize only those judgments produced by courts that—at a minimum—have jurisdiction, conduct regular proceedings, and provide due notice. *Hilton*, 159 U.S. at 166–67; *see also Restatement (Third) of the Foreign Relations Law of the United States* § 482 (1987) (listing factors for mandatory and discretionary denial of recognition); Uniform Foreign-Country Money Judgments Recognition Act (Nat'l Conference of Comm'rs on Unif. State Laws 2005). The court below applied a comity theory in great tension with these protections: Under the Second Circuit's test, no amount of unfairness or discrimination embedded in the foreign law could justify a different outcome. *Cf. Sanchez Osorio* v. *Dole Food Corp.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009), *aff'd sub nom. Osorio* v. *Dow Chemical Corp.*, 635 F.3d 1277 (11th Cir. 2011). So long as there exists a conflict between U.S. law and foreign law—however corrupt or unjust—the latter likely takes precedence.

* * *

Beyond these three examples, international comity touches a host of other doctrines. *See, e.g.*, *Societe Nationale Industrielle Aerospatiale* v. *U.S. Dist. Court of S. Dist. of Iowa*, 482 U.S. 522, 543–44 (1987) (transnational discovery); *Oetjen* v. *Central Leather*

Co., 246 U.S. 297, 302–04 (1918) (application of customary international law); *Royal & Sun All. Ins. Corp. of Can.* v. *Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006) (judicial abstention). In other areas of law, the doctrine requires balancing deference to foreign sovereigns against the interests of the U.S. and those who seek the protection of its laws. By focusing exclusively on what foreign law "facially requires" and by reducing U.S. interests to a vanishing point, the Second Circuit's test effectively makes deference "a matter of absolute obligation." *Hilton*, 159 U.S. at 163–64; *see also* Brief for the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioners at 8–11, *Animal Science Prods. Inc.* v. *Hebei Welcome Pharm. Co. Ltd.,* No. 16-1220 (U.S. May 5, 2018). This imbalance threatens the careful application of international comity in many other contexts.

III. *The Second Circuit Erred in Subordinating the Plain Meaning of U.S. Antitrust Law to a Policy-Laden Substantive Canon of Statutory Interpretation Largely of Its Own Creation.*

Purporting to interpret provisions of the Sherman Antitrust Act, 15 U.S.C. § 1, and the Clayton Antitrust Act, 15 U.S.C. §§ 4, 16, the Second Circuit did not start with the text; rather, it began (and ended) its analysis with a newfangled 'canon of international prescriptive comity.' In doing so, the court aggrandized one extratextual and ahistorical tool in utter disregard for the ordinary meaning of U.S. antitrust law.

A. The Second Circuit Abdicated its Duty to Interpret and Apply U.S. Antitrust Law by Exalting a Substantive Canon in the Absence of Ambiguity.

The court below applied a substantive canon of statutory interpretation before attempting to interpret the text, history, or structure of U.S. antitrust law. The Sherman Act unambiguously applies abroad, so there was no occasion to invoke the canon of international comity.

1. The Second Circuit's method of statutory interpretation improperly subordinates a statute's plain meaning. "In determining the meaning of a statutory provision," a court must "look first to its language, giving the words used their ordinary meaning." *Lawson* v. *FMR LLC*, 571 U.S. 429, 440 (2014) (internal quotation marks and citation omitted); *see also Sebelius* v. *Cloer*, 569 U.S. 369, 376 (2013) ("As in any statutory construction case, we start, of course, with the statutory text . . . [and its] ordinary meaning." (internal quotation marks and citation omitted)). "After all, only the words on the page constitute the law . . . . If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and [their] own imaginations, [judges] would risk amending statutes outside the legislative process reserved for the people's representatives." *Bostock* v. *Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020).

While a court may resort to substantive canons to compare multiple interpretations of a statute when the law is vague or ambiguous, the court must first read the statute and identify whether the text permits multiple readings. If the statute is clear, there is no

need for further inquiry. If it is not, then the "reviewing court [should] employ[] all of the traditional tools of construction . . . [to] reach a conclusion about the best interpretation." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring in judgment).

