16-1220
No. 16-

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

v.

HEBEI WELCOME
PHARMACEUTICAL CO. LTD., *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. GOTTLIEB
KAREN L. DUNN
WILLIAM A. ISAACSON
AARON E. NATHAN
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727

DAVID BOIES
Counsel of Record
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200
dboies@bsfllp.com

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether the Second Circuit, in conflict with the decisions of three courts of appeals, erred in exercising jurisdiction under 28 U.S.C. § 1291 over a pre-trial order denying a motion to dismiss following a full trial on the merits.

2. Whether a court may exercise independent review of an appearing foreign sovereign's interpretation of its domestic law (as held by the Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits), or whether a court is "bound to defer" to a foreign government's legal statement, as a matter of international comity, whenever the foreign government appears before the court (as held by the opinion below in accord with the Ninth Circuit).

3. 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.

PARTIES TO THE PROCEEDING

Petitioners are Animal Science Products, Inc. and The Ranis Company, Inc., plaintiffs-appellees in the court below.

Respondents are Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, defendants-appellants in the court below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Animal Science Products, Inc. states that it has no parent company, and no publicly-held company holds 10% or more of its shares. Petitioner The Ranis Company, Inc. states that it has no parent company, and no publicly-held company holds 10% or more of its shares.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

Table of Appendices

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Cited Authorities

Cited Authorities

STATUTES AND OTHER AUTHORITIES

Cited Authorities

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a) is reported at 837 F.3d 175. The opinion of the United States District Court for the Eastern District of New York (App. 39a) denying Respondents' renewed motion for judgment as a matter of law is unreported but available at 2013 WL 6191945. The District Court's opinion denying Respondents' motion for summary judgment (App. 54a) is reported at 810 F. Supp. 2d 522. The District Court's opinion denying Respondents' motion to dismiss (App. 157a) is reported at 584 F. Supp. 2d 546.

JURISDICTIONAL STATEMENT

The Court of Appeals entered judgment on September 20, 2016, and denied a petition for rehearing en banc on November 4, 2016 (App. 298a). On January 3, 2017, Justice Ginsburg granted an extension of time to file a petition for a writ of certiorari until April 3, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTES AND RULES INVOLVED

28 U.S.C. § 1291 provides, in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

28 U.S.C. § 1291.

The Sherman Antitrust Act, 15 U.S.C. § 1 et seq., provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1.

Rule 44.1 of the Federal Rules of Civil Procedure provides, in pertinent part:

> **Determining Foreign Law**
>
> . . . . In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Fed. R. Civ. P. 44.1.

INTRODUCTION

This case presents three important issues—two of which are the subject of circuit splits—arising from the Second Circuit's unprecedented reversal of a pre-trial order denying Respondents' motion to dismiss Petitioners' Sherman Antitrust Act complaint under the doctrine of international comity.

Petitioners represent American importers of vitamin C. Respondents are Chinese manufacturers and exporters of vitamin C. Petitioners alleged that Respondents agreed to fix prices and restrain supply in violation of the Sherman Act. There was no dispute below that Respondents' conduct violated the Sherman Act, nor was there any dispute that the Sherman Act validly applied to Respondents' foreign conduct. Instead, Respondents' raised several defenses that were all based on the claim that Chinese law had compelled their conduct. Two different district judges—one on a motion to dismiss, the second following both summary judgment and post-trial motions—found that Chinese law had *not* required Respondents' anticompetitive conduct. At trial, a jury found for Petitioners, and found in a special verdict that Respondents' conduct had been voluntary, rather than compelled.

The Second Circuit held that the District Court's failure to abstain from exercising jurisdiction in the first place was reversible error. The panel's conclusion rested solely on the fact that the Ministry of Commerce of the People's Republic of China ("the Ministry") had appeared before the court as *amicus curiae* and insisted that Chinese law had compelled Respondents to form a cartel, engage in

price fixing and limitations on supply, and thereby violate the Sherman Act. The District Court had respectfully considered the Ministry's position, but determined that it could not be reconciled with overwhelming evidence showing that Respondents and the Chinese Government had contemporaneously described the relevant conduct as voluntary and behaved accordingly. To shield the Ministry from even the slightest judicial scrutiny, the Second Circuit sidestepped the record at trial, reached back to a pre-trial order denying Respondents' motion to dismiss, and held that the District Court abused its discretion by failing to exercise its discretion to abstain under the common law doctrine of international comity.

The panel's decision rests upon two holdings in direct conflict with the law of other Circuits. Both issues warrant review in this Court.

First, the panel improperly exercised jurisdiction over an interlocutory pre-trial order denying Respondents' motion to dismiss, in tension with this Court's decision in *Ortiz* v. *Jordan*, 562 U.S. 180 (2011), and in direct conflict with the holdings of three other Circuits. In *Ortiz*, this Court held that 28 U.S.C. § 1291 does not authorize appellate jurisdiction over pre-trial orders denying summary judgment once there has been a full trial on the merits. *Id.* at 184. Instead, a litigant who seeks appellate review following a trial must preserve and raise pre-trial defenses in Fed. R. Civ. P. 50 motions for judgment as a matter of law. *Ibid.* The *Ortiz* Court did not address whether its decision similarly applies to interlocutory pre-trial motions to dismiss. However, the Sixth Circuit has held that *Ortiz* precludes appellate review of pre-trial motions after a full trial on the merits, and decisions of the Fifth and Tenth Circuits prior to *Ortiz* held the same.

The Second Circuit's decision cannot be reconciled with the rule followed in its sister circuits or the reasoning of *Ortiz* itself. By reviewing the District Court's initial pre-trial order denying Respondents' motion to dismiss based upon the pre-trial record, the panel ignored *Ortiz*'s command that the factual record developed over the course of a full trial on the merits may not be wiped away by post-trial judicial fiat. This error was not a harmless procedural mistake—because Respondents failed to preserve their international comity defense in their pre-verdict Rule 50(a) motion, there was no "final decision" over which the panel had appellate jurisdiction to review Respondents' comity defense.

