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.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals erred by reviewing a pretrial order denying a motion to dismiss in an appeal from a final judgment entered after a trial on the merits.

2. Whether a federal court determining foreign law under Federal Rule of Civil Procedure 44.1 is required to treat as conclusive a submission from the foreign government characterizing its own law.

3. Whether a district court may invoke principles of international comity to dismiss a private suit brought under the Sherman Act, 15 U.S.C. 1 *et seq.*

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the second question presented.

STATEMENT

1. Petitioners are U.S. purchasers of vitamin C. Respondents are Chinese manufacturers and exporters of vitamin C. In 2005, petitioners filed suits alleging that respondents had violated Section 1 of the Sherman Act, 15 U.S.C. 1, by fixing the prices and quantities of vitamin C exported to the United States. Petitioners alleged that the conspiracy was accomplished through a membership entity known as the China Chamber of Commerce of Medicines and Health Products Importers and Exporters (Chamber). Pet. App. 2a, 4a-5a.

a. Respondents moved to dismiss the complaints. They did not deny that they had fixed the prices and quantities of vitamin C exports. Instead, they asserted that their actions had been required by Chinese law, and that petitioners' claims were therefore barred by the act of state doctrine, the foreign sovereign compulsion doctrine, and principles of international comity. Pet. App. 6a. The Ministry of Commerce of the People's Republic of China (Ministry) filed an amicus brief supporting respondents. *Ibid.*; see *id.* at 189a-223a. The Ministry represented that it was the authority within the Chinese government responsible for regulating foreign trade, *id.* at 190a; that the Chamber was a state-supervised entity authorized to regulate vitamin C exports, *id.* at 201a; and that the alleged conspiracy had been "a regulatory pricing regime mandated by the government of China," *id.* at 197a.

Petitioners disputed that account of Chinese law. They noted, for example, that the Chamber had publicly described the agreement on vitamin C prices and quantities as a "self-regulated agreement" that was adopted "voluntarily" and "without any government intervention." Pet. App. 173a-174a (emphases and citation omitted). Petitioners also submitted evidence acquired through limited discovery, which in their view showed that respondents had "voluntarily restricted export volume and fixed prices." *Id.* at 175a.

The district court denied respondents' motion to dismiss. Pet. App. 157a-188a. The court held that the Ministry's description of Chinese law was "entitled to substantial deference," but it declined to treat the Ministry's brief as "conclusive," in part because "the plain language of the documentary evidence submitted by [petitioners] contradict[ed] the Ministry's position." *Id.*

at 181a; see *id.* at 179a. The court concluded that the record was "too ambiguous to foreclose further inquiry into the voluntariness of [respondents'] actions." *Id.* at 186a.

b. After further discovery, respondents moved for summary judgment. Pet. App. 10a. The Ministry submitted a statement reiterating its position that Chinese law had compelled respondents' conduct. *Id.* at 97a n.24. Petitioners cited additional evidence supporting their contrary view, including documents in which China had represented to the World Trade Organization (WTO) that it "gave up export administration of . . . vitamin C" in 2002. *Id.* at 74a (citation omitted).

The district court denied respondents' motion for summary judgment. Pet. App. 54a-156a. The court concluded that, although a foreign government's characterization of its law warrants deference, it is not "entitled to absolute and conclusive deference." *Id.* at 97a. Here, the court "respectfully decline[d] to defer to the Ministry's interpretation." *Id.* at 117a. The court explained that the Ministry's submissions had "fail[ed] to address critical provisions of the [governing legal regime] that, on their face, undermine its interpretation." *Id.* at 119a; see *id.* at 97a & n.24. The court also noted that the Ministry's most recent statement did not cite legal authorities "to support its broad assertions" and read like a "carefully crafted and phrased litigation position" rather than a "straightforward explanation of Chinese law." *Id.* at 120a. And the court emphasized that the Ministry had "ma[de] no attempt to explain China's representations [to the WTO] that it gave up export administration of vitamin C." *Id.* at 121a.

The district court then held that Chinese law did not require respondents to fix the price and quantity of vitamin C exports. Pet. App. 122a-155a. *Inter alia*, the court concluded that exporters had the authority to suspend the legal regime that assertedly required them to adhere to agreed-upon prices. *Id.* at 123a-125a. The court also concluded that, even if Chinese law required respondents to agree on and adhere to minimum prices, it did not compel their agreement to limit quantities. *Id.* at 126a-127a. The court stated that the factual record reinforced its understanding, because there was no evidence that Chinese exporters had faced penalties for failing to adhere to agreed-upon quantities or for "failing to reach agreements in the first instance." *Id.* at 151a; see *id.* at 149a-151a.

c. The case was tried to a jury, which found that respondents had conspired to fix the price and limit the output of vitamin C. The district court entered judgment for petitioners, awarding $147 million in damages and permanently enjoining respondents from further violations of the Sherman Act. Pet. App. 11a.

