No. 21-1283

In the Supreme Court of the United States

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

Petitioners,

v.

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

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

REPLY BRIEF FOR THE PETITIONERS

WILLIAM A. ISAACSON
PAUL, WEISS, RIFKIND,
WHARTON
& GARRISON LLP
2001 K Street, NW
Washington, DC 20006
(202) 223-7313

MICHAEL J. GOTTLIEB
Counsel of Record
AARON E. NATHAN
WILLKIE FARR &
GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006
(202) 303-1442
mgottlieb@willkie.com

(Additional Counsel on Inside Cover)

MICHAEL D. HAUSFELD
BRIAN A. RATNER
MELINDA R. COOLIDGE
HAUSFELD LLP
888 16th Street, NW
Washington, DC 20006
(202) 540-7200

BRENT W. LANDAU
HAUSFELD LLP
325 Chestnut Street
Philadelphia, PA 19106
(215) 985-3273

JAMES T. SOUTHWICK
SHAWN L. RAYMOND
SUSMAN GODFREY LLP
1000 Louisiana Street,
Suite 5100
Houston, TX 77002
(713) 651-9366

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INTRODUCTION

Under the decision below, the Sherman Act has no fixed meaning. The Act's text is irrelevant. All that matters in a given case is how a single judge decides to balance a judicially-invented list of policy-laden factors designed to guess how Congress might have applied the statute to that case. Next time might be different: if the factors change, or the judges do, a different balance will readily yield a different statutory interpretation. That approach is wrong, and conflicts with the decisions of several circuits and this Court.

Respondents oppose certiorari on multiple unpersuasive grounds. First, they assert that Petitioners failed to preserve their challenge to the Second Circuit's case-by-case approach to Sherman Act interpretation. But the panel majority was clear that its decision rested on a statutory-interpretation doctrine "distinct" from the abstention defense that Respondents pressed for years below. Petitioners challenged the panel's *sua sponte* holding at their first opportunity. Thus, there is no obstacle to review in this Court.

Respondents attempt to minimize the conflict introduced by the decision below by arguing that, if other circuits disagreed with the Second Circuit, it was in a criminal case, or in a non-antitrust case, or in a case where the defendants ultimately escaped liability. To the extent Respondents explain why those distinctions should matter, they miss the central point. Applying the prescriptive-comity canon to ambiguous statutory language demands, first, an actual textual ambiguity, and second, an across-the-

board interpretive result that will govern future cases. The panel majority's atextual, *ad hoc* balancing approach conflicts with the consensus among the circuits about how to apply the canon of prescriptive comity to federal statutes, whether they concern criminal, antitrust, or other matters. Deepening the majority's error, this Court has already held that the Sherman Act is consistent with prescriptive comity to the extent it applies to foreign conduct that caused domestic injury. The decision below improperly reopens that question, and departs from this Court's precedents by authorizing courts, rather than Congress, to exercise prescriptive jurisdiction.

The Court should also review the Second Circuit's "face value" limit on Rule 44.1 interpretations of foreign law. Respondents' only objection to review of that question is that, in Respondents' view, the Second Circuit applied its own rule imperfectly in this case. But the Second Circuit's holding could not have been clearer: in assessing whether foreign law conflicts with U.S. law, a court's Rule 44.1 inquiry must pay "[e]xclusive attention to what foreign law facially requires." Pet.App.18a. That rule conflicts with the established practice among the other circuits, and will lead to erroneous Rule 44.1 determinations whenever—as here—a foreign legal system requires consideration of materials beyond "what foreign law facially requires." *Id.*

ARGUMENT

I. The Court Should Review the Circuits' Conflicting Approaches to Prescriptive Comity.

1. Respondents incorrectly contend that Petitioners forfeited their challenge to the Second Circuit's newly announced doctrine of case-by-case Sherman Act interpretation. Opp.16–21. Petitioners' first opportunity to address the Second Circuit's holding that the doctrine of "prescriptive comity" authorizes case-by-case reinterpretation of the Sherman Act did not arise until the decision below, in which the panel majority substituted its prescriptive-comity holding for the abstention framework that Respondents had pressed throughout this case.