Second, the panel held that the District Court abused its discretion by declining to defer to the assertion in the Ministry's amicus brief that Respondents' conduct was compelled. The panel acknowledged that the District Court had carefully and thoughtfully weighed the record evidence relating to the voluntariness of Respondents' conduct, including several statements and materials from the Ministry itself. The panel did not conclude that the District Court had erred in *how* it weighed this evidence, but instead held that the entire exercise was an abuse of discretion because the Ministry had appeared in the litigation. According to the Second Circuit, that appearance *by itself* meant that the District Court was "bound to defer" to the Ministry's interpretation. The Second Circuit's rule of deference-on-appearance aligns with that of the Ninth Circuit, and conflicts with the deference standards applied to the legal statements of foreign sovereigns in the Fifth, Sixth, Seventh, Tenth, Eleventh and D.C. Circuits. Absent clear guidance from this Court, foreign sovereigns and opposing litigants will

be left to navigate a patchwork of inconsistent federal rules, and the lower courts will lack certainty regarding the scope of their authority over foreign legal questions under Fed. R. of Civ. P. 44.1.

The Second Circuit's deference standard threatens to undermine the federal antitrust laws by issuing a "get out of jail free" card to any foreign defendant whose home government comes to its defense. A foreign government's views about whether its laws required a defendant to engage in anticompetitive conduct are certainly entitled to respect, but the measure of that respect should not require a district court to ignore all contrary evidence simply because the foreign government appears as *amicus curiae*. By requiring deference to foreign government statements at the motion-to-dismiss stage, regardless of what the record evidence shows, the panel has drawn a road-map for foreign cartels to violate U.S. law with impunity.

A final question also warrants this Court's review. The panel's decision incorrectly answered an important question that this Court left unanswered in *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764 (1993)—namely, whether the doctrine of international comity authorizes case-by-case abstention from exercising otherwise valid jurisdiction under the Sherman Act. This Court has never approved of the comity-inspired abstention doctrine on which the panel relied. To the contrary, the Court rejected as "too complex to prove workable" a similar case-by-case abstention approach to the Foreign Trade Antitrust Improvements Act (FTAIA). *F. Hoffman-La Roche Ltd.* v. *Empagran*, 542 U.S. 155, 168 (2004). Despite the reasoning of *Empagran*, the opinion below held that

the application of the antitrust laws to foreign conduct is a matter for case-by-case judicial discretion, rather than a question that Congress has answered by statute. This Court should grant certiorari to clarify that the panel's discretionary ten-factor balancing test is not a valid basis for abstaining from the exercise of federal jurisdiction.

STATEMENT OF THE CASE

Respondents are two Chinese vitamin C manufacturers and exporters who, along with several co-conspirators, "fixed prices and agreed on output restrictions" in violation of U.S. antitrust laws. App. 56a. Respondents have not disputed these facts, nor have they contested that the U.S. antitrust laws validly applied to their extraterritorial conduct. App. 6a, 14a, 56a, 163a. Instead, Respondents have claimed that they are immune from liability because Chinese law compelled their anticompetitive conduct. App. 163a.

At the motion-to-dismiss stage, the District Court declined to afford binding deference to the Ministry's interpretation of Chinese law, which was presented in the form of an unsworn amicus brief. The court's decision was informed in part by the underlying legal documents cited by the Ministry, and in part by the "plain language of the documentary evidence submitted by plaintiffs [which] directly contradicts the Ministry's position." App. 181a. The panel held that the District Court's "careful and thorough treatment of the evidence before it . . . would have been entirely appropriate" had the Chinese Government "not appeared in this litigation." App. 30a n.10. In conflict with the standards of review applied in most other circuits, however, the panel held that the Ministry's appearance

as an amicus transformed a "careful and thorough treatment" into an abuse of discretion.

1. Respondents are members of the Chamber of Commerce of Medicines and Health Products Importers and Exporters ("the Chamber") and its "Vitamin C Subcommittee." App. 56a. Like similar Chinese chambers of commerce established in the 1980s as China began its transition to a market economy, the Chamber is a private "social organization" with a mix of private and public functions. App. 58-59a.

The Ministry is China's "highest authority . . . authorized to regulate foreign trade." App. 6a. In 1997, the Ministry promulgated regulations (the "1997 Notice") setting export quotas for vitamin C, requiring licenses for the export of vitamin C, and directing the Chamber to improve its coordination on vitamin C exports. App. 62a. The 1997 Notice also required the Chamber to establish a "Vitamin C Subcommittee" and required all vitamin C exporters to participate in the Subcommittee. App. 62a. Finally, the 1997 Notice directed the Vitamin C Subcommittee to establish a minimum export price of its own choosing. App. 62a-63a. The Vitamin C Subcommittee determined that it would punish those Subcommittee members who departed from the agreed-upon price through various escalating means, the most serious of which was by revoking their Subcommittee membership and then recommending that the Ministry revoke the offending company's license to export vitamin C. App. 63a.

This export regime lasted for five years. By the end of 2001, Chinese vitamin C manufacturers and exporters had taken advantage of low domestic production costs and

"captured over 60% of the worldwide market for vitamin C," and China's "share of vitamin C imports to the United States" had reached 80%. App. 159a.

In 2001, China became a member of the World Trade Organization ("WTO"), and instituted fundamental changes to its vitamin C export regime "in order to accommodate the new situations since China's entry into WTO." App. 172a. As one of its first policy changes upon accession to the WTO, the Ministry repealed the 1997 Notice, including its requirement that along with other regulations had imposed export license and quota requirements on the vitamin C industry. App. 64a. In its place, the Ministry instituted an export regime known as Price Verification and Chop ("PVC"), in order to keep Chinese exports (including vitamin C) clear of WTO anti-dumping concerns. App. 65a-66a. In the post-2002 regime, vitamin C exports were "no longer subject to supervision and review by customs." App. 65a. Instead, the Chamber was supposed to review an export contract, ensure that it complied with applicable industry standards, and then affix a "chop"—a stamp—to the contract to signal its compliance. App. 65a. If an export contract lacked a proper "chop," Chinese customs was to forbid the goods from leaving China. App. 65a-66a. At trial it was shown that only a handful of vitamin C contracts for sales in the U.S. were subject to this procedure. App. 244a-245a.