2. The court of appeals reversed. Pet. App. 1a-38a. The court held that "the district court erred in denying [respondents'] motion to dismiss" based on comity, and it therefore declined to "address the subsequent stages of th[e] litigation." *Id.* at 2a & n.2.

The court of appeals explained that, "[t]o determine whether to abstain from asserting jurisdiction on comity grounds," a court hearing a Sherman Act suit should apply a "multi-factor balancing test" drawn from *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597 (9th Cir. 1976) (*Timberlane*), and *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). Pet. App. 14a-15a. In this case, the court focused primarily

on the first factor, which asks whether there was a "true conflict" between U.S. and Chinese law. *Id.* at 18a.

The court of appeals concluded that the existence of a true conflict "hinges on the amount of deference" that is owed to the Ministry's characterization of Chinese law. Pet. App. 20a. The court acknowledged that there is "competing authority" on that question, and that some courts have declined to "accept such statements as conclusive." *Id.* at 20a-21a. But the court held that, when a foreign sovereign "directly participates in U.S. court proceedings" and offers an interpretation that is "reasonable under the circumstances," "a U.S. court is bound to defer." *Id.* at 25a. The court then held, based on the Ministry's submissions, that "Chinese law required [respondents] to engage in activities in China that constituted antitrust violations here in the United States." *Ibid.* The court limited itself to the analysis in the Ministry's brief and did not consider the apparently contradictory statements or other evidence identified by the district court. *Id.* at 27a-33a.

Having found a true conflict, the court of appeals stated that the remaining comity factors "clearly weigh in favor of U.S. courts abstaining from asserting jurisdiction." Pet. App. 33a. *Inter alia*, the court noted that respondents are Chinese companies, that their conduct had occurred in China, and that (according to the Ministry) this suit had "negatively affected U.S.-China relations." *Id.* at 34a-35.

DISCUSSION

The petition for a writ of certiorari should be granted, limited to the second question presented. That question seeks review of the court of appeals' holding that the Ministry's brief conclusively established the content of Chinese law during the prior period of time

that is at issue in this case. A federal court determining foreign law should give substantial weight to a foreign government's characterization of its own law. But a submission from a foreign government need not be treated as conclusive in all circumstances, and it does not preclude the court from considering other relevant material. The court of appeals' contrary holding warrants further review because it departs from the decisions of other circuits on an important question of federal law.

Petitioners also contend that the court of appeals erred by reviewing the denial of respondents' motion to dismiss, and that courts may never dismiss Sherman Act claims based on considerations of comity. Those additional questions do not warrant this Court's review. They do not implicate any conflict among the circuits, and they were neither briefed below nor expressly addressed by the court of appeals.

I. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' HOLDING THAT THE MINISTRY'S AMICUS BRIEF CONCLUSIVELY ESTABLISHED THE CONTENT OF CHINESE LAW

A. A Foreign Government's Characterization Of Its Own Law Is Entitled To Substantial Weight, But It Is Not Conclusive

Federal Rule of Civil Procedure 44.1 was adopted in 1966 to establish an "effective procedure for raising and determining an issue concerning the law of a foreign country." Fed. R. Civ. P. 44.1 advisory committee's note (1966) (Adoption). The rule states that the determination of foreign law is a "question of law" for the court rather than a question of fact for the jury. Fed. R. Civ. P. 44.1. It further provides that, "[i]n 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." *Ibid.*; see Fed. R. Crim. P. 26.1 (similar).

Rule 44.1 reflects a judgment that courts should have "maximum flexibility about the material to be considered and the methodology to be employed in determining foreign law in a particular case." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2444, at 349 (3d ed. 2008). Courts rely on a variety of materials, including "[s]tatutes, administrative material, and judicial decisions"; "expert testimony" interpreting those primary sources; and "any other information" that may be probative. *Id.* at 342-343; see, *e.g.*, *Bodum USA, Inc.* v. *La Cafetiere, Inc.*, 621 F.3d 624, 628 (7th Cir. 2010).

Federal courts considering questions of foreign law are sometimes presented with the views of the relevant foreign government. The foreign government may be a party to the suit, see, *e.g.*, *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (*Amoco Cadiz*), or (as in this case) it may express its views through an amicus brief or similar submission, Pet. App. 189a-223a; see, *e.g.*, *United States* v. *McNab*, 331 F.3d 1228, 1239-1240 & n.23 (11th Cir. 2003), cert. denied, 540 U.S. 1177 (2004). A federal court determining foreign law may also consider views that the relevant foreign government has expressed in another context. See, *e.g.*, *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999), cert. denied, 531 U.S. 917 (2000).

A federal court should afford substantial weight to a foreign government's characterization of its own law. That weight reflects "the spirit of cooperation in which

a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court*, 482 U.S. 522, 543 n.27 (1987). It also makes practical sense. "Among the most logical sources for [a] court to look to in its determination of foreign law are the [relevant] foreign officials," who are familiar with the context and the nuances of the foreign legal system. *McNab*, 331 F.3d at 1241.

