No. 16-1220

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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR DIVIDED ARGUMENT

Pursuant to Supreme Court Rules 21, 28.4, and 28.7, Respondents Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corp. and *Amicus Curiae* the Ministry of Commerce of the People's Republic of China (MOFCOM) respectfully move that oral argument on behalf of respondents be divided and that counsel for MOFCOM be allowed 15 minutes of argument time. MOFCOM will submit an *amicus* brief supporting respondents and seeks to present oral argument on issues of significant importance to the People's Republic of China, as it did in the court of appeals. Respondents support this motion and have agreed to cede 15 minutes of argument time to MOFCOM's counsel. Accordingly, no enlargement of the time allotted for this case would be required.

MOFCOM is no ordinary *amicus*. It is a component of the central Chinese government and the highest administrative authority in China authorized to regu-

late trade between Chinese exporters and other countries. It formulates strategies, guidelines, and policies concerning domestic and foreign trade and international cooperation; drafts, enforces, and interprets trade laws and regulations; and regulates markets. MOFCOM's conduct, moreover, is at issue in this case in two respects. The core question below was whether MOFCOM's regulations required defendants to engage in conduct inconsistent with the Sherman Act, and the sole question on review here is whether the court of appeals properly deferred to MOFCOM's explanation of the meaning and effect of China's trade laws, as submitted directly to the lower courts through *amicus* submissions. MOFCOM thus has an unusually direct and significant interest in the resolution of this case, and has an unique ability to assist the Court in resolving the consideration of the question presented.

1. This case arises from a multi-district class action alleging that Respondents, Vitamin C manufacturers operating and incorporated in China, conspired to fix the price and supply of vitamin C sold on the international market in violation of the Sherman Act. Pet. App. 2a. Respondents did not dispute that they entered into price- and supply-fixing arrangements, but argued that those agreements were compelled by Chinese law and therefore dismissal was required on the grounds of (inter alia) international comity. Cf. *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764 (1993).

In an effort to assist the district court in determining what Chinese law required defendants to do, MOFCOM filed an *amicus* brief in 2006 in the district court, explaining the regulatory regime governing Vitamin C production and ex-

ports in China and setting forth the Chinese government's authoritative interpretation of Chinese law. MOFCOM reaffirmed its position in supplemental statements made to that court in 2008 and 2009, and in a second *amicus* brief submitted to the court of appeals in 2014. MOFCOM also participated in oral argument in the Second Circuit. As both courts below observed, this was "historic." Pet. App. 6a. Never before had "any entity of the Chinese Government … appeared *amicus curiae* before any U.S. court." *Id*. n.5.

The district court, however, rejected MOFCOM's explanation of Chinese law, accused the Chinese Government of submitting "a post-hoc attempt to shield defendants' conduct from antitrust scrutiny" rather than "a frank and straightforward explanation of Chinese law," Pet. App. 120–21a, and devised its own interpretation, ostensibly based on the "plain language" of translated Chinese-language materials, that contradicted MOFCOM's interpretation. *Id.* at 97a. In sum, the district court gave no deference to MOFCOM's submission in this case.

The court of appeals reversed, holding that the district court erred in refusing to defer to MOFCOM's "reasonable" interpretation of Chinese law, and then went on to order the case dismissed on comity grounds. It explained that the district court's interpretation rested on several significant analytical errors and would have produced "nonsensical" results, Pet. App. 27a–28a, 30a–33a; that MOFCOM's explanation of the Chinese regulatory regime was clear and consistent with the underlying materials, *id.* at 27a–28a; and that the courts were therefore bound to defer to MOFCOM's reasonable explanation under *United States* v. *Pink*, 315 U.S. 203

(1942); Pet. App. 20a, 25a. This Court granted certiorari to review the degree of deference due to a foreign sovereign's reasonable explanation of its own laws, as submitted directly to the court by the foreign government. *Animal Sci. Prods., Inc.* v. *Hebei Welcome Pharm. Co.*, 138 S. Ct. 734 (2018) (mem.); see Pet. i.