During this transition to a new regulatory scheme for vitamin C exports, Respondents and several other vitamin C manufacturers began their anticompetitive activities. App. 78a-82a. Over the next several years, Respondents and their fellow cartel members attended meetings facilitated by the Chamber and voluntarily

agreed to fix export prices and volumes, including for export to the United States. App. 82a-93a. The cartel was able to maintain prices "substantially above competitive levels." App. 161a. The cartel—acting at Subcommittee meetings—also repeatedly agreed to restrict vitamin C export volumes, even agreeing to shut down production at certain times to limit supply and fend off price drops. App. 161a-162a.

By the time this case reached the motion-to-dismiss stage, the record overwhelmingly showed that the Chinese government had not compelled Respondents to fix prices after 2001. App. 173a-179a. That evidence included public pronouncements from the Chinese Government regarding its deregulation of vitamin C prices, App. 173a, direct statements from Respondents describing the voluntary association that they had joined, App. 176a, evidence that certain Respondents had sold vitamin C at prices that were multiples above the mandatory price point they contended existed, App. 175a-176a, and even statements from Respondents showing that the entire notion of a "compulsion" defense had been manufactured for litigation purposes, App. 178a.

2. On January 26, 2005, Petitioners filed a complaint in the Eastern District of New York against Respondents and several other defendants, alleging Sherman Act violations. App. 88a. The Judicial Panel on Multidistrict Litigation consolidated two other actions with that complaint before the late Judge Trager. App. 157a-158a.

Respondents moved to dismiss the complaints, arguing that Petitioners' claims were barred by the doctrines of foreign sovereign compulsion, act of state,

and international comity because their allegedly anticompetitive conduct had been compelled by Chinese law. App. 163a. The legal authority on which Respondents' arguments rested was an amicus brief filed by the Ministry, which argued that Chinese law had compelled Respondents' conduct. App. 212a, 217a, 221a. Respondents argued that the court was obliged to accept the Ministry's amicus brief "as true, because it [contained] the official position of the government of China." App. 168a. Notably, the brief did *not* claim that the Chinese legal system recognizes the Ministry of Commerce as an authoritative interpreter of Chinese law. App. 189a-223a.

Judge Trager denied the motion to dismiss following limited discovery on November 6, 2008. App. 188a. Judge Trager explained that the standard of deference due to the Ministry's amicus brief was dispositive to his decision, because the legal documents attached to the Ministry's brief suggested "on their face that defendants' acts were voluntary rather than compelled." App. 179a. Surveying the applicable precedents following the adoption of Fed. R. Civ. P. 44.1, Judge Trager concluded that the Ministry's legal interpretation did not have to be treated as "conclusive," but was entitled to "substantial deference." App. 181a. Applying that standard, Judge Trager concluded that the record "was simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions," App. 186a, in part based on Respondents' own documents but also based upon "documentary evidence submitted by plaintiffs [that] directly contradict[ed] the Ministry's position." App. 181a. Judge Trager reasoned that further discovery would shed light on the question whether Respondents' actions in coordinating pricing were voluntary or mandatory. App. 186a & n.12.

Respondents sought to certify the order denying their motion to dismiss for interlocutory appeal, but Judge Trager denied the request. App. 225a-226a, 232a.

3. Following the conclusion of discovery, Respondents moved for summary judgment, again arguing that "they were compelled by the Chinese government to fix prices," and that the case should be dismissed based upon the same three doctrines raised in their motion to dismiss. App. 55a.[1]

The District Court denied the motion for summary judgment. App. 56a. With respect to Respondents' comity defense,[2] the court held that the "continuing validity" of the *Timberlane* "comity balancing test"[3]—a ten-factor test developed by the Ninth and Third Circuits to guide case-by-case abstention in Sherman Act cases involving extraterritorial conduct—was "unclear after the Supreme Court's decision addressing comity in *Hartford Fire*." App. 100a. Applying *Hartford Fire*, the court held that

---

1. By this time, Judge Trager had passed away, and the consolidated action had been reassigned to Judge Brian M. Cogan. App. 58a.

2. The District Court rejected the defense of foreign sovereign compulsion because Respondents had failed to meet their burden to prove that their anticompetitive conduct was "compelled" with the threat of "penal or other severe sanctions." App. 102a-104a. The District Court further held that the act of state doctrine did not apply because the case did not require the court to inquire into the legality or validity of a foreign sovereign's official act. App. 108a-116a.

3. App. 15a-16a; *Timberlane Lumber Co.* v. *Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1977).

regardless of the continuing viability of the *Timberlane* factors, "unless [Respondents'] price-fixing was compelled by the Chinese government, dismissal on comity grounds would not be justified." App. 102a.

To decide whether Chinese law actually compelled Respondents' conduct, the District Court considered the Ministry's motion-to-dismiss-stage amicus brief, as well as a subsequent 2009 Ministry statement about the regulatory regime governing Chinese vitamin C exports. App. 118a-122a. The court found that the Ministry's statements were entitled to respect, and deferred to the Ministry's "explanation of the relationship between the Ministry and the Chamber," App. 118a-119a & n.37. But the court concluded, "based on what may be considered the more traditional sources of foreign law—primarily the governmental directives themselves as well as the charter documents of the [Vitamin C] Subcommittee and the Chamber—that the [post-2001] regime did not compel [Respondents'] conduct." App. 118a-119a.

The District Court found that the high-level legal conclusions advanced in the Ministry's amicus brief contained gaps and ambiguities, and failed to address "critical provisions" of the relevant legal regime. App. 119a. As Judge Trager had found at the motion-to-dismiss phase, Judge Cogan found that certain of the Ministry's statements were directly contradicted by the documentary evidence relating to compulsion before the court. App. 121a-122a. For example, the court pointed to language on the Chamber's website and in other public materials stating that the vitamin C industry's price coordination was the product of "self-restraint," arrived at "voluntarily," "*without any government intervention*,"

and "*completely implemented by each enterprise's own decisions.*" App. 79a-81a (emphasis added).

Finally, while noting that this was "not dispositive on the question of the appropriate deference to be afforded to statements by foreign governments," the District Court held that because the "alleged compulsion [was] in [Respondents'] own self-interest, a more careful scrutiny of [the Ministry's] statement [was] warranted." App. 121a. The court concluded that the Ministry's legal position appeared to be an "attempt to shield [Respondents'] conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period in question." App. 121a-122a. Applying Rule 44.1 to the summary judgment record, the court held that Respondents had not demonstrated that Chinese law in fact compelled Respondents' particular anticompetitive conduct and rejected Respondents' comity defense. App. 56a.

