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

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

BRIEF IN OPPOSITION TO CERTIORARI

STEFFEN N. JOHNSON
MICHAEL W. MCCONNELL
SCOTT A. SHER
CONOR D. TUCKER
Wilson Sonsini Goodrich & Rosati, P.C.
1700 K Street, NW
Washington, DC 20006
(202) 973-8800

JONATHAN M. JACOBSON
Counsel of Record
Wilson Sonsini Goodrich & Rosati, P.C.
1301 Ave. of the Americas
New York, NY 10019
(212) 497-7700
jjacobson@wsgr.com

Counsel for Respondents

QUESTIONS PRESENTED

In its earlier decision in this case, this Court held that the court of appeals erred in giving "conclusive effect," rather than "respectful consideration," to China's explanation of the dictates of Chinese law. 138 S. Ct. 1865, 1869 (2018). On remand, the court faithfully applied the new standard, carefully considering all of the evidence and ultimately reaching the same conclusion—that Chinese law mandated the price-fixing regime at issue. Petitioners do not ask this Court to overturn that case-specific conclusion, but argue instead that the court below erred in applying an international comity standard uniformly used by the lower courts for 50 years, and in holding that courts determining foreign law may consider only the "face" of foreign law. The questions presented are:

1. Whether petitioners' first question presented, which broadly challenges any case-by-case application of international comity principles to dismiss antitrust cases, but which was neither pressed nor passed on below, is properly before this Court.

2. If petitioners' first question is properly presented, whether the court below erred in employing the case-by-case framework of *Timberlane Lumber Co.* v. *Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), to resolve the question of international comity.

3. Whether this Court should review petitioners' claim that the court below "held" that courts applying Rule 44.1 may consider only the "face" of foreign law and cannot "consider evidence as to how foreign law is implemented and enforced" (Pet. i), where the court in reality held that courts "may consider any relevant material or source" and spent pages analyzing in detail all of the relevant evidence.

RELATED PROCEEDINGS

The following proceedings are directly related to the case:

Supreme Court of the United States:

Animal Science Products, Inc. v. *Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865 (2018).

United States Court of Appeals for the Second Circuit:

In re Vitamin C Antitrust Litigation, 837 F.3d 175 (2d Cir. 2016) (vacating March 14, 2013, district court judgment and remanding with instructions to dismiss), vacated and remanded, *Animal Science Products, Inc.* v. *Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865 (2018).

In re Vitamin C Antitrust Litigation, Nos. 13-4375 & 14-4378 (2d Cir. Nov. 29, 2016) (vacating as moot district court's October 23, 2014, post-judgment enforcement order).

In re Vitamin C Antitrust Litigation, 8 F.4th 136 (2d Cir. 2021) (reversing March 14, 2013, district court judgment and remanding with instructions to dismiss).

United States District Court for the Eastern District of New York:

In re Vitamin C Antitrust Litigation, No. 1:06-md-1738 (Mar. 14, 2013) (entering judgment in favor of petitioners) (MDL).

Animal Science Product, Inc., et al. v. *Hebei Welcome Pharmaceutical Co. Ltd., et al.*, No. 1:05-CV-453 (Mar. 14, 2013) (entering final judgment in favor of petitioners) (MDL member case).

United States District Court for the Eastern District of New York (cont'd):

Keane et al. v. *Hebei Welcome Pharmaceutical Co. Ltd. et al.*, No. 1:06-cv-149 (Oct. 24, 2012) (approving settlement with indirect purchaser class) (MDL member case).

Philion et al. v. *Hebei Welcome Pharmaceutical Co. Ltd.*, No. 1:06-cv-987 (Oct. 24, 2012) (approving settlement with indirect purchaser class) (MDL member case).

Audette v. *Hebei Welcome Pharmaceutical Co. Ltd.*, No. 1:06-cv-988 (Oct. 24, 2012) (approving settlement with indirect purchaser class) (MDL member case).

United States District Court for the Northern District of California:

Philion et al. v. *Hebei Welcome Pharmaceutical Co. Ltd.*, No. 3:05-cv-4524 (Apr. 4, 2006) (transferred to E.D.N.Y. pursuant to JPML order).

United States District Court for the District of Massachusetts:

Audette v. *Hebei Welcome Pharmaceutical Co. Ltd.*, No. 1:05-cv-12224 (Apr. 4, 2006) (transferred to the E.D.N.Y. pursuant to JPML order).

United States District Court for the District of New Jersey:

Animal Science Prods., Inc. v. *China Nat. Metals & Minerals Import & Export Corp.*, 702 F. Supp. 2d 320 (D.N.J. 2010), vacated and remanded, 654 F.3d 462 (3d Cir. 2011).

World Trade Organization Appellate Body:

Appellate Body Report, *China–Exportation of Various Raw Materials*, WTO Doc. WT/DS394, -95, 398 (adopted Jan. 30, 2012).

PARTIES TO THE PROCEEDING

Petitioners Animal Science Products, Inc. and The Ranis Company, Inc. were appellees in the court below. Respondents Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation were appellants in the court below.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Hebei Welcome Pharmaceutical Co. Ltd. hereby discloses that it is wholly owned by North China Pharmaceutical Co. Ltd. North China Pharmaceutical Co. Ltd. hereby discloses that Jizhong Energy Group Co., Ltd. is its indirect parent company and no other publicly held corporation (other than North China Pharmaceutical Group Corporation) holds more than 10% of its stock. North China Pharmaceutical Group Corporation hereby discloses that it is wholly owned by Jizhong Energy Group Co., Ltd. Jizhong Energy Group Co., Ltd. is wholly owned by the State-Owned Assets Supervision and Administration Commission of the Hebei Province of the People's Republic of China.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This Court should deny the petition for certiorari. The first question presented was neither pressed nor passed on below. Rather, petitioners consistently litigated this case under the case-by-case framework of *Timberlane Lumber Co.* v. *Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), never questioning its applicability until the case first reached this Court, which declined to review the issue. That alone warrants denying certiorari on the first question. But beyond forfeiture, the decision below accords with settled international comity doctrine and conflicts with no decision of this Court or any circuit.

A longstanding and uniform line of precedent recognizes that courts may appropriately dismiss certain antitrust cases on international comity grounds. That approach does not require "reinterpreting" the Sherman Act in each case involving foreign conduct—just applying its settled meaning to genuine conflicts with foreign law. Although petitioners' Statement suggests that the price-fixing challenged here was not required by Chinese law, they have grossly misrepresented the record; and their questions presented do not contest the court of appeals' contrary conclusion, which in any event is case-specific. In fact, petitioners suggest the opposite—that the conflict between Chinese and U.S. law is irrelevant because international comity dismissals are *never* appropriate.

Far from being inconsistent with this Court's precedents, moreover, the decision below rests on the venerable principle that U.S. law should be read "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).

That principle, which rests on the centuries-old rule of *Murray* v. *The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804), was known to Congress when it passed the Sherman Act, and Congress specifically preserved the uniform decisions applying it to antitrust cases when it passed the Foreign Trade Antitrust Improvement Act (FTAIA), 15 U.S.C. § 6a.

Petitioners' claims of conflict with other circuit decisions are wildly off the mark. None of their cases even *mentions* the *Timberlane* framework that petitioners now challenge, much less accepts their theory that "there is no justification" for "case-by-case" dismissals on comity grounds. Pet. 22. None involves a true conflict with foreign law. And many are criminal cases, do not involve antitrust, or both.