Throughout fifteen years of litigation, Respondents' sole "international comity" defense sought comity-based *abstention*, asking the courts below to decline to exercise valid Sherman Act jurisdiction, without ever disputing the Sherman Act's settled substantive application to foreign conduct that causes harm in the United States. Pet.11–12, 13, 15; *see* Brief in Opposition at 11–12, *Animal Sci. Prods. v. Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865 (2018) (No. 16-1220), 2017 WL 2472071 (Respondents "moved to dismiss principally under Rule 12(b)(1)" as a matter of "international comity abstention"). The 2016 panel adjudicated Respondents' comity defense on that understanding, *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 194 (2d Cir. 2016), and Respondents asked for the same result under the same abstention framework on remand, Pet.16–17.

The decision below was *not* based on an abstention framework, but on a "dis[tinct] legal doctrine" of "prescriptive comity," which requires courts to interpret ambiguous statutes in light of customary international law. Pet.App.12a n.8. The panel majority expressly distinguished its holding from the comity-abstention doctrine Respondents pressed, explaining that these "dis[tinct] legal doctrines" each "ask a different question and" are based upon "a different legal theory." *Id.*

Moreover, the majority's recharacterization of Respondents' defense has practical doctrinal consequences that were outcome-determinative in this case. A court engaged in the practice of case-by-case Sherman Act reinterpretation must attempt to discern the statute's meaning without a thumb on the scale: the only question is what Congress would have wanted the Sherman Act to mean had it envisioned the precise balance of policy considerations before the court. As a matter of statutory interpretation, the result of any such analysis is then reviewable *de novo*, again without a thumb on the scale for or against the decision below.

By contrast, the comity abstention defense that Respondents actually raised must clear a much higher bar. A court's discretion to *abstain* is "narrowed by the federal court's obligation to exercise its jurisdiction in all but the most extraordinary cases." *Hachamovitch v. DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998). As is well established, federal courts "ordinarily" have an "obligation[] to decide cases and controversies properly presented to them," in antitrust cases just as in other areas of law. *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990).

Comity-based abstention is therefore appropriate, if ever, only in "rare" and "extraordinary circumstances," "because Congress unambiguously intended the Sherman Act to reach foreign conduct and because federal courts 'have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.'" Br. for U.S. as Amicus Curiae at 19, *Animal Sci. Prods.*, 138 S. Ct. 1865 (No. 16-1220), 2017 WL 5479477 (quoting *W.S. Kirkpatrick*, 493 U.S. at 409).

The panel majority made no finding of "extraordinary circumstances." Nor did it even mention the federal courts' "strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, (1996). Judge Wesley cited those aspects of the comity-based abstention framework as reasons why he would have affirmed the judgment. Pet.App.62a–63a. Combined with the loosened standard of review that applies to questions of statutory interpretation, *see* Pet.36–37 & n.2, the panel majority's *sua sponte* shift from Respondents' abstention framework had serious practical consequences for this case, as it will in many others unless this Court intervenes.

This Court's general disinclination to review issues raised for the first time on rehearing, Opp.21, does not apply here, because this "distinct" question was not part of the litigation until the panel majority's opinion. This Court's "traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below," a rule that "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *United States v. Williams*, 504

U.S. 36, 41 (1992) (cleaned up). Because the panel majority introduced and adjudicated the question presented, Pet.18–20, there is no barrier to this Court's review. *Williams*, 504 U.S. at 41; *see Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices . . . that the court below passed on the issue presented, particularly where the issue is . . . in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." (cleaned up)).

2. Respondents' substantive arguments fare no better. Whatever the merits of a case-by-case antitrust *abstention* doctrine, that is not what the panel majority applied here. Instead, the panel majority could not have been clearer that it was applying the doctrine of prescriptive comity to interpret the substantive scope of the Sherman Act, Pet.App.11a–12a n.8, not applying "the Act's settled meaning to the particular facts established on this record," Opp.21–22. Rather than interpret text or structure, the majority "balanc[ed] the United States' interest in adjudicating antitrust violations alleged to have harmed those within its jurisdiction with the PRC's interest in regulating its economy within its borders." Pet.App.11a. After "[b]alancing [six] factors" in that quintessentially legislative exercise, the majority expressly "decline[d] to construe U.S. antitrust law as reaching [Respondents'] conduct in the circumstances presented here." Pet.App.51a–52a. That is a far cry from the abstention doctrine this Court discussed in *Hartford Fire*. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993). Respondents understand this difference, having urged

dismissal under Rule 12(b)(1) as a matter of discretionary "comity abstention." *Supra*, at 3.

There is nothing "settled" about the panel's case-by-case approach to prescriptive comity *or* to statutory interpretation, Opp.27. As set forth in the petition, the overwhelming majority of authority conflicts with the Second Circuit's case-by-case statutory interpretation method both as a general approach to prescriptive comity and in the specific case of the Sherman Act.