4. The case proceeded to trial. During the course of a three-week trial, the jury heard testimony from the head of the Vitamin C Subcommittee, Qiao Haili, who claimed there was government compulsion. The jury then heard deposition testimony in which Mr. Qiao said it was "accurate" that "export prices are fixed by enterprises *without* government intervention." App. 295a (emphasis added) Mr. Qiao further admitted that "on the whole, the government did not involve itself in price fixing," and that after 2002, no price limitations or agreements on export quantities went forward without the support of the majority of the vitamin C manufacturers. App. 295a. Mr. Qiao even confirmed that it was "perfectly acceptable" for the companies to decide to have *no minimum prices at*

all, App. 296a, and that no vitamin C company was ever punished for charging less than the minimum price, App. 249a. In July 2003, Mr. Qiao wrote a memo to the Ministry that showed that the compulsion defense in this case was never true; at trial he denied the memo was about vitamin C, and was shown to have fabricated his testimony.

After the close of evidence, Respondents made an oral motion for judgment as a matter of law under Fed. R. Civ P. 50(a). App. 250a. Respondents' Rule 50(a) motion did not move for judgment as a matter of law on the basis of comity. App. 250a-275a. Instead, the motion raised three defenses: first, the sufficiency of the evidence to establish Respondent North China Pharmaceutical Group Corp.'s liability, App. 256a-258a; second, the act of state doctrine, App. 253a-255a; and third, the doctrine of foreign sovereign compulsion, App. 256a. The court reserved decision on the first ground and denied judgment as a matter of law on the latter two. App. 273a-275a.

After the jury returned a verdict for Petitioners, App. 276a-279a, Respondents moved again for judgment as a matter of law, this time under Rule 50(b). This time, Respondents also raised the independent ground that international comity required dismissal of Petitioners' suit. App. 41a. The court denied the motion on all grounds. App. 53a.

5. The Court of Appeals did not rule on Respondents' Rule 50(b) motion, but instead reviewed Judge Trager's 2008 order denying Respondents' initial motion to dismiss, reversed that order, vacated the jury verdict, and remanded with instructions to enter judgment dismissing Petitioners' complaint with prejudice. App.

3a. The court did so relying solely on the grounds that comity required the court to abstain from adjudicating Petitioners' claims, and without explaining the basis for its appellate jurisdiction over Respondents' pre-trial motion to dismiss.[4]

The Second Circuit held that "exercising jurisdiction over antitrust violations that occur abroad" raises "unique international concerns" requiring federal courts to consider whether comity bars the exercise of jurisdiction—even where the Sherman Act indisputably reaches the foreign conduct, and entirely separate from any inquiry involving the defense of foreign sovereign compulsion. App. 14a-15a. The court explained that "[t]o determine whether to abstain from asserting jurisdiction on comity grounds," it would "apply the multifactor balancing test set out in" *Timberlane Lumber Co.* v. *Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1977) (seven factors) and supplemented by *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) (ten factors). App. 14a-15a.

The first of those "*Timberlane* factors," the Second Circuit explained, required the court to determine whether there was a "true conflict" between U.S. and Chinese law. App. 16a. The Second Circuit reasoned that "if Chinese law required [Respondents] to enter into horizontal price-fixing agreements," a "true conflict" would exist between U.S. and Chinese law, even if

4. At no time in their merits briefing before the Second Circuit did Respondents urge reversal of the order denying their initial motion to dismiss. Instead, Respondents simply urged reversal of the District Court's Rule 50(b) order.

Respondents entered into different horizontal price-fixing agreements than the agreements that Chinese law required. App. 19a. The panel explicitly held that the District Court erred in even *considering* factual material—available at both the motion-to-dismiss record and on summary judgment—that contradicted the Ministry's claim that Chinese law compelled Respondents' conduct. App. 32a ("We are disinclined to view this factual evidence of China's unwillingness or inability to enforce the PVC regime as relevant to the PVC regime's legal mandate."); App. 32a-33a ("Even if [Respondents'] specific conduct was not compelled by the 2002 Notice, that type of conflict is not required for us to find a true conflict between the laws of the two sovereigns. . . . Whether [Respondents], in fact, charged prices in excess of those mandated by the 2002 Notice does not weigh heavily into our consideration of whether the PVC regime, *on its face*, required [Respondents] to violate U.S. antitrust laws in the first instance.") (emphasis added).

The Second Circuit held that Judge Trager had abused his discretion by failing to defer to the Ministry's amicus brief at the motion-to-dismiss stage. App. 37a. The panel held that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction *and effect* of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court *is bound* to defer to those statements."[5] App. 25a (emphasis added). Notwithstanding

5. Although the Second Circuit referred to a "sworn evidentiary proffer," no such "sworn" proffer was ever before the District Court, including when Judge Trager denied Respondents'

its nod to a reasonableness standard, the panel made clear that the bare fact of the Ministry's appearance as *amicus curiae* was dispositive: "if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required *at both the motion to dismiss and summary judgment stages would have been entirely appropriate.*" App. 30a n.10 (emphasis added). In sum, because the Ministry appeared in the litigation, the District Court was "bound to defer" to the Ministry's assertions regarding *both* the construction and effect of Chinese law regardless of any contrary record evidence. App. 25a. Thus, based solely upon the Ministry's appearance, the panel accepted as binding the Ministry's assertion that there was a "true conflict" between the Sherman Act and Chinese law, applied the remaining *Timberlane* factors, and concluded that comity barred Petitioners' suit.

Petitioners moved for panel rehearing and rehearing en banc, arguing *inter alia* that the District Court's order denying Respondents' motion to dismiss was "not reviewable" under this Court's decision in *Ortiz* v. *Jordan*, 562 U.S. 180 (2011). App. 291a. The petition for rehearing was the first point at which Petitioners could have raised this argument, because Respondents did not request appellate review of the District Court's pre-trial order denying their motion to dismiss in their briefs before the Second Circuit. The Second Circuit denied the petition, and this petition for certiorari followed.