The second question presented flagrantly mischaracterizes the ruling below. By petitioners' lights, the court below "held" that courts applying Rule 44.1 may consider only the "face" of foreign law. Pet. i. In reality, the court analyzed "in detail" all the evidence relevant under Rule 44.1—including (among other materials) "industry records," "China's representations to the World Trade Organization," and "testimony describing how [China's] regime actually functioned" in "practice." Pet. 21a n.17, 29a, 32a. The petition utterly ignores every inconvenient part of the decision. *E.g.*, Pet. 28a-34a ("Other Records Corroborate Chinese Law's Price-Fixing Requirement"). And once the decision is read honestly, petitioners' second "question presented" evaporates.

The long and short of it is that the decision below faithfully carried out this Court's instructions for remand. There is no basis for further review, and this 15-year-old litigation should finally end.

STATEMENT

Petitioners, U.S.-based Vitamin C importers, allege that respondents, Chinese manufacturers that export Vitamin C, conspired to fix Vitamin C prices and output in violation of the Sherman Act, 15 U.S.C. § 1. Respondents maintain, and the court below correctly held, that Chinese law required their conduct.

A. Factual background

China unequivocally required price-fixing of Vitamin C from 2002 forward. That is the conclusion of every assessment of Chinese law other than the district court's. It was the view expressed by the United States, Europe, and Mexico before the World Trade Organization (WTO). The WTO itself so ruled, as did the District of New Jersey in related litigation. Petitioners themselves conceded below that China "required the Chamber and its Subcommittee to 'actively coordinate to set vitamin C export prices and quantities.'" C.A. Br. 25 (Dkt. 174).

1. The Ministry of Commerce has regulated China's transition from a "command economy," where productive assets were state-owned, to a "socialist market economy." CAJA304-305. The Ministry—"the highest authority in China authorized to regulate foreign trade" (Pet. 40a-41a, 82a)—"has authority to draft and implement trade-related laws, regulations, policies and directives." CAJA307.[1]

---

[1] CAJA refers to the appendix below, SPA to the special appendix below, SCTJA to the joint appendix in No. 16-1220, available at https://bit.ly/36YqMFC. Unless otherwise noted, all emphases are added.

Since 1989, the Ministry has regulated Vitamin C exports through the Chamber of Commerce of Medicines and Health Products Importers & Exporters ("Chamber"). Pet. 21a-22a; CAJA685. The Chamber is sometimes called a "social organization," but that English translation of a Chinese term of art can be misleading. The Chamber acts as the Ministry's regulatory arm. CAJA747, 3715-3718. At all relevant times, its function was to "coordinate import and export business" by implementing government regulations. CAJA412. Its duties included "[c]oordinating price, market and clients of foreign trade." *Ibid.*

In 1997, the Ministry instituted a regulatory system for producing and exporting Vitamin C. Together with the State Drug Administration, it issued the "1997 Notice." CAJA3821-3826; Pet. 21a-24a. The Notice directed the Chamber to establish what became the Vitamin C Subcommittee as part of the Chamber. SPA322. Its main responsibilities were "to coordinate with respect to Vitamin C export market, price and customers." CAJA3822.

The Subcommittee's members, four Chinese Vitamin C manufacturers, were all required to participate and to "subject themselves to the coordination of the Group." *Ibid.* The Subcommittee's duty was to "coordinate and administ[er] market, price, customer and operation order of Vitamin C export" (SPA318; Pet. 23a-24a), and to oversee "export administration" —i.e., to "advise on allocation and adjustment of [export] quota, and [to supervise the] issuance of export licenses." SPA318.

By late 2001, the Ministry had become dissatisfied with the 1997 regime. It had failed to prevent a price war that was damaging the Chinese economy. Pet.

24a; CAJA176, 2012. The Ministry thus changed the system to *strengthen* price coordination, avoid anti-dumping claims, and restore profitability. Pet. 25a-28a; CAJA3879-3881; see CAJA2012. In December 2001, the Chamber informed the four manufacturers that "[t]he committed export volume as part of the industry self-discipline shall be strictly implemented," adding that companies "not in strict compliance with this requirement will be punished." CAJA3880.

"Self-discipline" (often called self-regulation) is a "regulatory process that is well-understood and applied broadly in China." CAJA305. "That process, by design, involved communications among the relevant parties with a goal of seeking agreement on a unified course of action that would implement the mandatory goals of Chinese policy." CAJA305, 324; see Bruce M. Owen *et al., China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 248-249 (2008) (Under "'industrial self-discipline,' the major companies in an industry reach price agreements or other agreements to limit competition, in an effort to stabilize the market."); Wang Xiaoye*, The Prospect of Antimonopoly Legislation in China*, 1 WASH. U. GLOBAL STUD. L. REV. 201, 208 (2002) ("synonym for government intervention in price competition"); *First Written Submission of United States*, China–Exportation of Various Raw Materials (WT/DS394, -395, -398) ¶¶ 205, 207, 216-217, 229 (June 1, 2010) ("US-WTO Submission").[2]

---

[2] Available at https://bit.ly/3voxe27.

2. In early 2002, the Ministry superseded its 1997 Notice with a "2002 Notice" issued jointly with the General Administration of Customs ("Customs"):

- Its objective was "to accommodate the new situations since China's entry into WTO, maintain the order of market competition, make active efforts to avoid anti-dumping sanctions * * *, *promote industry self-discipline* and facilitate the healthy development of exports." SPA301.
- Vitamin C and 29 other products were made subject "to price review by the customs" under a "Price Verification and Chop" ("PVC") procedure, where a "chop" was Customs' seal of approval for exportation. *Ibid.*
- "[T]he relevant chambers must * * * submit * * * information on *industry-wide negotiated prices* for those export products." SPA302.
- "The adoption of PVC procedure shall be convenient for exporters while it is conducive for the chambers *to coordinate export price and industry self-discipline*." *Ibid.*

A "2003 Announcement" followed, detailing the PVC system. CAJA3910-3916. It stated that: (i) the Chamber was "responsible for implement[ation]"; (ii) exporters' contracts were to specify "prices and quantities"; (iii) the Chamber was required to "verify the submissions * * * based on the industry agreements," "affix V&C chop to the conforming applications," and return them for transmission to Customs. CAJA3915-3916; Pet. 29a. The 2002 Notice authorized the various chambers and Customs to "suspend export price review for certain products" if the rele-

vant subcommittee members approved. SPA302. This never-invoked provision was not continued in the 2003 Announcement. CAJA3910-3916.

The Subcommittee's duties continued as before. It would "coordinate and guide vitamin C import and export business activities, promote self-discipline," and "discipline members" for "[f]ailure to carry out industrial agreements." CAJA3927, 3948, 3950. The revised Charter also described the Subcommittee as "a self-disciplinary industry organization jointly established on a voluntary basis" (CAJA2180), whose members had a right "to freely resign" (CAJA2182). As Council members, however, the four manufacturers were appointed to four-year terms, and no provision allowed them to resign. CAJA2185, 2190. As "a practical matter," therefore, they could not withdraw. CAJA701. None ever did.