The Second Circuit here applied a unique "form of statutory interpretation," App.10a n.7, 11a n.8, that is precisely backward. According to the Second Circuit, the comity canon "comes into play" to "guide[] [the court's] interpretation of statutes that might . . . apply to [extraterritorial] conduct." *In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC*, 917 F.3d 85, 102–03 (2d Cir. 2019), *cert. denied sub nom. HSBC Holdings PLC* v. *Picard*, 140 S. Ct. 2824 (2020) (quoting *In re Maxwell Commc'n Corp. plc by Homan*, 93 F.3d 1036, 1047, 1049 (2d Cir. 1996)). When a statute might apply extraterritorially, the Second Circuit's canon "may serve to 'shorten the reach of [the] statute.'" App.10a n.7 (quoting *In re Picard*, 917 F.3d at 100). One "important criterion" for "shorten[ing]" a statute is the existence of a "true conflict" between foreign law and American law—i.e., when the conduct complained of was required by foreign law such that the defendant could not have complied with both legal regimes. App.5a, 10a–16a; *see also In re Picard*, 917 F.3d at 102; *Figueiredo Ferraz E Engenharia de Projeto Ltda.* v. *Republic of Peru*, 665 F.3d 384, 391 (2d Cir. 2011); *In re Maxwell*, 93 F.3d at 1050.

However, this Court has said that courts may "construe[] *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) (emphasis added); *see also In re Maxwell*, 93 F.3d at 1047 ("[T]he principle of comity . . . has no application where Congress has indicated otherwise."); *Ramsey*, 925–36 (emphasizing that the "comity" inquiry is properly understood as "an interpretive tool to construe . . . an ambiguous U.S. statute," not "an exercise of equitable discretion"). The canon of international comity does not direct courts to ignore the fundamental first step of statutory interpretation. Yet the Second Circuit's gloss on *Empagran* replaced the phrase "ambiguous statutes" with the phrase "U.S. antitrust law," App.11a n.8, asserting without argument that the canon always applies in foreign antitrust cases.

Empagran offered a roadmap for resolving statutory ambiguity that the Second Circuit declined to follow. Addressing the application of the Foreign Trade Antitrust Improvements Act (FTAIA) to claims arising from foreign conduct causing foreign harms, the *Empagran* Court considered "the language," "history," and "design[]" of the Act. 542 U.S. at 169–70. The Court also considered a handful of early cases applying antitrust law to foreign conduct, *id.* at 170–73, and the statutory purpose to forbid domestic anticompetitive conduct, *id.* at 165–66. In conclusion, the Court adopted one of two possible "reading[s] of the statute's language" in light of "the statute's basic purposes," "considerations of comity," and "Sherman Act history." *Id.* at 175; *see also Timberlane Lumber Co.* v. *Bank of Am., N.T. & S.A.*, 549 F.2d 597, 609 n.14 (9th Cir. 1976) (applying a comity principle *after* determining that the text of the Sherman Act (pre-1982) was "not precise or limited enough to provide additional guidance" as to its extraterritoriality).

In contrast, the lengthy decision below never supplied an interpretation of U.S. antitrust law—let alone multiple plausible interpretations that could evince some vagueness or ambiguity. Instead, the court took a shortcut to the finish line, applying a canon for resolving ambiguity that it had not identified in the first place. While "there is no errorless test" for what constitutes ambiguous language, *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), bypassing the textual inquiry altogether is not an option. The Second Circuit's methodology is therefore at odds with basic principles of statutory interpretation and renders the canon of international comity a stark outlier among the substantive canons. *Cf. Wooden* v. *United States*, 142 S. Ct. 1063, 1075–76 (2022) (Kavanaugh, J., concurring) (lenity applies after "exhaust[ing] all the tools of statutory interpretation"); *id.* at 1083–87 (Gorsuch, J., concurring in the judgment) (same); *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 843 (2018) (similar as to the canon of constitutional avoidance); *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93–94 (2001) (similar as to the "pro-Indian" canon).