---

motion to dismiss. Instead, as Judge Trager himself noted, the Ministry had merely filed an amicus brief signed by its counsel, who had entered into a joint defense agreement with Respondents. App. 230a-232a, 237a-238a.

REASONS FOR GRANTING THE PETITION

A. The Panel Erred in Exercising Jurisdiction Over a Pre-Trial Order Denying a Motion to Dismiss, Creating a Clear Split with Three Other Circuits.

1. The Court of Appeals decision to review and reverse the District Court's 2008 interlocutory order denying Respondents' motion to dismiss—ignoring Respondents' post-trial Rule 50 motion—creates a split with three other circuits regarding the scope of appellate jurisdiction over pre-trial motions to dismiss.

Under 28 U.S.C. § 1291, the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." In *Ortiz* v. *Jordan*, 562 U.S. 180 (2011), this Court interpreted § 1291 to preclude a party from appealing an order denying summary judgment after a trial on the merits, because the order "retains its interlocutory character as simply a step along the route to final judgment." *Id.* at 184. The Court explained that after a trial, "the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Ibid.* The decision in *Ortiz* was unanimous for the proposition that "a party ordinarily cannot appeal an order denying summary judgment after a full trial on the merits," and a court of appeals "lack[s] jurisdiction to review" such an order). *Id.* at 192 (Thomas, J., concurring in judgment).

Following *Ortiz*, the clear majority view is that pre-trial orders denying motions to dismiss, like motions denying summary judgment, may not be reviewed following trial. Instead, the Fifth, Sixth, and Tenth Circuits have held

that pre-trial motions to dismiss retain their interlocutory character, and that an unsuccessful moving party must renew its arguments in Rule 50 motions to raise them on appeal. *See Nolfi* v. *Ohio Ky. Oil Corp.*, 675 F.3d 538, 545 (6th Cir. 2012) (holding that *Ortiz* "precludes . . . consideration of appeal from the district court's denial of [a] motion to dismiss"); *ClearOne Commc'ns, Inc.* v. *Biamp Sys.*, 653 F.3d 1163, 1172 (10th Cir. 2011) (holding that "a defendant may not, after a plaintiff has prevailed at trial, appeal from the pretrial denial of a Rule 12(b)(6) motion to dismiss, but must instead challenge the legal sufficiency of the plaintiff's claim through a motion for judgment as a matter of law"); *Bennett* v. *Pippin*, 74 F.3d 578, 585 (5th Cir. 1996) ("When the plaintiff has prevailed after a full trial on the merits, a district court's denial of a Rule 12(b)(6) dismissal becomes moot."); *In re Gollehon*, No. CO-14-031, 2015 WL 1746496, at *5 (B.A.P. 10th Cir. Apr. 17, 2015) ("Perhaps at some point in the future, the Tenth Circuit will definitively rule that in limited instances a denial of a motion to dismiss is appealable following trial and final judgment. But until such time, we decline to push that boundary . . . ."). The decision below creates a split with the Fifth, Sixth, and Tenth Circuits on the question whether 28 U.S.C. § 1291 confers jurisdiction to review an interlocutory order denying a motion to dismiss following a trial on the merits.[6]

6. There is a further split of authority—not implicated here—regarding appellate jurisdiction to review "purely legal" questions that are raised in a pretrial motion but not preserved in post-trial Rule 50 motions. *See Feld* v. *Feld*, 688 F.3d 779, 781-783 (D.C. Cir. 2012) (collecting cases). Whatever may be the merits of the "controversial" exemption for "purely legal" questions, *see Empress Casino Joliet Corp.* v. *Balmoral Racing Club, Inc.*, 831 F.3d 815, 824 (7th Cir. 2016), it is inapplicable here

2. The question presented warrants review in this Court. The jurisdictional limits imposed by 28 U.S.C. § 1291 promote the objectives of judicial economy and finality. Permitting appellants to re-litigate any pre-trial interlocutory order outside of the context of Rule 50 motions would "enable litigants to extend" their dispositive objections in the district court "simply by adoption of the expedient of an appeal." *Cone* v. *W. Va. Pulp & Paper Co.*, 330 U.S. 212, 218 (1947). "Congress, in enacting present §§ 1291 & 1292 of Title 28, has been well aware of the dangers of an overly rigid insistence upon a 'final decision' for appeal in every case, and has in those sections made ample provision for appeal of orders which are not 'final' so as to alleviate any possible hardship." *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 746 (1976). And litigants have "ample" opportunity to raise any argument raised in a motion to dismiss via an order that *is* final. *Ibid.*

---

because Respondents' motion to dismiss raised a comity defense that the panel itself conceded is not a "purely legal" question, but rather involves the application of a ten-factor test including factual considerations. App. 34a; *see GAMCO Inv'rs, Inc.* v. *Vivendi Universal, S.A.*, 838 F.3d 214, 223 n.5 (2d Cir. 2016) (a court of appeals does not have jurisdiction to review an order denying summary judgment where factual issues contributed to the grounds for denial); *see also Drexel Burnham Lambert Grp. Inc.* v. *Galadari*, 777 F.2d 877, 881 (2d Cir. 1985) (international comity analysis requires factual development); *Pan E. Expl. Co.* v. *Hufo Oils*, 798 F.2d 837, 839 (5th Cir. 1986) ("the considerations necessary to decide whether to extend comity" are "inextricably bound with the facts relevant to the merits").The panel's "true conflict" analysis was central to its decision, but that was only *one* of ten factors the court considered. Notably, in *Timberlane* itself, the Ninth Circuit reversed the district court's pretrial *dismissal* of the plaintiff's claims, noting that "the Supreme Court has expressed disapproval of summary disposition in this type of case." *Timberlane*, 549 F.2d at 602.