Those exporters who were "non-member exporters" of the Subcommittee were subjected to "the same treatment as * * * member exporters." CAJA3916; Pet. 26a. Thus, all exporters had to use the prices agreed to by the Subcommittee's members.[3]

3. Under the revised 2002 regime, as before, export prices were largely "fixed by enterprises without government intervention." CAJA1811. What China continued to command was that the companies themselves fix prices under the supervision of the Cham-

---

[3] Petitioners assert that PVC was not "mandatory" because some contracts produced in discovery had no chop. Pet. 10. But the companies transmitted the actual chopped contracts to Customs. SCTJA104-106, 396. No discovery was taken from Customs.

ber and its Subcommittee; the requirement was to reach "voluntary" price agreements through industry self-discipline. CAJA306. The agreed-on prices were up to the companies' agreements, provided they exceeded anti-dumping minima. CAJA325; CAJA3927.

Price-fixing agreements are notoriously difficult to monitor and enforce, see George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 44-48 (1964)—especially when the government previously controlled all production. But it is not true that "[e]xporters faced no sanctions" for noncompliance. Pet. 10. The Chamber enforced the law by denying chops to non-conforming contracts. CAJA703-704. Although one manufacturer initially refused to curtail production, it was brought into compliance. CAJA1979, 704-705. Contracts were inspected by the Chamber, which "refused to affix our chop to non-conforming contracts." CAJA705; see CAJA1767-1768.

4. Petitioners misrepresent the record in arguing that the 2002 regime abolished the requirement to fix prices. Pet. 7-11. As the court below stated: "The ubiquitous references to 'price coordination' in these regulations leave little doubt that the 2002 Notice instituted by the Ministry required the defendants to engage in price-fixing through the Chamber and Sub-Committee." Pet. 29a.

The changes from the 1997 regime to the 2002 regime were modest. Pet. 26a-28a. Non-manufacturing trading companies could join the Subcommittee. Members could resign; but there is no evidence that any ever did, and non-members were bound by the same requirements anyway. The major change was that enforcement through export quota restrictions and non-automatic licensing—i.e., "export admin-

istration"—was replaced with the PVC system. CAJA321, 698-700, 3898-3899; see CAJA2012.

What did not change was the requirement to fix prices. PVC obligated firms to engage in industry self-discipline, to accept the Chamber-driven price coordination, and to report industry-wide negotiated prices. Price coordination through industry self-discipline was *enhanced*, not curtailed. Pet. 26a-28a; CAJA2154.

That some members occasionally charged different prices makes no legal difference. *United States* v. *Andreas,* 216 F.3d 645, 679 (7th Cir. 2000) ("cartel members cheated each other when they could"). Neither does the ability to withdraw—even if the four manufacturers had that ability, which they did not. *Morton's Mkt., Inc.* v. *Gustafson's Dairy, Inc.*, 198 F.3d 823, 837 & n.22 (11th Cir. 1999), amended, 211 F.3d 1224 (11th Cir. 2000).

5. The WTO "Raw Materials" proceedings confirm that price-fixing was required throughout the class period. Those proceedings related to materials governed by another chamber, the Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters ("CCCMC"). In promoting industry self-discipline and price coordination (CAJA1357-1361), its operations were identical to those of the Chamber here. US-WTO Submission ¶ 208.

At the WTO, the United States, Europe, and Mexico—complainants—explained: "China coordinates export prices for the products at issue through a 'system of self-discipline' based on informal statements and oral agreements between traders and export regulators." CAJA1354. As the United States stated, "coordination of export prices" is a "key area[] in

which the CCCMC coordinates export activities"; "the industry coordinated export price is considered 'a collective contract' that industry members must abide by." US-WTO Submission ¶¶ 210, 217, 224. The other complainants agreed—as did the WTO, which concluded that, through 2010, "China require[d] exporting enterprises to export at set or coordinated export prices or otherwise face penalties." CAJA1378. The court in *Animal Science Products*, *Inc.* v. *China National Metals & Minerals Import & Export Corp.*, 702 F. Supp. 2d 320, 421-464 (D.N.J. 2010), vacated on other issues, 654 F.3d 462 (3d Cir. 2011), concurred. Only the district court below has held otherwise.

6. Throughout this case, petitioners have falsely stated that China's statement to the WTO that it had given up "export administration" meant that it had stopped price-fixing. China said only that it stopped requiring Vitamin C exporters to comply with discretionary licensing and transaction-specific export quotas. CAJA820, 698-699; SCTJA319; see WTO, China Trade Policy Review 2006, WT/TPR/S/161, at 104 ¶ 141 & n.120 (Feb. 28, 2006);[4] WTO, Transitional Review, G/C/W/438, at 2-3 ¶ 5(a) (Nov. 20, 2002).[5] Nothing in the WTO's trade reviews or later submissions from any complainant suggested that China abandoned industry self-discipline or price and quantity coordination. They all said the opposite.

7. China's 2002 regime conflicted directly with the Sherman Act. Because "[a]ny combination which tampers with price structures" is "unlawful," an

---

[4] Available at goo.gl/H97MgH.

[5] Available at goo.gl/uu7k71.

agreement to fix a price floor with independent but coordinated prices above the minimum—what China required—is illegal *per se*. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 172-173, 224 n.59 (1940) (prices coordinated by a "Planning and Coordination Committee"); accord *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647-648 (1980) (fixing credit terms only with independent pricing on anything else); *Plymouth Dealers' Ass'n* v. *United States*, 279 F.2d 128, 132-134 (9th Cir. 1960) (fixing minimum prices with ability to charge independently above the minimum); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) (Posner, J.) (price coordination). Any other rule would allow competitors to avoid liability simply by agreeing on "minimum prices," set however they chose, while "competing" on higher prices. And every cartel would do just that.

There can be no reasonable dispute that Chinese and U.S. law squarely conflict.

B. Prior proceedings

1. District court decision

Given the conflict with foreign law outlined above, respondents moved to dismiss the complaint, and later sought summary judgment, based on the foreign sovereign compulsion doctrine, the act-of-state doctrine, and international comity. The Ministry filed amicus briefs in support. Pet. 7a (No. 16-1220).

The district court denied respondents' motions, rejecting the Ministry's position as a "post-hoc attempt to shield defendants' conduct." *Id.* at 142a. The court also excluded extensive evidence supporting respondents' defenses, including the laws and regulations themselves and the Ministry's explanation of Chinese

law. A jury thus concluded that respondents were not required to fix Vitamin C prices, awarding $147.8 million in treble damages. *Id.* at 2a.

2. Court of appeals' first decision

The court of appeals reversed, holding that the case should have been dismissed. "The central issue," the court explained, was "whether principles of international comity required the district court to dismiss the suit," and it resolved that issue under "the multi-factor balancing test" of "*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)." Pet. 11a, 14a-15a (No. 16-1220). The court then explained "that Chinese law required Defendants to violate U.S. antitrust law," that it would be "nonsensical to incorporate into a government policy the concept of an 'industry-wide negotiated' price and require vitamin C manufacturers to comply with that minimum price point if there were no directive to agree," and that the remaining *Timberlane* factors "decidedly weigh[ed] in favor of dismissal." *Id.* at 27a-28a, 33a-34a. In assessing the "conflict" factor, the court believed it was "bound to defer" to the Ministry's position, provided it was "reasonable." *Id.* at 25a.