2. There is no ambiguity warranting departure from the plain text of U.S. antitrust laws. If the Second Circuit had attempted to construe the Sherman Act, in light of subsequent amendments and Supreme Court precedent, it would have found no ambiguity about whether U.S. antitrust laws apply to foreign conduct. They plainly do. The text of the Sherman Act, as amended by the FTAIA, provides that 15 U.S.C. §§ 1–7 "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless" such conduct substantially affects domestic commerce in the U.S. or affects U.S. exports. 15 U.S.C. § 6(a). Thus, the Act

expressly permits certain claims arising from foreign commerce—those involving import trade or commerce and those with domestic effects—and it forecloses certain other claims. And if the text and structure of the FTAIA were not enough, the legislative history also suggests that Congress contemplated comity yet sought to maintain the Sherman Act's extraterritorial reach. *See, e.g.*, H.R. Rep. No. 97–686, at 13 (1982) ("[T]he bill is not intended to restrict the application of American laws to extraterritorial conduct where the requisite effects exist. . . . Any major activities of an international cartel would likely . . . fall within the reach of our antitrust laws."). Without so much as a nod to the existence of Section 6(a) of the FTAIA, the Second Circuit effectively nullified the provision in favor of an extratextual judge-made canon.

The Second Circuit's truncated analysis also sidestepped Supreme Court precedent that has affirmed the extraterritorial reach of U.S. antitrust laws. It is "well established 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) (collecting cases and treatises). The *Hartford Fire* Court noted that "it is well established that Congress has exercised [prescriptive] jurisdiction under the Sherman Act." *Id.* at 796 n.22. The Supreme Court recently reaffirmed the extraterritorial reach of U.S. antitrust law in *Empagran*. 542 U.S. at 165 (finding extraterritorial application to be "consistent with principles of prescriptive comity").

Other circuits recognize that the Supreme Court has "definitively establishe[d] that Section One of the

Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States." *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997); *see also Timberlane*, 549 F.2d at 608 ("There is no doubt that American antitrust laws extend over some conduct in other nations."); *Minn-Chem, Inc.* v. *Agrium, Inc.*, 683 F.3d 845, 855–58 (7th Cir. 2012) ("[*Empagran*] reaffirm[ed] the well-established principle that the U.S. antitrust laws reach foreign conduct that harms U.S. commerce."). Consequently, it is not ambiguous whether the Sherman Act applies extraterritorially, which means federal courts have a "virtually unflagging obligation" to exercise this jurisdiction conferred by Congress, *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976).

The Second Circuit addressed *Empagran* in a footnote, imprecisely asserting that the Court "relied on this rule of prescriptive comity." App.11a n.8. Indeed, the *Empagran* Court invoked prescriptive comity as a factor when interpreting 15 U.S.C. § 6(a), but its analysis bears no resemblance to that of the Second Circuit. The *Empagran* Court identified actual ambiguity, 542 U.S. at 174 (comparing two readings), and it weighed the text, history, structure, and purpose of the FTAIA amendments to the Sherman Act. *See, e.g.*, *id.* at 165–66, 169–70, 175. The Second Circuit's method, on the other hand, functionally *assumes* the statute is ambiguous and reduces all of statutory interpretation to one canon. *Empagran* does not license this approach.

3. The Second Circuit's inversion of ordinary statutory interpretation is especially troubling where the relevant canon requires answering factual

questions and making policy predictions about foreign affairs. According to the Second Circuit, "comity principles require . . . determin[ing] whether the application of U.S. law would be reasonable under the circumstances, comparing the interests of the United States and the relevant foreign state." *In re Picard*, 917 F.3d at 102 (internal quotation marks and citation omitted). To determine what is "reasonable under the circumstances" the Second Circuit relies on a ten-factor analysis that requires courts to ascertain (a) facts about the defendants, including the nature of the alleged conduct and defendants' intent to harm American commerce; (b) facts about the world, including the importance of the alleged conduct here and abroad and the availability of other remedies; and (c) facts about the future, including the possible effects on foreign affairs and the enforceability of a court order. App.13a n.9.