2. MOFCOM's participation at oral argument will aid the Court in two significant respects.

First, MOFCOM is uniquely positioned to assist the Court in considering what weight should be accorded to MOFCOM's official interpretation of Chinese law. The Chinese Government plainly has a strong interest in the resolution of that question, both in this case and as it will impact future cases. As noted, this marks the first appearance of any Chinese Government body as an *amicus* in a U.S. court. And the district court's disrespectful rejection of MOFCOM's position prompted a formal diplomatic protest from the Chinese Embassy to the State Department, highlighting that "China has attached great importance to this case," urging the United States to support MOFCOM's position, and reiterating that MOFCOM's submissions correctly "described China's compulsory requirements concerning vitamin C exports." JA782–84.

Moreover, as an agency and representative of a foreign government, MOFCOM is ideally situated to explain to the Court the important interests that a foreign government might have in the deference question at issue. In particular, MOFCOM has direct insight into the importance of deference where, as here, the foreign legal system differs substantially from the American legal system. In such

cases, a weak or indeterminate deference rule that allows lower courts to lightly cast aside official foreign legal interpretations would not only invite error, but incentivize parties to attack the candor and motives of the foreign sovereign (as Petitioners have done throughout this case), discourage foreign sovereigns from appearing in U.S. courts, and subject private parties to conflicting legal obligations when U.S. courts adopt wrong interpretations of foreign law. MOFCOM's participation at oral argument would likely aid the Court in analyzing these significant issues, just as MOFCOM's appearance at argument assisted the Second Circuit below.

Second, MOFCOM is uniquely positioned to address the underlying question of whether MOFCOM's interpretation of Chinese law merits deference. The regulations and directives in question were issued and enforced by MOFCOM, as well as by subordinate bodies that exercised authority delegated to them by MOFCOM. Pet. App. 28a. As the record reflects, see JA142, and as MOFCOM's *amicus* brief will further illustrate, MOFCOM's interpretation of these regulations and policies carries decisive weight under Chinese law. MOFCOM can therefore assist the Court like none other in understanding the terms of art used in the Chinese regulatory regime and the consistency of MOFCOM's position in these proceedings with China's position in World Trade Organization proceedings, and otherwise in appreciating the compulsory nature of the export regime established by MOFCOM.

3. To grant MOFCOM leave to participate in oral argument would be consistent with the Court's prior practice. Just as the Court grants the Solicitor General leave to argue where the meaning of federal law is at issue in a dispute be-

tween private parties, *e.g.*, *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 51 (2017) (mem.), it should grant MOFCOM leave to appear in this case, where MOFCOM's regulations and its (and the Chinese Government's) official interpretation of those regulations are at issue. Indeed, the Court has previously granted foreign governmental bodies leave to participate in oral argument in analogous circumstances. *E.g.*, *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 541 U.S. 901 (2004) (European Commission); *Air France v. Saks*, 469 U.S. 1103 (1985) (Government of France). It should do so again here.

4. The Solicitor General has sought leave to participate in the oral argument and to divide time with Petitioners' counsel. If the Court follows its usual practice and allows the Government of the United States to argue in support of Petitioners, it should likewise hear from the Government of China in support of Respondents. Respondents and MOFCOM respectfully submit that granting divided argument on both sides, and thus allowing both directly interested sovereigns to participate, will best ensure a full and fair presentation of the issues, including the far-reaching ramifications that would follow from adopting the unprecedented approach urged by Petitioners and the Solicitor General.

Respectfully submitted,

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CERTIFICATE OF SERVICE

No. 16-1220

Animal Science Products, Inc., et al.,

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Respondents.

I, Carter G. Phillips, do hereby certify that, on this twenty-second day of March, 2018, I caused three copies and an electronic copy of the Joint Motion For Leave To Participate In Oral Argument And For Divided Argument in the foregoing case to be served by first class mail, postage prepaid, and by email, on the following parties:

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