Consistent with *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764 (1993), the Second Circuit spoke of "absention" as well as "dismissal." Compare Pet. 16a (16-1220) (*Hartford Fire* "relied solely upon the first [*Timberlane*] factor" to "decide that abstention was inappropriate") with *id.* at 17a ("That a true conflict was lacking in *Hartford Fire* does not" mean "such a conflict alone is sufficient to require dismissal"). But respondents *never* invoked "adjudicatory"

or "adjudicative" comity as petitioners claim (Pet. 18a, 24a); they invoked "international comity" or "comity" doctrine generally. Nor did the court below rely on "adjudicatory comity." Both sides accepted, and the court applied, *Timberlane*'s case-by-case framework.

3. This Court's earlier decision

Petitioners sought certiorari on three questions: a procedural question not relevant here; whether Rule 44.1 requires U.S. courts to defer to foreign governments' statements on foreign law; and a comity question: "Whether a court may abstain from exercising jurisdiction on a case by case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Antitrust Act claim involving purely domestic injury." Pet. i (No. 16-1220). Respondents countered that petitioners had "waived their argument that international comity abstention should not apply on a case-by-case basis" by "fail[ing] to raise it at any stage." Opp. 27 (No. 16-1220).

The Court invited the Solicitor General's views. He supported review on only the Rule 44.1 question. "Petitioners did not raise [their international comity] argument below," he noted, and "the court of appeals' implicit conclusion that comity-based dismissals are sometimes permissible does not conflict with any decision of this Court or another court of appeals." U.S. Invitation Br. 17. This Court reviewed only the Rule 44.1 holding, vacating and remanding because the circuit court gave "conclusive effect," rather than "respectful consideration," to the Ministry's positions. *Animal Sci. Prods., Inc.* v. *Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865, 1869 (2018). The Court declined to review the comity question.

4. Court of appeals' remand decision

On remand, petitioners *again* did not challenge the case-by-case application of international comity factors as grounds for dismissing their claim, and the court never addressed that issue. As before, petitioners accepted the *Timberlane* framework, disputed any "true conflict" with foreign law, and argued that "the remaining *Timberlane* comity factors" supported them. C.A. Supp. Letter Br. (Dkt. 294); see *ibid*. ("the *Timberlane* factors weigh against abstention"). Thus, the court again applied *Timberlane*, again describing the "central issue" as "whether the district court should have dismissed this antitrust action for reasons of international comity." Pet. 10a, 11a-16a.

In so doing, the court noted that whereas *Hartford Fire* "seemed to assume that international comity" was "an abstention doctrine," *Empagran* approvingly cited Justice Scalia's *Hartford Fire* dissent, which assessed whether to dismiss antitrust claims on comity grounds as a matter of "prescriptive comity." Pet. 11a n.8. The court thus used the latter taxonomy, while noting that the doctrines often require "similar analysis" (*ibid*. (citation omitted)), and it again stated: "To determine whether international comity principles require dismissal of a lawsuit, we apply a multi-factor balancing test as set forth" in "*Timberlane*" and "*Mannington Mills*." *Id.* at 13a.

The court did not, in applying *Timberlane*, consider only the "face" of Chinese law. Courts determining foreign law "may consider any relevant material or source," the court stated, and "[t]he Rule 44.1 materials relevant" here include evidence such as "internal industry records and trial testimony describing how that regime actually functioned," "the Ministry's

statements interpreting Chinese law," and "China's representations to the [WTO] concerning its export controls on Vitamin C." Pet. 21a n.17. The court analyzed the record "in detail" (*ibid.*), reviewing (among other materials) "records [that] corroborate Chinese law's price-fixing requirement," "industry records," how the "system" worked "in practice," "expert" testimony, "internal" reports, and of course the "Ministry's submissions"—which received only "respectful consideration." *Id.* at 28a-46a, 58a. Petitioners ignore this analysis.

Judge Wesley dissented. He accepted the case-by-case *Timberlane* test (Pet. 62a), but disagreed over its application, believing respondents could "comply with both Chinese and U.S. law." *Id.* at 55a. His view of the conflict, however, presumed that U.S. law permits firms to fix a price floor, provided they retain flexibility "above the industry-coordinated minimum price." Pet. 56a; see Pet. 60a ("even if Chinese law required Vitamin C exporters to coordinate in setting a price, it was only a minimum price"). He did not attempt to reconcile that view with *Socony-Vacuum* or *Catalano*.

The court's second decision, like its first, thus applied *Timberlane*—the framework both sides invoked—by asking if there was a true conflict between U.S. and foreign law and, upon concluding that there was, whether the other comity factors supported dismissal. The main difference between the decisions is that the second, heeding this Court's direction, examined the

record in greater depth, according the Ministry's position only "respectful consideration," not deference.[6]

Petitioners' en banc petition was unanimously denied. No judge requested a response.

REASONS FOR DENYING THE PETITION

I. Petitioners have doubly forfeited their first question presented.

Petitioners' first question presented is a broadside attack on "case by case" or "discretionary" reliance on principles of international comity to dismiss Sherman Act cases within the federal courts' subject matter jurisdiction. Pet. i, 21-29. According to petitioners, such dismissals are categorically improper and, in holding that comity principles warranted dismissal here, the court below made a "*sua sponte*" break "from how the parties litigated this matter for fifteen years." Pet. 21. But it is petitioners who are rewriting history—they repeatedly failed to preserve their first question presented, the court below never addressed it, and this Court previously declined to review it. That alone warrants denying certiorari.

A. Petitioners never raised the first question until their initial petition for certiorari, and this Court denied review.

The first time petitioners raised anything like the first question presented was in their last certiorari petition, which raised the question "[w]hether a court may abstain from exercising jurisdiction on a case by

---

[6] Having accepted respondents' comity defense, the court did not reach respondents' other defenses. Pet. 51a n.44.

case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Act claim * * * ." Pet. i (No. 16-1220). At no point in the district court, the merits phase in the court below, or (if it mattered) their first en banc petition did petitioners advance that theory. Nowhere did they suggest that case-by-case comity dismissals conflicted with precedent or otherwise challenge *Timberlane*. Rather, they answered respondents' comity defense by defending the district court's "express[] consider[ation] [of] the *Timberlane* factors" and its "conclu[sion] that they do not support abstention unless the government of China actually compelled the alleged conduct." C.A. Br. 46 (Dkt. 174).

Not surprisingly, the appellate court ruled on that basis. It stated that "[t]he central issue" was "whether principles of international comity required the district court to dismiss the suit," and it resolved that issue by "apply[ing] the multi-factor balancing test" of "*Timberlane*" and "*Mannington Mills*." Pet. 11a, 15a (No. 16-1220). The court held "that Chinese law required Defendants to violate U.S. antitrust law," and that the other comity factors "decidedly" supported dismissal. *Id.* at 33a-34a. Petitioners sought rehearing, but never challenged *Timberlane* (C.A. Pet. for Reh'g En Banc (Dkt. 255)), which by definition calls for case-by-case analysis.