3. This case presents an ideal vehicle to consider the question presented. The panel's conclusion that it had appellate jurisdiction over Respondents' motion to dismiss was dispositive of its consideration of the comity defense, because that defense was not properly preserved in Respondents' motion for judgment as a matter of law. Before the case was submitted to the jury, Respondents failed to raise their comity defense in their Rule 50(a) motion. App. 250a-275a. Under clearly established Second Circuit law, Respondents' failure to raise comity as a defense in their pre-verdict Rule 50(a) motion barred them from seeking relief on that ground in their post-verdict Rule 50(b) motion, and on any appeal from the order denying that motion. *Lore* v. *City of Syracuse*, 670 F.3d 127, 152-53 (2d Cir. 2012) ("In order for a party to pursue a request for JMOL on appeal, the party must have made timely motions for JMOL in the district court. . . . A Rule 50(a) motion requesting judgment as a matter of law on one ground but omitting another is insufficient to preserve a JMOL argument based on the latter. . . . Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. . . .") (citations omitted).

The panel's review of Respondents' comity defense was permissible if, and only if, 28 U.S.C. § 1291 permits review of a pre-trial motion to dismiss that has not been properly incorporated into a Rule 50 motion following trial. That precise question is the subject of the split described above. This Court should grant certiorari to provide needed guidance to the courts of appeals.

B. The Second Circuit's Rigid Standard of Deference to Foreign Sovereign Statements Deepened an Important Circuit Split.

1. The holding at the core of the panel's decision—that a court is "bound to defer" to a foreign governmental entity's interpretation of its domestic law when that entity appears in the litigation—conflicts directly with the rules applied in at most other circuits and exacerbates widespread disarray regarding the proper standard of deference to foreign sovereigns in the context of Rule 44.1.

In *United States* v. *Pink*, 315 U.S. 203 (1942), this Court concluded that an interpretation of a Russian decree offered in the form of an "official declaration" by a Russian official who had the legal authority to "interpret existing Russian law" was "conclusive" with respect to the question of the decree's extraterritorial effect under Russian law. Since the adoption of Fed. R. Civ. P. 44.1 in 1966, the courts of appeals have diverged over whether and how to apply *Pink*'s "conclusive" formulation to legal statements offered by foreign sovereigns who participate in U.S. litigation as parties or amici. The Sixth and D.C. Circuits, in direct conflict with the decision below, have declined to defer to appearing sovereigns' interpretations of their domestic laws, while the Fifth, Seventh, and Eleventh Circuits each applies its own flexible standard of deference taking into account a variety of factors that would have counseled against deference here. Meanwhile, the opinion below aligned the Second Circuit with the Ninth Circuit's decision in *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1471,1474 & n.7 (9th Cir. 1992), which reflexively deferred to an interpretation of Chinese law proffered by a corporate "arm of the

[Chinese] government," *id.* at 1471. In sum, the Ministry's amicus brief could have been subjected to any one of at least three different standards of deference applied by the courts of appeals, the selection of which would likely have been outcome determinative.

The standard of deference applied by the Court of Appeals conflicts directly with the standard applied by the D.C. Circuit. In *McKesson Corp.* v. *Islamic Republic of Iran*, 672 F.3d 1066 (D.C. Cir. 2012), the D.C. Circuit held—over Iran's objections—that Iranian law afforded plaintiffs with a private right of action that would allow their suit to proceed against Iran in U.S. federal court. *Id.* at 1078-82; see also *McKesson HBOC, Inc.* v. *Islamic Republic of Iran*, 271 F.3d 1101, 1108-09 (D.C. Cir. 2001), (exercising Rule 44.1 authority to interpret Iranian law, rejecting Iran's interpretation of Iranian law, and adopting a different interpretation based on evidence in the record including Iran's own proffered evidence and legal materials); *McKesson Corp.* v. *Islamic Republic of Iran*, 753 F.3d 239, 242-243 (D.C. Cir. 2014) (conducting a Rule 44.1 analysis later in the same litigation, and this time *agreeing* with Iran's interpretation of its own laws as to attorney's fees). At no point in the *McKesson* litigation did the D.C. Circuit defer to Iran's proffered interpretation of its own laws. The D.C. Circuit has elsewhere expressed its skepticism that applying a rule of deference to foreign legal interpretations would be consistent with Rule 44.1. *Riggs Nat'l Corp. & Subsidiaries* v. *Comm'r of Internal Revenue Serv.*, 163 F.3d 1363, 1368 (D.C. Cir. 1999) ("We are . . . hesitant to treat an interpretation of law as an act of state, for such a view might be in tension with rules of procedure directing U.S. courts to conduct a *de novo* review of foreign law when an issue of foreign law is raised") (citing Fed. R. Civ. P. 44.1).

The Sixth Circuit has also declined to require deference to foreign sovereigns appearing in litigation. In *Chavez* v. *Carranza*, 559 F.3d 486 (6th Cir. 2009), the Sixth Circuit rejected the arguments in an amicus brief filed by the Republic of El Salvador, and affirmed a jury verdict holding Nicolas Carranza liable under the Alien Tort Statute and the Torture Victims Protection Act for atrocities committed in El Salvador by Salvadoran Security Forces. Invoking international comity, Carranza had protested at trial that the Salvadoran Amnesty Law, an important element of the peace accords that ended eleven years of civil war, "preclud[ed] criminal or civil liability for political or common crimes committed" prior to the signing of the peace accords. *Id.* at 490, 494-95. On appeal, the Republic of El Salvador filed an amicus brief in which it argued that the judgment below constituted "an unwarranted intrusion into the sovereign affairs of another nation" and "undermine[d] the very vehicle of El Salvador's transformation." Brief of the Republic of El Salvador as Amicus Curiae at 4-5, *Chavez* v. *Carranza*, No. 06-6234 (6th Cir. Apr. 18, 2008). The Sixth Circuit rejected the notion that it was bound to defer to El Salvador's amicus brief—instead, it ignored El Salvador's arguments and concluded that the Amnesty Law did not preclude the plaintiffs' suit. *Chavez*, 559 F.3d at 495-96.

Three other circuits apply standards of deference that are far more searching than the panels' "bound to defer" approach.

The Eleventh Circuit has held that the "initial foreign law determination . . . is a question of law for the court," (under Fed. R. Crim. P. 26.1, a parallel provision to Fed. R. Civ. P. 44.1), and that although it is "logical" to "assume

that statements from foreign officials are a reliable and accurate source" of authority on foreign law, a court is not bound to defer to those statements when the foreign nation's official position has changed. *United States* v. *McNab*, 331 F.3d 1228, 1241 (11th Cir. 2003). In reaching its conclusion, the court rejected an amicus brief filed by the Honduran government arguing that the defendants "violated no Honduran law," and that the court's refusal to accept this interpretation would violate "the international principles of comity which require nations to give deference to the laws and procedures of other sovereign states." Brief Amicus Curiae of the Embassy of Honduras at 8, 32, *United States* v. *McNab*, 2002 WL 32919784 (11th Cir. June 6, 2002).