Consequently, the Second Circuit's approach is disordered for another reason: Rather than apply the law to the facts, this canon of international comity asks that courts interpret the law in light of the facts of each case. The idea that a nineteenth-century antitrust law could *mean something different* depending on the current state of U.S.-China relations is inimical to any serious view of statutory interpretation. *See Empagran*, 542 U.S. at 168–69 (rejecting the view that courts should apply "comity considerations case by case" rather than "across the board"). Such fact- and policy-laden concerns may be appropriate and desirable for prosecutors in deciding whether to bring an antitrust action. *See* Department of Justice & Federal Trade Commission, Antitrust Guidelines for International Enforcement and Cooperation § 4.1 (2017). But they are not cardinal

sources of statutory meaning and ought not supplant the plain text of a clear statute. *See, e.g.*, *Bostock*, 140 S. Ct. at 1751 ("'[I]n the context of an unambiguous statutory text,' whether a specific application was anticipated by Congress 'is irrelevant.'" (quoting *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998)).

B. The Second Circuit's Ten-Factor International Comity Canon Is Ahistorical and Premised On Dubious Policy Considerations.

Even if it were proper to eschew the text and other sources of meaning in favor of a single substantive canon, the Second Circuit's formulation of international comity should be rejected in the context of statutory interpretation.

1. In order for a substantive canon to reflect a legal convention that informs the meaning of law, it must "have been long indulged," Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 583 (1989), and must have been in use at the time the law at issue was passed. Only then can a canon have "prescriptive validity, since the legislature presumably has [that canon] in mind when it chooses its language." *Id.* "[I]t makes no sense whatsoever to test congressional intent using a set of interpretative rules that Congress could not conceivably have foreseen at the time it acted . . . ." *Dellmuth* v. *Muth*, 491 U.S. 223, 239 (1989) (Brennan, J., dissenting).

The Second Circuit's canon of international comity is of relatively recent vintage, so Congress could not have had it in mind when it enacted the Sherman

Antitrust Act of 1890. The Second Circuit draws support from very few cases, none older than 1976: *Empagran* (2004), *Mannington Mills* (3d Cir. 1979), and *Timberlane* (9th Cir. 1976). And none of these clearly fashioned a canon of statutory interpretation.

Both *Mannington Mills* and *Timberlane* concerned questions of jurisdiction, not interpretations of the Sherman Act. In *Mannington Mills* v. *Congoleum Corp.*, the Third Circuit asked how "the consequences to the American economy and policy" "weigh[ed] [against the] competing interests . . . [of] foreign policy, reciprocity, comity, and limitations of judicial power." 595 F.2d 1287, 1296 (3d Cir. 1979). But by the court's own terms, these were "considerations that should have a bearing on *the decision to exercise or decline jurisdiction*." *Id.* (emphasis added).

Similarly, "[t]he comity question" in *Timberlane* turned on "jurisdictional grounds," 549 F.2d at 615, and whether comity required "'jurisdictional' forbearance," *id.* at 613 n. 27. Although the Ninth Circuit quoted *Alcoa* for the proposition that "[w]e should not impute to Congress an intent to punish all whom its courts can catch," *id.* at 609 (quoting *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945)), this passage concerned the presumption against extraterritoriality. *Timberlane* did not adopt a new canon against readings that "unreasonabl[y] interfere[] with [foreign] sovereign authority." App.11a n.8.[2]

[2] The Ninth Circuit cited for its balancing test a section of the *Restatement (Second)* titled "Limitations on Exercise of Enforcement Jurisdiction." *Timberlane*, 549 F.2d at 614 n.31 (citing *Restatement (Second) of the Foreign Relations Law of the United States* § 40 (1965)). This abstention doctrine was never a

In *Empagran*, the Supreme Court cited neither *Mannington Mills* nor *Timberlane* for its comity principle. 542 U.S. at 164. Instead, *Empagran* explicitly rejected the idea that courts should take "account of comity considerations case by case, abstaining where comity considerations so dictate." *Id.* at 168 (contrasting *Mannington Mills*). The Court posited a general rule of thumb, which it derived from an amalgam of other doctrines. *Id.* at 164 (citing, e.g., *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–22 (1963) (presumption against extraterritoriality); *Murray* v. *Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (avoidance of violations of international law)). All told, no court has offered a convincing genealogy of the Second Circuit's comity canon.