When petitioners sought certiorari, respondents observed that petitioners had "waived their argument that international comity abstention should not apply on a case-by-case basis" by "fail[ing] to raise it at any stage." Opp. 27 (No. 16-1220); see *ibid.* (petitioners "have never argued (until now) that the multifactor test outlined in *Timberlane* and *Mannington Mills* can no longer be applied to abstain on a case-by-case

basis"); *id.* at i ("Petitioners did not raise [this question] below"). Petitioners themselves conceded that the question was "not squarely presented and litigated below." Reply to Br. in Opp. 13 (No. 16-1220).

The government opposed review on the comity question—both because "[p]etitioners did not raise that argument below" and because the holding "that comity-based dismissals are sometimes permissible does not conflict with any decision of this Court or another court of appeals." U.S. Invitation Br. 17. As to forfeiture, the government elaborated:

> As petitioners acknowledge (Reply Br. 13), they did not argue below that comity-based dismissals are categorically impermissible, and the court of appeals therefore did not consider that argument. This Court's 'traditional rule * * * precludes a grant of certiorari' where, as here, '"the question presented was not pressed or passed on below."' *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioners identify no sound reason to depart from that rule here.

Id. at 22.

The government was right. Petitioners' last certiorari petition "presented the [comity] question," but it "was not raised in the Court of Appeals" and thus was "not properly before [this Court]." *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); see *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (collecting cases); *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001). Not surprisingly, the Court declined to review it.

B. Petitioners again failed to raise their first question on remand, and the court below again did not address it.

This Court did take up the Rule 44.1 question, holding that federal courts should give only "respectful consideration" to foreign states' official positions on their laws, and remanding for application of the new rule. 138 S. Ct. at 1869. But even on remand, petitioners never challenged case-by-case comity dismissals. Nor did the court below mention, much less decide, that issue.

Instead, petitioners argued there was no true conflict between U.S. and foreign law, and that "[e]ven if the Court finds a true conflict does exist, or that comity abstention may be appropriate absent a true conflict, the remaining *Timberlane* comity factors do not support comity abstention in this case." C.A. Supp. Letter Br. (Dkt. 294); see *ibid.* ("the *Timberlane* factors weigh against abstention"). As before, petitioners accepted *Timberlane*, never suggesting that it conflicted with this Court's precedents.

The court below thus again identified "[t]he central issue" as "whether the district court should have dismissed this antitrust action for reasons of international comity," and again analyzed that question under *Timberlane*'s "multi–factor balancing test." Pet. 10a, 14a. Giving "careful consideration" to the Ministry's position, the court held that "defendants were required to engage in price-fixing"—"it was impossible for them to 'comply with the laws of both' countries." Pet. 44a (quoting *Hartford Fire*, 509 U.S. at 799). It added that its "prior opinion * * * consider[ed] the 'remaining factors in the comity balancing test' even after concluding that a true conflict existed.

The Supreme Court did not disturb this portion of our decision, and we maintain that approach here." Pet. 15a n.11 (citation omitted)).

Petitioners make much (Pet. 1-2, 21) of the court's observation that, while *Hartford Fire* labeled dismissals of antitrust claims on comity grounds as "abstention," *Empagran*, tracking Justice Scalia's *Hartford Fire* dissent, viewed them as a matter of "prescriptive comity"—prompting the court below to do the same. Pet. 11a n.8. But petitioners cannot explain why this matters to this case's resolution or certworthiness. The court's terminology did not affect its substantive analysis: at both sides' urging, both decisions applied *Timberlane*.

Specifically, the court's first opinion stated: "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*." Pet. 14a-15a (No. 16-1220). Likewise, the court's second opinion stated: "To determine whether international comity principles require dismissal of a lawsuit, we apply a multi-factor balancing test as set forth * * * in *Timberlane*" and "*Mannington Mills*." Pet. 13a. Thus, this is a case where, however labeled, the doctrines "demand similar analysis." Pet. 11a n.8. In any event, petitioners never objected—before either merits panel—to *Timberlane*'s case-by-case framework, and the court below never considered a challenge to that framework.

Only in an en banc petition filed after the court's second decision did petitioners argue—for the first time—that *Timberlane*'s "case-by-case" framework conflicts with this Court's decisions. C.A. Pet. for

Reh'g En Banc 1-2, 7-8 (Dkt. 340). But the full court unanimously denied review.

In sum, petitioners failed to raise their first question presented at every merits stage below—before and after this Court's Rule 44.1 ruling—and neither court below addressed it. This Court's "traditional practice" is "to decline to review claims raised for the first time on rehearing." *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (mem.) (O'Connor, J., concurring in denial of certiorari). In sum, this is an unsuitable vehicle for answering the first question presented. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (the Court is one "of review, not first view"); accord *Empagran*, 542 U.S. at 175.

II. Beyond petitioners' forfeiture, review should be denied on the first question presented.

Even apart from petitioners' forfeiture, this Court should deny certiorari on the first question presented. That question (like the second) badly mischaracterizes the decision below—which does not require "reinterpret[ing] the substantive scope of the Sherman Act in every case." Pet. 2. Nor does the decision conflict with the precedent of other circuits or this Court. Rather, it correctly applies longstanding comity principles known to Congress when it adopted the Sherman Act and preserved when it adopted the FTAIA.

A. The petition mischaracterizes the ruling below as "reinterpreting the text" of the Sherman Act on a case-by-case basis.

Contrary to petitioners' claims, the decision below does not invite courts to "reinterpret the same text" of the Sherman Act to mean something different in every case involving foreign conduct. Pet. i. It simply applies the Act's settled meaning to the particular

facts established on this record. The Act's *meaning* does not change from case to case—only its *application*. The court below charted no new territory in holding it inapplicable in this case of true conflict between foreign and U.S. law. Pet. 12a n.8; see *Charming Betsy,* 6 U.S. at 118;

B. The decision below does not conflict with any decision of any circuit or this Court.

Petitioners' alleged circuit split (Pet. 24-26) is entirely unfounded. None of the allegedly conflicting cases involves a true conflict with foreign law; none mentions *Timberlane*, let alone holds that its case-by-case framework is wrong; and none addresses, much less accepts, the idea that "there is no justification" for "case-by-case" dismissals on comity grounds. Pet. 22. Indeed, most of petitioners' cases are not antitrust cases, others involve criminal prosecution, and many affirmatively support the decision below.

1. The court below narrowly held that, where it is impossible for foreign defendants to satisfy both U.S. and foreign law, longstanding international comity principles require courts to consider dismissal. Pet. 12a (quoting *Empagran*, 542 U.S. at 164).

Petitioners cite no antitrust case involving an actual conflict between U.S. and foreign law—and thus no case that conflicts with the decision below. See *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538-539 (8th Cir. 2007); *Empagran S.A.* v. *F. Hoffmann-Laroche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005); *In re DRAM Antitrust Litig.*, 546 F.3d 981, 987 (9th Cir. 2008); *Minn-Chem, Inc.* v. *Agrium, Inc.*, 683 F.3d 845, 858 (7th Cir. 2012) (en banc). The word "conflict" does not even appear in these cases, three of which *dismissed* antitrust claims for alleging foreign

harm not proximately caused by domestic activity. *Monosodium Glutamate*, 477 F.3d at 538-539; *Empagran*, 417 F.3d at 1271; *DRAM*, 546 F.3d at 987. As the government has noted, moreover, *Monosodium Glutamate* and *Empagran* "did not address any case-specific comity arguments, much less hold that such arguments are categorically foreclosed." U.S. Invitation Br. 22 (No. 16-1220). So too with *Minn-Chem* (683 F.3d at 858) as well as *DRAM*, which, in dismissing the claims there, expressly recognized that U.S. law could create a "risk of interference with a foreign nation's ability to regulate its commercial affairs." 546 F.3d at 987 & n.8.