The Fifth Circuit "recognizes the difficulty" that may arise in the course of adjudicating Rule 44.1 questions, and has held that "courts *may* defer to foreign government interpretations." *Access Telecom, Inc.*, v. *MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (emphasis added). That rule of permissive deference includes important caveats that would have made a difference in this case. For example, in *Access Telecom*, the court refused to defer to an interpretation of Mexican law proffered by a Mexican administrative agency, in part because of ambiguities in the agency's proffered interpretation, and in part because "the evidence . . . [did] not persuasively show that the [Mexican agency] was empowered to interpret Mexican law" in the first place. *Ibid.*

Finally, the Seventh Circuit holds that federal courts owe "substantial deference to the construction [a foreign sovereign] places on its domestic law." *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992).

Accordingly, the Seventh Circuit deferred to a foreign sovereign's proffered interpretation of its domestic law in circumstances where 1) the sovereign government (France) appeared in federal court and 2) offered a view of its law that was both plausible and consistent with its stated views through many years of domestic and international litigation on the subject in question. *Id.* at 1312-13.

2. It is vitally important that the federal courts apply a consistent and coherent standard of deference to interpretations of foreign law offered by foreign sovereign governments. Clarity and uniformity are essential where judicial rules govern the treatment of foreign sovereigns in federal court. *Cf. Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2086 (2015) (noting the importance of a "single policy regarding which governments are legitimate in the eyes of the United States and which are not" and stressing that assurances regarding the treatment of foreign sovereigns in U.S. courts "cannot be equivocal"). Uniformity is particularly important given the frequency with which modern foreign sovereigns appear as litigants in U.S. courts—inconsistent treatment of foreign sovereign statements creates a potential for diplomatic conflicts and risks forum shopping. Litigants and judges should understand the rules that govern the interpretation of foreign law, and those rules should not depend upon the Circuit that ultimately has jurisdiction over a given claim.

This question is also important to ensure the consistent application of U.S. antitrust laws to foreign conduct. As illustrated by multiple guilty pleas, criminal fines, and prison sentences in the 1990s, European manufacturers F. Hoffmann La Roche, Ltd. of Switzerland, Merck KgaA

and BASF AG of Germany, Takeda Chemical Industries, Ltd. of Japan, and other companies around the world formed one of the world's largest and most infamous illegal cartels to suppress competition and fix prices for a range of vitamins, including vitamin C.[7] Under the panel's approach, all of that prosecuted conduct, and other conduct like it, would be immunized in any country whose government chose to appear in U.S. court and assert that their law compelled the anticompetitive conduct. As the Eleventh Circuit warned in rejecting a rule of binding deference to foreign sovereign legal statements, "it is not difficult to imagine a . . . defendant in the future, who has the means and connections in a foreign country, lobbying and prevailing upon that country's officials" to alter the foreign law at issue in order to immunize him from liability in the United States. *McNab*, 331 F.3d at 1242. "Such a scenario would completely undermine the purpose" of the U.S. laws at issue. *Id.*

Further percolation is unwarranted. *Pink* was decided three-quarters of a century ago, and Rule 44.1 has been on the books for nearly as long. The divergent approaches of the circuits have been afforded adequate time to develop, and continued confusion threatens to undermine U.S. law and introduce needless complications into foreign relationships. Other countries may question why China's Commerce Ministry has received more favorable treatment from U.S. courts than, for example, Mexico's Secretary of Communications and Transportation. *See Access Telecom*,

7. *See* U.S. Dep't of Justice Press Release Dated May 20, 1999, https://www.justice.gov/archive/atr/public/press_releases/1999/2450.htm; Victoria Broadbent, *Vitamin Companies Back in Court*, BBC News (Feb. 7, 2013), http://news.bbc.co.uk/2/hi/business/2737835.stm.

197 F.3d at 702. The danger of inconsistency is particularly acute in the antitrust context, where the United States maintains complex relationships with foreign trading partners that are undermined by warring judicial rules.

3. This case presents an ideal vehicle to consider this recurring question. The standard of deference owed to the Ministry's amicus brief was dispositive to the outcome of the litigation. The District Court understood this. App. 179a ("The authority of the Ministry's brief is critical to defendants' motion, because . . . the documents on which defendants rely to demonstrate governmental compulsion of their anti-competitive acts suggest on their face that defendants' acts were voluntary rather than compelled"). So, too, did the Second Circuit. App. 30a n.10. ("[I]f the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required at both the motion to dismiss and summary judgment stages would have been entirely appropriate."). But for the Second Circuit's deference to the Ministry's brief, the jury's verdict would not have been disturbed.

C. This Court Should Clarify Whether Courts Have Discretionary Authority to Abstain from Otherwise Valid Sherman Act Jurisdiction over Foreign Conduct.

1. The merits of this case raise a third question that is of exceptional importance: whether a court may abstain from exercising Sherman Act jurisdiction based upon a case-by-case international comity analysis.

This Court has never countenanced a case-by-case approach to abstention from Sherman Act jurisdiction on international comity grounds. The comity doctrine on which the panel relied first surfaced in the Ninth Circuit's decision in *Timberlane Lumber Co.* v. *Bank of Am.*, 549 F.2d 597 (1977), which held that even where the jurisdictional requirements for an extraterritorial application of the Sherman Act are satisfied, international comity provides an independent basis for a U.S. court to decline jurisdiction over a Sherman Act claim. *Id.* at 613-15; *see generally* Areeda & Hovenkamp, Antitrust Law ¶ 273, at 375-83 (4th ed. 2013). *Timberlane* thus created an exception to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976); *see* Areeda & Hovenkamp ¶ 273, at 378 ("The distinctive holding of *Timberlane* is that notwithstanding sufficient effects and an antitrust violation, the court may still decline to assert its extraterritorial jurisdiction" on the basis of its multi-factor comity test); *id.* ¶ 273 at 359-60 (following *Timberlane*, "several lower courts . . . expressly acknowledge a judicial discretion to decline to exercise the jurisdiction conferred").[8]

In *Hartford Fire*, this Court reserved decision on the question whether international comity is *ever* an appropriate basis for abstention from otherwise valid Sherman Act jurisdiction. *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 798 (1993) ("[E]ven assuming that in a proper case a court may decline to exercise

8. The panel explicitly relied upon *Timberlane*'s formulation of the comity test, as supplemented in *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). App. 34a.