The upshot of the novelty of this canon is twofold. First, there is little precedent for the idea that unambiguous statutes should be interpreted via a ten-factor balancing test sensitive to, among other things, predictions about foreign affairs. At best, the canon can be viewed as an extrapolation of *Empagran*'s principle that ambiguous statutes should be construed

---

mode of statutory interpretation. *Timberlane* also inaptly likened its approach to *Lauritzen* v. *Larsen*, 345 U.S. 571, 583 (1953), a maritime tort case applying choice-of-law principles. *See* 549 F.2d at 613–14. But *Lauritzen* invoked the *Charming Betsy* canon to read a particular statute in accordance with international maritime law. 345 U.S. at 577–78, 581–82; *see also Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 382 (1959) (similar). It did not establish a freestanding "international comity" canon to be applied whenever a statute may have extraterritorial reach. For the same reason, the Second Circuit is mistaken to assert that its canon "has been here all along." App. 11a n.8.

to avoid unreasonable interference with foreign sovereignty. But the Second Circuit has greatly transformed *Empagran* into a complex case-by-case method that this Court expressly rejected. For this reason alone, the court below erred.

Second, it is difficult to see how Congress could have had this canon in mind when drafting the Sherman Act. Even by the time of the FTAIA, Congress had the benefit of just two opaque circuit cases—hardly the kind of consensus legal convention that other canons reflect. Thus, the "presum[ption] that Congress legislates with knowledge of [the] basic rules of statutory construction" does not hold for this canon. *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); *see also Finley* v. *United States*, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

2. *Empagran* itself was premised on policy considerations seeking to "help[] the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." 542 U.S. at 164–65. It is unclear that the Second Circuit's canon advances any harmony interest, especially as applied retroactively to the Sherman Act. It is not harmonious to let foreign cartels fix prices with impunity so long as their government so ordered. *See* Eleanor M. Fox, *Antitrust: Updating Extraterritoriality*, Italian Antitrust Rev. 1, 6, 10 (2019) (arguing that foreign interests in export cartel profits should be given zero weight when balancing comity concerns). The Seventh Circuit aptly explained that in today's highly

interdependent commercial world, "[e]xport cartels are often exempt from a country's antitrust laws . . . [so] [i]t is the U.S. authorities or private plaintiffs who have the incentive—and the right—to complain . . . and whose interests will be sacrificed if the law is interpreted not to permit this kind of case." *Minn-Chem*, 683 F.3d at 860; *see also Republic of Philippines* v. *Westinghouse Elec. Corp.*, 43 F.3d 65, 75 (3d Cir. 1994) ("As *Hilton* makes clear, comity must yield to domestic policy: 'no nation will suffer the laws of another to interfere with her own to the injury of her citizens . . . .'" (quoting *Hilton*, 159 U.S. at 164); *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 707 (5th Cir. 1999) (similar).

The Second Circuit's balancing test is heavily weighted in favor of foreign cartels. It effectively authorizes courts to dismiss antitrust actions whenever there is a facial conflict of laws, making it easy for foreign states to immunize anticompetitive conduct. This will severely harm U.S. consumers and businesses. Neither U.S. antitrust law nor international comity requires such a result.