Granted, petitioners say this case involves no "true conflict" either. Pet. 30-31. But that conclusion cannot be squared with the decision below or the record. *Supra* at 6-11; 14-16. And even if it could, petitioners' disagreement would raise only case-specific issues beyond the scope of the question presented and lacking any national importance.

2. Petitioners' other decisions (Pet. 25-26) are criminal cases, do not involve antitrust, or both.

For example, petitioners' first case—*United States* v. *Leija-Sanchez*—is "not an antitrust case"; it involved a federal murder prosecution under a violent crimes law with some elements completed outside the United States, but where "*all* of the conduct ascribed to [the defendant]" was domestic. 602 F.3d 797, 801 (7th Cir. 2010). There was no conflict with foreign law, as "murder [is] forbidden by U.S." and "Mexican law." *Id.* at 799. Not surprisingly, the court nowhere addressed whether dismissing civil antitrust cases on comity grounds is categorically impermissible, and the court's passing reference to *Empagran* is irrele-

vant to the question presented. *Id.* at 798 ("criminal statutes are applied differently").

Citing *United States* v. *Nippon Paper Industries*, 109 F.3d 1, 8 (1st Cir. 1997)—a pre-*Empagran* criminal case—petitioners say courts may not "tease an ambiguity out of Section One relative to its extraterritorial application." Pet. 25-26. But that was why "the rule of lenity" was inapplicable. 109 F.3d at 8. The *Nippon* court's discussion of comity read *Hartford Fire* as limiting dismissal to "those few cases in which the law of the foreign sovereign require[s] a defendant to act in a manner incompatible with the Sherman Act" or "full compliance with both statutory schemes [is] impossible" (*ibid.*)—*i.e.*, just as the court below read it. But the conduct there violated "both Japanese and American laws." *Ibid.*[7]

3. Nor does the decision below conflict with this Court's precedents. Petitioners invoke *Empagran*'s refusal to allow for "case by case" comity-based exceptions to the FTAIA's "exclu[sion of] independent foreign injury cases across the board." 542 U.S. at 168. But *Empagran* is the opposite of this case. The plaintiffs there invoked comity as a sword, to overcome the

---

[7] Petitioners cite *In re Sealed Case*, 932 F.3d 915 (D.C. Cir. 2019), where the government itself sought to enforce a subpoena implicating national security concerns involving North Korea's nuclear weapons efforts, in contending that the court below should have used "an abuse-of-discretion standard." Pet. 36-37. But foreign law rulings are reviewed "*de novo*" (*Animal Science*, 118 S. Ct. at 1868), and neither question presented raises the standard of review. Respondents, moreover, have never argued that comity dismissals are appropriate *in a government case*.

absence of extraterritorial jurisdiction over claims arising from foreign sales to foreign buyers—which "alone g[ave] rise to" liability. *Id.* at 166.

The Court deemed it "too complex" to allow extraterritorial jurisdiction to be *expanded* "case by case" (*id.* at 168), but it did not "purport to * * * bar courts from invoking comity principles" where jurisdiction exists. U.S. Invitation Br. 21. Indeed, it "caution[ed] courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws [and] thereby help[] the potentially conflicting laws of different nations work together in harmony" (542 U.S. at 164)—which is what the court below did. Furthermore, the Court called *Timberlane* "a leading contemporaneous lower court case," citing with approval not only Justice Scalia's *Hartford Fire* dissent, but the cases on which he principally relied. *Id.* at 173, 164; cf. *Hartford Fire*, 509 U.S. at 814-821. Those are odd ways to reject case-by-case comity dismissals, especially where U.S. and foreign law conflict.

4. *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), and *RJR Nabisco, Inc.* v. *European Community*, 579 U.S. 325 (2016), are non-antitrust cases addressing the presumption against extraterritoriality, not international comity. 579 U.S. at 347 n.9. Comity is an independent doctrine, and what little *Morrison* and *RJR Nabisco* say about comity supports its continued vitality.

Morrison held that § 10(b) of the Securities Exchange Act did not overcome the presumption against extraterritoriality. The Court reminded lower courts "that silence means no extraterritorial application," explaining: "Rather than guess anew in each case, we

apply the presumption in all cases, preserving a stable background against which Congress can legislate" predictably. 561 U.S. at 261. The Court's opinion (per Scalia, J.) mentioned *comity* only later. In answering the government's contention that its reading was "in accord with prevailing notions of international comity," the Court explained: "If so, that proves that if the United States asserted prescriptive jurisdiction pursuant to [its reading] it would not violate customary international law; but it in no way tends to prove that that is what Congress has done." *Id*. at 272. In other words, whether Congress legislated extraterritorially is distinct from whether extraterritorial application would violate "customary international law"—the comity question. *Ibid*.; cf. *Hartford Fire*, 509 U.S. at 815 (Scalia, J., dissenting).

Petitioner's invocation of *RJR Nabisco* has it precisely backwards. *RJR Nabisco* held that RICO does not apply extraterritorially, and (like *Empagran*) explicitly declined to make "case-by-case" jurisdictional exceptions based on "the consent of the affected sovereign." 579 U.S. at 349. Indeed, it distinguished the presumption against extraterritoriality from "the related rule that we construe statutes to avoid unreasonable interference with other nations' sovereign authority where possible." *Id*. at 347 n.9.

5. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), supports the decision below. *McCulloch* held the National Labor Relations Act inapplicable to Honduran workers on a Honduran ship, reasoning that Honduran law "prohibited [the NLRB-recognized American union] from representing the seamen on Honduran-flag ships." *Id*. at 21. Absent express indications that "the Act as written was intended to have any application to for-

eign registered vessels employing alien seamen," "such highly charged international circumstances" warranted dismissal. *Id.* at 19-20 (citing *Charming Betsy*, 6 U.S. at 118).

In sum, the Second Circuit's "conclusion that comity-based dismissals are sometimes permissible does not conflict with any decision of this Court or another court of appeals." U.S. Invitation Br. 17.

C. The decision below correctly applies settled principles of international comity.

Beyond the absence of conflicts, the court below correctly applied longstanding comity principles that were well known to Congress when it adopted the Sherman Act and were preserved by the FTAIA.

1. As the government has stated, "the comity doctrine had already been established when the Sherman Act was enacted" and "thus formed a part of the 'contemporary legal context in which Congress acted.'" U.S. Invitation Br. 18 (citation omitted). Indeed, the rule that U.S. law "ought never to be construed to violate the law of nations if any other possible construction remains" dates to 1804. *Charming Betsy*, 6 U.S. at 118.