Sherman Act jurisdiction over foreign conduct . . . international comity would not counsel against exercising jurisdiction in the circumstances alleged here."). In *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), this Court rejected the contention that courts should take "account of comity considerations case by case, abstaining where comity considerations so dictate." *Id.* at 168. The Court explained that such an approach was "too complex to prove workable," requiring courts "to examine how foreign law, compared with American law, treats not only price fixing but" countless other anticompetitive arrangements, "in respect to both primary conduct and remedy." *Ibid.* Instead, this Court adopted a uniform, predictable comity-inspired rule, interpreting the FTAIA to exclude cases "where foreign injury is independent of domestic effects" from federal antitrust jurisdiction across the board. *Id.* at 169. With respect to cases like the present one, in which substantial domestic effects have been established, *Empagran* recognized that "our courts have long held that 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." *Id.* at 165.

It is unclear whether the *Timberlane* test remains appropriate following *Empagran*'s rejection of case-by-case abstention. *Empagran*, not *Timberlane*, is more consistent with the historic approach to comity in the Sherman Act context. Writing for a Second Circuit panel that sat as a court of last resort, Judge Learned Hand acknowledged that principles of comity should inform a court's interpretation of the Sherman Act's "general

words." *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945). But when deciding whether the Sherman Act reached foreign conduct, the courts are "concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it." *Ibid. Empagran* reaffirmed *Alcoa*'s approach. *Empagran*, 542 U.S. at 165-69. So too did *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010), which rejected a case-by-case approach to the extraterritoriality of § 10(b) of the Securities Exchange Act of 1934 in favor of a straightforward exercise in statutory interpretation. *Ibid.* at 261 (holding that the appropriate rule, "[r]ather than [to] guess anew in each case," was to interpret the statute across-the-board against extraterritoriality for *all* cases, thus "preserving a stable background against which Congress can legislate with predictable effects").

The panel's decision is not only at odds with this Court's decisions, it is also out of step with lower court decisions that have treated the extraterritorial limits of Sherman Act jurisdiction as a question of statutory interpretation rather than case-by-case abstention. *See, e.g.*, *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538-39 (8th Cir. 2007) (interpreting the scope of the Sherman Act in light of "prescriptive comity"); *Empagran S.A.* v. *F. Hoffmann-LaRoche Ltd* ("*Empagran II*"), 417 F.3d 1267, 1271 (D.C. Cir. 2005) (same); *Indus. Inv. Dev. Corp.* v. *Mitsui & Co., Ltd.*, 671 F.2d 876, 884 n.7 (5th Cir. 1982) ("We also disagree with [*Timberlane* and other cases'] suggestion . . . that the question whether to entertain the suit is discretionary with the trial judge. A decision not to apply the antitrust laws must be based on solid legal ground; the question is one of interpreting the

scope that Congress intended to give the antitrust laws."), *cert. granted, vacated, and remanded on other grounds*, 460 U.S. 1007 (1983).

2. This question presented is exceptionally important. *Timberlane*'s discretionary abstention doctrine is "cumbersome, often indeterminate, conducive to lengthy and expensive discovery, and thus extremely burdensome to both litigants and courts," and "largely inconsistent" with this Court's own approach in *Empagran*." Areeda & Hovenkamp ¶ 273, at 375. Antitrust class actions are generally lengthy and complex proceedings, and in such actions all parties benefit from clear *ex ante* rules. The existence of a boundless discretionary abstention doctrine that may be applied *sua sponte* at any time from motion to dismiss through appeal interferes with judicial economy and the intended efficiency benefits of multidistrict proceedings.

Review is particularly important given the potential for *Timberlane*'s discretionary test to supplant more precisely defined doctrines. *Timberlane*, as applied to antitrust claims like Petitioners', subsumes clearer defenses to Sherman Act liability such as the defense (also raised and litigated below) of foreign sovereign compulsion. *See, e.g., O.N.E. Shipping Ltd.* v. *Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987). That defense relieves a defendant of Sherman Act liability when it can prove, as a factual matter, that the foreign sovereign compelled the conduct at issue. *See Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979) ("It is necessary that foreign law must have coerced the defendant into violating American antitrust law."); Areeda & Hovenkamp ¶ 274c. Given

the extensive factual record in this case indicating that Respondents were *not* so compelled, *e.g.*, App. 117a, and the jury's factual finding to that effect, App. 278a, the panel could not have ruled for Respondents on grounds of foreign sovereign compulsion. In sum, *Timberlane*'s unbounded discretion allowed the panel to hold that a foreign sovereign compelled Respondents' conduct without bothering to consider the requisite elements of the foreign sovereign compulsion defense.

The *Timberlane* test, as applied by the opinion below, threatens to replace more precisely-defined inquiries and creates virtually unbounded judicial discretion over the extraterritorial application of U.S. antitrust laws. *See, e.g.*, Areeda & Hovenkamp ¶ 273, at 367 ("Indeed, to the extent the federal antitrust laws represent the public economic policy of the United States, there may be little room for considerations of comity at all. Dismissals are rare when there is a substantial effect on American commerce and no act of state or foreign compulsion.") (footnote and emphasis omitted). This Court's decision in *Empagran* casts serious doubt on the propriety of the panel's approach. *Empagran*, 542 U.S. at 165. Review in this Court is warranted to ensure that the extraterritorial reach of U.S. antitrust laws remains a matter decided by statutory text, rather than case-by-case application of a discretionary ten-part test.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL J. GOTTLIEB
KAREN L. DUNN
WILLIAM A. ISAACSON
AARON E. NATHAN
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727

DAVID BOIES
Counsel of Record
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200
dboies@bsfllp.com

Counsel for Petitioners

April 3, 2017