Following *Hartford Fire* and *Empagran*, the First and Seventh Circuits have held that those cases definitively resolve whether the Sherman Act's application to foreign conduct with a substantial domestic effect is consistent with prescriptive comity. Pet.25–26. And to the extent other aspects of the U.S. antitrust laws remain ambiguous, at least three circuits have followed *Empagran* to generate an "across-the-board" interpretation. Pet.26. That is because ambiguity is not a license, much less a delegation of authority, to "guess anew in each case," attempting to "divin[e] what Congress would have wanted if it had thought of the situation before the court." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 261 (2010).

Notably, in *Morrison* this Court abrogated a case-by-case balancing exercise that the Second Circuit had long employed to assess the application of § 10(b) to foreign conduct. *Id.* at 255–56 ("the Second Circuit believed that . . . it was left to the court to 'discern' whether Congress would have wanted the statute to apply," leading to "a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application" (citation omitted)). While extraterritoriality and

prescriptive comity may be "distinct" questions, Opp.26, "considerations relevant to one . . . are often relevant to the other," *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 347 n.9 (2016), and extraterritoriality often (as here) derives from and depends upon prescriptive comity considerations, *see United States v. Alcoa*, 148 F.2d 416, 443 (2d Cir. 1945) (construing the Sherman Act's extraterritorial application in light of prescriptive comity principles). And this Court has explained that once the presumption against extraterritoriality is overcome—as it is here, *Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting)—the statute's "scope . . . turns on the limits Congress has (or has not) imposed on the statute's foreign application"; "barring some other limitation" in the statute, courts need not "determine which transnational [violations] it applied to; it would apply to all of them." *RJR*, 579 U.S. at 337–38 (cleaned up)

Whether or not "comity-based dismissals are sometimes permissible," Opp.27, the Second Circuit's method of *case-by-case statutory interpretation* has thus opened a serious conflict with decisions of its sister circuits and this Court. The Second Circuit is wrong, and the other circuits are right: This Court has definitively resolved the extent to which Congress exercised its prescriptive jurisdiction under the statutory provisions relevant to this case. Pet.21–24. Even in the face of "potentially conflicting laws"—with which "America's antitrust laws" may well "interfere"—"application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a

legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164–65 (2004).

Respondents' cookie-cutter arguments attempting to undermine this split ignore that the decision below, on remand from a unanimous reversal by this Court, refashioned antitrust law to re-impose effectively the same result it had reached before. Further percolation in that context will yield only confusion, wasted judicial resources, and the erosion of this Court's authority. In any event, the conflict itself is worthy of review. The First Circuit has recognized that this Court's precedents "foreclose[]" any finding of "ambiguity . . . relative to [the Sherman Act's] extraterritorial application," *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997), a necessary prerequisite to application of the prescriptive-comity canon, *Empagran*, 542 U.S. at 164, and rejected consideration of "the existence and meaning of foreign law" in assessing the "scope of Congressional intent and power to create jurisdiction" under an analogous federal statute, *McBee v. Delica Co.*, 417 F.3d 107, 121 (1st Cir. 2005).[1] Similarly, the Seventh Circuit expressly relied on *Empagran*'s "principle . . . that the United States may redress

[1] This Court recently called for the Solicitor General's views in a Lanham Act case involving parallel, conflicting tests for extraterritoriality. *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, No. 21-1043 (U.S. May 2, 2022). As here, those tests run the gamut from case-by-case *Timberlane* balancing to a categorical, antitrust-derived "substantial effects" test that does not consider conflicts with foreign law. *Hetronic Int'l, Inc. v. Hetronic Germany GmbH*, 10 F.4th 1016, 1034–38 (10th Cir. 2021). A CVSG would be equally appropriate here.

effects in this nation of conduct abroad" in reaching its conclusion that such applications of the Sherman Act "adequately avoid[] unnecessary interference with other nations' laws." *United States v. Leijia-Sanchez*, 602 F.3d 797, 801 (7th Cir. 2010).