Accordingly, the circuits have long applied comity principles to the Sherman Act's "generalized" text—which is not "clear and definitive" (*United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978)) and "cannot mean what it says" because, "read literally," it "would outlaw the entire body of private contract law." *National Soc'y of Prof. Eng'rs* v. *United States*, 435 U.S. 679, 687-688 (1978). The leading cases are *Timberlane* and *Mannington Mills*, which other circuits have followed. *Montreal Trading Ltd.* v. *Amax Inc.*, 661 F.2d 864, 869 (10th Cir. 1981) ("the analysis

set forth in *Timberlane* * * * contains the proper elements"); *Industrial Inv. Dev. Corp*. v. *Mitsui & Co.*, 671 F.2d 876, 884 & n.7 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007 (1983) ("commend[ing] th[e] analysis"); Pet. 13a-14a. In short, courts should not "read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers.'" *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (Hand., J.).

Courts therefore "have long held that courts may, in unusual circumstances, dismiss private Sherman Act claims based on principles of comity." U.S. Invitation Br. 19 (citing *Mannington Mills* and *Timberlane*). And cases involving true conflicts with foreign law apply the doctrine "narrowly." Pet. 15a n.11.

2. "Congress did not disturb those decisions when it enacted the FTAIA. To the contrary, the House Report accompanying the FTAIA cited *Timberlane* and specified that the FTAIA "'would have no effect on the courts' ability to employ notions of comity.'" U.S. Invitation Br. 18 (quoting H.R. Rep. No. 686, 97th Cong., 2d Sess. 13 (1982)); accord U.S. Br. 18 in *Hartford Fire* (Nos. 91-1111, 91-1128) ("principles of comity are properly invoked in antitrust cases even though the U.S. court has subject matter jurisdiction"; *Timberlane* "provide[s] a useful approach"). Although Congress expressed no view on the specific circumstances that would support dismissal (*Hartford Fire*, 509 U.S. at 798), it preserved *Timberlane*'s vitality. "Congress is presumed to be aware of * * * [a] judicial interpretation of a statute and to adopt that interpretation when it" legislates. *Lorillard* v. *Pons*, 434 U.S. 575, 580-583 (1978).

The Court has repeatedly applied this presumption based on the "uniform holdings of lower courts" (A. Scalia & B. Garner, Reading Law 324 (2012))—even absent explicit confirmation that Congress knew of the relevant precedent.[8] Here, legislative history "demonstrates that Congress was indeed well aware of the [relevant] standard," so the Court "need not rely on the bare force of this presumption." *Lindahl* v. *Office of Pers. Mgmt*, 470 U.S. 768, 782-783 (1985).

3. More generally, the ruling below is consistent with settled international law. *Empagran* reaffirmed both that U.S. law "ought never to be construed to violate the law of nations if any other possible construction remains," and that prescriptive comity "reflects principles of customary international law * * * that (we must assume) Congress ordinarily seeks to follow." 542 U.S. at 164 (quoting *Charming Betsy*, 6 U.S. at 118). Yet the court below, while mindful that courts should be "cautious" to avoid "'foreign policy consequences not clearly intended by the political branches'" and "the international discord that can result when U.S. law is applied'" extraterritorially, recognized its limited "institutional capacity" and the "considerable significance" of the State Department's views, where expressed. Pet. 50a-51a (quoting *Nestlé*

---

[8] See *Helsinn Healthcare S.A.* v. *Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633-634 (2019) (given "settled pre-AIA [Federal Circuit] precedent on the meaning of 'on sale,' we presume that when Congress reenacted the same language in the AIA, it adopted the earlier judicial construction"); accord *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1762 (2018); *Manhattan Props. Inc.* v. *Irving Trust Co.*, 291 U.S. 320, 336 (1934).

USA, Inc. v. *Doe*, 141 S. Ct. 1931, 1940 (2021); *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013); and *RJR Nabisco*, 136 S. Ct. at 2100). Petitioners' hyperbolic rhetoric about "judicial micromanagement of foreign policy" (Pet. 28) cannot obscure the court's measured decision.

D. The available remedies for import-related concerns and respondents' alternative grounds for decision make this case a poor vehicle to address comity doctrine.

As the government earlier explained, comity dismissals are "unusual" and "rare," and thus pose little risk to antitrust enforcement. U.S. Invitation Br. 18, 19. Moreover, if foreign law becomes a serious threat to U.S. law and the U.S. economy, there are legal, political, and diplomatic remedies.

Under the International Emergency Economic Powers Act (IEEPA), for example, the President has broad authority to ban imports or impose tariffs on foreign goods. 50 U.S.C. § 1701. Presidents of both parties have exercised this authority by (among other things) banning specific imports from specific countries. *E.g.*, Exec. Order 13348, 69 Fed. Reg. 44885 (July 22, 2004) (prohibiting importation of certain Liberian goods); Exec. Order 13651, 78 Fed. Reg. 48793 (Aug. 6, 2013) (prohibiting importation of jadeite and rubies from Burma). As the Second Circuit observed, moreover, "alternate means" of vindicating U.S. interests include "bilateral diplomatic efforts, multilateral discussions, trade proceedings in the WTO, or dispute resolution in another international forum." Pet. 53a-54a. Such legal authorities and diplomatic channels are the proper remedies for conflicts between U.S. and foreign law. This Court should de-

cline petitioners' plea for judicial recourse when Congress has chosen to respect traditional rules of international comity.

Moreover, respondents have several powerful arguments supporting the outcome below that the court below did not reach. C.A. Br. 47-62 (Dkt.175). These include: (i) the district court's exclusion of the most relevant proof of conflict, namely China's regulations and related testimony; (ii) the lack of personal jurisdiction over NCPG, which had no U.S. contacts; (iii) certification of a purchaser class despite serious conflicts among the class members, in direct conflict with *Valley Drug Co.* v. *Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181 (11th Cir. 2003); (iv) allowing the Damages Class to recover for foreign purchases, in violation of *Empagran*; (v) allowing recovery of damages outside the class definition; and (vi) rejection of respondents' foreign sovereign compulsion defense. Even if petitioners prevailed on comity, therefore, key issues would remain, prolonging the likely result of this protracted litigation still further.

III. The second "question presented" is not presented by this case.

Petitioners' second question presented rests on the premise that the court below "held" that "a court interpreting the meaning of foreign law under Federal Rule of Civil Procedure 44.1 is limited to the 'face' of written legal materials" and cannot "consider evidence as to how foreign law is implemented and enforced." Pet. i. That premise is false.

A. The court below did not hold that Rule 44.1 limits courts to the face of foreign law, but rather considered all relevant evidence of its meaning.

According to petitioners, the Second Circuit's Rule 44.1 analysis focused "entirely on foreign law, taken at face value," and thus "defied this Court's instructions" to "consider all the evidence relevant to the meaning of Chinese law." Pet. 30 (quoting Pet. 18a). Petitioners must be reading another opinion. They ignore both the quoted language's context and the myriad evidence that the court considered "in detail" in 27 pages of analysis. Pet. 21a n.17, 19a-46a.

Read in context, the court's references to the "face" of Chinese law were plainly a shorthand to distinguish the law's *requirements* from the *consequences* of noncompliance. The court "consider[ed] primarily what the state as sovereign legislates—not the severity of the penalties the state imposes." Pet. 19a. It criticized the district court's reliance on anecdotes of "spottiness of enforcement during a specific period," its "surmise that the available sanctions were not sufficiently severe," and its speculation that respondents "did not need to be compelled," concluding that the question was what Chinese law required, not "the degree of compulsion defendants faced." Pet. 28a n.25. And it sought to avoid a "false equivalency" between foreign sovereign compulsion doctrine and "true conflict analysis." Pet. 19a. Accordingly, the court would not undertake to determine how forcefully foreign law is *enforced*—a matter of foreign governments' *discretion* that is far harder for courts to discern than the *content* of foreign law. Cf. *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 493 U.S. 400, 406 (1990) (act-of-state doctrine precludes reviewing "the

effect of official action by a foreign sovereign"); *Underhill* v. *Hernandez*, 168 U.S. 250, 252-254 (1897).