3. The presumption against extraterritoriality addresses the same needs as the Second Circuit's canon and avoids its shortcomings. In this case, the court below confronted whether to "construe the Sherman and Clayton Acts to reach" an extraterritorial price-fixing scheme. App.54a. When "consider[ing] whether a federal statute applies extraterritorially," this Court applies "a canon of statutory construction known as the presumption against extraterritoriality." *RJR Nabisco, Inc.* v. *Eur. Cmty.*, 579 U.S. 325, 335–36 (2016). The canon instructs courts (1) to "examine[] whether [the statute]

gives any clear indication of extraterritorial effect, and (2) to "consider[] the focus of congressional concern." *Id.* at 336 (internal quotation marks omitted). If the Second Circuit were unsure about the extraterritorial reach of U.S. antitrust law—despite this Court's instruction in *Empagran*, *Hartford Fire*, *Matsushita*, *Alcoa*, etc.—the interpretive tool available to it is the presumption against extraterritoriality. The presumption is firmly entrenched in two centuries of Supreme Court precedent. *See, e.g.*, *United States* v. *Palmer*, 16 U.S. 610, 630–34 (1818) (declining to enforce U.S. piracy laws against a noncitizen on a foreign ship because "no general words of a statute ought to be construed to embrace [offenses] committed by foreigners against a foreign government.").

In comparison, the comity canon is a solution in search of a problem. The Second Circuit has said that its doctrine "is best understood as a guide where the issues to be resolved are entangled in international relations." *In re Maxwell Commc'n Corp. plc by Homan*, 93 F.3d 1036, 1047 (2d Cir. 1996). This is not a unique feature: Many canons—such as the presumption against extraterritoriality or *Charming Betsy*—are guides when the case involves international relations. The court below asserted that the canon also "helps the potentially conflicting laws of different nations work together in harmony." App.11a n.8 (quoting *Empagran*, 542 U.S. at 164–65). Again, the presumption against extraterritoriality serves the same purpose. *See, e.g.*, *RJR Nabisco*, 579 U.S. at 335 ("[I]t serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries."); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("It serves to protect

against unintended clashes between our laws and those of other nations . . . .").

The one unique characteristic of the Second Circuit's comity canon is its case-by-case approach to extraterritoriality. Of course, the Supreme Court has repeatedly criticized the case-by-case approach, which results in "judicial-speculation-made-law." *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 261 (2010); *see also Nestlé USA, Inc.* v. *Doe*, 141 S. Ct. 1931, 1940 (2021); *Empagran*, 542 U.S. at 168–69 ("[T]ak[ing] . . . account of comity considerations case by case . . . is too complex to prove workable."). Instead of following this Court's guidance, the Second Circuit created the canon of comity, which *requires* case-by-case interest-balancing and *requires* predictions about foreign affairs. As a result, the court below conceded that it remained "in the dark" about one of the comity factors because it was "ill-equipped to assess" U.S. foreign policy. App.50a–51a. The comity canon is not very helpful if the court deems itself *incapable* of applying it.

In contrast, the presumption against extraterritoriality is eminently workable. It asks courts to engage in a familiar exercise of statutory interpretation guided by multiple recent decisions of this Court. Examples of the presumption's application can be found in any treatise or handbook on statutory interpretation. *See, e.g.*, William N. Eskridge, *Interpreting Law* 351–53 (2016); Robert A. Katzmann, *Judging Statutes* 70–81 (2014); Antonin Scalia & Bryan A. Garner, *Reading Law* 268–72 (2012). The same cannot be said for the supposed canon of international comity.

This case is an ideal vehicle to rein in the Second Circuit's haphazard approach and to elucidate the proper role—if any—of the principle described in *Empagran*.

* * *

The court below considered whether U.S. antitrust laws apply to a foreign price-fixing scheme that caused domestic antitrust injury. As has been "long held," *Empagran*, 542 U.S. at 165, and "well established," *Hartford Fire*, 509 U.S. at 796, the answer is "Yes." If some doubt remained, the Second Circuit should have examined the text and structure of the Sherman Act, which are unambiguous. Any conflict between U.S. law and contemporary Chinese law may be cognizable under other doctrines, but it is immaterial to the *meaning* of the Sherman Act, which does not change on a case-by-case basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL F. MURRAY
Counsel of Record
ROBERT M. OVERING
PAUL HASTINGS LLP
2050 M Street, N.W.
Washington, D.C. 20036
(202) 551-1700
michaelmurray@
paulhastings.com

TYLER S. BADGLEY
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062

Counsel for Amicus Curiae

April 22, 2022