Respondents repeat the truism that the Sherman Act is composed of general words requiring judicial construction, Opp.27–28, but that was the *premise* for this Court's categorical interpretation of the Act in light of prescriptive comity, not its conclusion, under which the Act applies categorically to foreign conduct with a substantial effect on U.S. commerce. Pet.21–24. Meanwhile, Respondents cite the *Empagran* Court's reliance on a different aspect of *Timberlane*, Opp.25, as evidence that *Empagran* actually favored case-by-case statutory interpretation *sub silentio* while rejecting it out loud. 542 U.S. at 173. The panel majority's arrogation of *ad hoc* authority to continuously revisit the Sherman Act's meaning based upon shifting policy considerations cannot be reconciled with this Court's decisions.

II. The Court Should Review the Second Circuit's Face-Value-Only Rule for Interpreting Foreign Law.

Contrary to Respondents' assertions, the second question is also squarely presented: the panel majority's holding could not have been clearer that in assessing whether foreign law conflicts with U.S. law, a court's Rule 44.1 inquiry must pay "[e]xclusive attention to what foreign law facially requires." Pet.App.18a.

Respondents argue that the Second Circuit cannot have meant what it said because it also discussed evidence beyond the face of China's written legal materials in its opinion. Opp.32–34. But the majority maintained a clear distinction between the written legal materials, which it described as conclusively establishing what "Chinese Law Facially Required," Pet.App.21a–28a, and other evidence discussed in the *dicta* that followed, Pet.App.28a–34a. At each turn, the "face value" of the written legal materials controlled. The majority's "face value" interpretation was sufficient to reject the district court's "opposite conclusion" as to Chinese law, which it based on evidence of oral communications and practice. Pet.App.28a n.25. It was also sufficient, in the majority's view, to rebut the dissent's conclusion that Respondents *could* have complied with Chinese law by independently setting prices above the minimum. Pet.App.32a. According to the majority, that could not have been so, because of the conclusion that it had reached by relying solely on the "face value" of the written legal materials: that "Chinese law further required [Respondents] to coordinate—that is, to fix—market prices" as well as minimum prices. Pet.App.31a; *see* Pet.App.27a–28a (reaching that conclusion as a matter of the "face value" of the written legal materials). Under the decision below, the face value of written foreign legal materials controls, regardless of evidence outside the four corners of those documents. That rule will lead to erroneous results wherever, as here, the meaning of foreign law cannot be determined by resort to those written materials alone. Pet.31–33.

III. This Case Is an Excellent Vehicle.

The questions presented were essential to the decision below. Respondents run through a checklist of supposedly "powerful" alternative arguments, Opp.31, but each is meritless for reasons Petitioners explained below. For its part, the panel majority saw fit to address only two.

First, the majority properly rejected Respondents' act of state defense, observing that "the factual predicate for application of the act of state doctrine does not exist here because nothing in the present suit requires the Court to declare invalid . . . the official act of a foreign sovereign." Pet.App.52a n.44 (cleaned up) (citing *W.S. Kirkpatrick*, 493 at 405).

Second, the panel majority commented that it "might be inclined to the view that Chinese law compelled at least part of [Respondents'] anticompetitive conduct with sufficient coercive force to trigger" the foreign sovereign compulsion doctrine. Pet.App.52a n.44. But that *dicta* ignored the jury's finding in a special verdict that Respondents had failed to prove that the Chinese Government had "actually compelled" their conduct, much less with coercive force. Pet.14–15. To overturn that verdict, Respondents would have to carry a "particularly heavy" burden to show a "complete absence of evidence supporting" it, something they have never seriously attempted. *Cash v. Cnty. of Erie*, 654 F.3d 324, 333 (2d Cir. 2011) (cleaned up). Even then, the majority limited its comments to "part" of Respondents' conduct, Pet.App.52a n.44, meaning that Respondents would be entitled at most to a recalculation of damages, Pet.App.63a n.51.

CONCLUSION

The petition should be granted.

Respectfully submitted.

WILLIAM A. ISAACSON
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, NW
Washington, DC 20006
(202) 223-7313

JAMES T. SOUTHWICK
SHAWN L. RAYMOND
SUSMAN GODFREY LLP
1000 Louisiana Street, Suite 5100
Houston, TX 77002
(713) 651-9366

MICHAEL J. GOTTLIEB
Counsel of Record
AARON E. NATHAN
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006
(202) 303-1000
mgottlieb@willkie.com

MICHAEL D. HAUSFELD
BRIAN A. RATNER
MELINDA R. COOLIDGE
HAUSFELD LLP
888 16th Street, NW
Washington, DC 20006
(202) 540-7200

BRENT W. LANDAU
HAUSFELD LLP
325 Chestnut Street
Philadelphia, PA 19106
(215) 985-3273

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