If any doubt remained, it would be dispelled by the balance of the court's opinion—which looks nothing like petitioners' caricature of it. The court hewed closely to this Court's opinion, explaining that courts determining foreign law "may consider any relevant material or source," and that "[t]he Rule 44.1 materials relevant" here include evidence such as:

- "internal industry records and trial testimony describing how that regime actually functioned";
- "the Ministry's statements interpreting Chinese law"; and
- "China's representations to the [WTO] concerning its export controls on Vitamin C."

Pet. 21a n.17.

Indeed, the court discussed at length "Other Records" that "Corroborate Chinese Law's Price-Fixing Requirement." Pet. 28a-34a. It analyzed "in detail" (Pet. 21a n.17) the operative "notices" issued by the government, foundational documents of the Chamber and Subcommittee that set Vitamin C prices, "industry records," how the "system" worked "in practice," "expert" testimony, "internal" reports, and of course the "Ministry's submissions"—which received "respectful consideration," not deference. *Id*. at 22a-30a, 32a-46a. Astonishingly, petitioners never mention these passages.

The court also assessed each factor that this Court identified as relevant to assessing the Ministry's position. Pet. 34a (quoting 138 S. Ct. at 1873). It considered the submission's "clarity, thoroughness," "sup-

port," "context and purpose" (Pet. 38a-40a); the Ministry's "role and authority" (Pet. 40a-41a); the system's "transparency" (Pet. 41a-42a); and the submission's "consistency with [China's] past positions" (Pet. 42a-43a). Some factors it found "inconclusive." Pet. 41a. Others it took "with more than a grain of salt." Pet. 38a-40a. Still others it gave "considerable weight." Pet. 40a-41a. At every step, the court heeded this Court's "instruction" and "directions." Pet. 11a, 38a.

B. The petition raises factbound complaints about the Second Circuit's application of this Court's Rule 44.1 decision, which the court below meticulously followed.

Because the "error" asserted here mischaracterizes the decision below, the second "question presented" is not actually presented. At most, petitioners are quibbling about an alleged "misapplication of a properly stated rule of law"—a fact-bound question that would not warrant review even if the court below had erred. Rule 10. But it did not.

1. Petitioners identify no evidence that the court below wrongly overlooked. The closest they come is quoting *respondents'* expert, Professor Shen, who opined that Chinese law should be read in light of its "application and implementation." Pet. 31. But the court *did* consider "internal industry records and trial testimony describing how that regime actually functioned" (Pet. 21a n.17, 28a-34a), and petitioners ignore Shen's fundamental conclusion that respondents were "subject to mandatory industry coordination." SCTJA137-138.

In any event, courts have wide latitude concerning whether to consider materials in a Rule 44.1 analysis.

Petitioners' own cases involve courts reviewing only a subset of evidence presented on the meaning of foreign law. See *Sharifi* v. *United States*, 987 F.3d 1063, 1069-1070 (Fed. Cir.) (ignoring "customary law" not shown to govern Afghani property transfers), cert. denied, 142 S. Ct. 107 (2021); *Palencia* v. *Perez*, 921 F.3d 1333, 1339 (11th Cir. 2019) (ignoring "Guatemalan caselaw" as not offering "any authoritative guidance" on the Guatemalan civil law system). That petitioners disagree with the weight accorded certain evidence does not mean that the court erred, let alone that certiorari is warranted. See Fed. R. Civ. P. 44.1 advisory comm. note (1966) (courts may consider any evidence regarding, and even conduct independent investigations into, foreign law).

2. Petitioners also nitpick the court's analysis of the evidence it did cite. For example, they cite testimony from the Subcommittee's Secretary General as evidence that respondents could choose not to coordinate. Pet. 10 (citing CAJA1707-1708). But the panel reviewed that very testimony, noting that, in context, it showed the opposite: respondents were subject to a "legal mandate" to fix prices. Pet. 32a n.28 (citing CAJA1709-1710, SPA302). Likewise, petitioners cite a memorandum as proof that "Respondents' cartel behavior was voluntary." Pet. 10 (citing CAJA2173-2175). But the court simply read this "industry record[]" differently—to "strongly suggest that Chinese law * * * required price-fixing." Pet. 30a-31a (citing CAJA2173).

Petitioners point to China's statement to the WTO that it "gave up export administration of * * * Vitamin C," and to imperfect price coordination, as proof of voluntary pricing. Pet. 8, 9-10. The record flatly disagrees. *Supra* at 6-11. But regardless, the court

addressed these points. It concluded that the WTO statements neither contradicted the Ministry's interpretation nor undermined the conclusion that price-fixing was required. Pet. 42a-43a. As to imperfect coordination, it stated: "the instructions were clear: the Chinese government expected the defendants to agree on a profit-maximizing market price." Pet. 33a.

The record confirms that petitioners' factual complaints are unfounded. But even if there were room for debate, review would not be warranted. In letter and spirit, the Second Circuit faithfully followed this Court's decision. Petitioners simply dislike the result.

IV. The Solicitor General has already presented the United States' views on this case, and there is no need for repetition.

Petitioners' last gasp is asking the Court to ask for the Solicitor General's views. Pet. 29. But no development since the government's last invitation brief undermines its powerful reasons why review should be denied on the comity question.

First, it is equally true now that petitioners "did not argue below that comity-based dismissals are categorically impermissible, and the court of appeals therefore did not consider that argument." U.S. Invitation Br. 22; *supra* at 14-16. Second, it is equally true now that the Second Circuit's "conclusion that comity-based dismissals are sometimes permissible does not conflict with any decision of this Court or another court of appeals." U.S. Invitation Br. 17. Indeed, petitioners' conflict argument (Pet. 21-29) cites *no* decision postdating the last round of certiorari briefing. Third, as the government explained, Congress specifically preserved the *Timberlane* framework when it adopted the FTAIA (U.S. Invitation Br.

19), and the court below faithfully applied that framework.

As to the Rule 44.1 question, the court below followed this Court's decision to the letter. It expressly considered the very "evidence as to how foreign law is implemented" (Pet. i.) that petitioners baldly say it ignored. *Supra* at 32-36.

Nothing that the government might say in an invitation brief could change those facts. It is time for this 15-year-old case to end.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted.

STEFFEN N. JOHNSON
MICHAEL W. MCCONNELL
SCOTT A. SHER
CONOR D. TUCKER
Wilson Sonsini Goodrich & Rosati, P.C.
1700 K Street, NW
Washington, DC 20006
(202) 973-8800

JONATHAN M. JACOBSON
Counsel of Record
Wilson Sonsini Goodrich & Rosati, P.C.
1301 Ave. of the Americas
New York, NY 10019
(212) 999–5800
jjacobson@wsgr.com

Counsel for Respondents

JUNE 2022