Federal courts should not, however, treat a foreign government's characterizations as conclusive in all circumstances. When "a foreign government changes its original position" or otherwise makes conflicting statements, a court is not bound to accept its most recent statement, or the one offered in litigation. *McNab*, 331 F.3d at 1241. A court likewise need not credit a statement that is unclear or unsupported, or that fails to address relevant authorities. See, *e.g.*, *McKesson HBOC, Inc.* v. *Islamic Republic of Iran*, 271 F.3d 1101, 1108-1109 (D.C. Cir. 2001) (*McKesson*), cert. denied, 537 U.S. 941 (2002), vacated in part on other grounds, 320 F.3d 280 (D.C. Cir. 2003). The precise weight to be given to a foreign government's statement turns on factors including the statement's clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency with past statements; and any other corroborating or contradictory evidence.[1]

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[1] In *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) (*Matsushita*), the United States suggested a more deferential approach, arguing that when a foreign government submits a statement characterizing its own law, federal courts "generally" must "accept that statement at face value." U.S. Amicus Br. at 23, *Matsushita*, *supra* (No. 83-2004). But the *Matsushita* brief clarified that courts are not bound to accept "[p]lainly ambiguous or

B. The Court Of Appeals Erred By Treating The Ministry's Amicus Brief As Conclusive And Disregarding Other Relevant Materials

1. The court of appeals held that, when a foreign government "directly participates in U.S. court proceedings" and offers a characterization of its law that is "reasonable under the circumstances," the court "is bound to defer." Pet. App. 25a. That formulation would not necessarily be problematic if the qualifier "reasonable under the circumstances" allowed a court to assess the reasonableness of the foreign government's statements in light of *all* relevant circumstances. The totality of the court of appeals' opinion, however, indicates that it adopted and applied a far more deferential standard, under which a court is bound to accept a foreign government's characterization—and may not consider other material—unless that characterization is *facially* unreasonable.

Thus, the court of appeals disagreed with decisions holding that U.S. courts need not treat a foreign government's characterization as "conclusive." Pet. App. 21a. The court also stated that, if deference "is to mean anything, it must mean that a U.S. court not embark on a challenge to a foreign government's official representation." *Id.* at 25a-26a. Most importantly, in concluding

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internally inconsistent statements," and it added that courts may look behind a foreign government's statement in "extraordinary circumstances." *Ibid.* More recently, in *McNab*, the United States endorsed what had by then become the courts of appeals' general practice of affording "substantial—but measured—deference to a foreign nation's representations." U.S. Br. in Opp. at 16-17, *McNab* v. *United States*, 540 U.S. 1177 (2004) (No. 03-622). That more nuanced approach is consistent with the position advocated here. To the extent the *Matsushita* brief suggested a different standard, it no longer reflects the views of the United States.

that the Ministry's brief was a "reasonable" characterization warranting deference, *id.* at 27a, the court limited its inquiry to the four corners of the brief and the sources cited therein, *id.* at 27a-29a.

The court of appeals thus did not acknowledge the Chamber's public statement that respondents had "voluntarily" agreed on prices and quantities "without any government intervention." Pet. App. 173a-174a (emphases and citation omitted). It also did not address the district court's conclusion that the Ministry's submissions "fail[ed] to address key provisions" of the governing legal regime. *Id.* at 119a; see *id.* at 97a & n.24. And because the court concluded that the Ministry's amicus brief precluded consideration of other material, it did not address the more extensive record developed at summary judgment, including, in particular, China's representation to the WTO that it had "g[i]ve[n] up export administration of . . . vitamin C." *Id.* at 74a (citation omitted). Those circumstances are, at minimum, relevant to the weight that the Ministry's brief should receive. A standard that does not permit a court even to consider such information is inconsistent with federal courts' responsibility to "determin[e] foreign law" based on "any relevant material or source." Fed. R. Civ. P. 44.1.

2. The court of appeals believed that its rigid approach was compelled by *United States* v. *Pink*, 315 U.S. 203 (1942). Pet. App. 20a, 22a-23a. In *Pink*, which preceded the adoption of Rule 44.1, the United States had obtained an "official declaration by the Commissariat of Justice" of the Soviet Union defining the extraterritorial reach of a Russian decree. 315 U.S. at 218. The Court concluded that, because "the evidence supported [a] finding" that "the Commissariat for Justice ha[d]

power to interpret existing Russian law," the "official declaration [wa]s conclusive so far as the intended extraterritorial effect of the Russian decree [wa]s concerned." *Id.* at 220.

Because the Commissariat was empowered to render an authoritative construction of Russian law, the official declaration in *Pink* was in some respects analogous to a state supreme court's answer to a question of state law certified by a federal court. Cf. *United States* v. *Juvenile Male*, 560 U.S. 558, 561 (2010) (per curiam). There was also apparently no indication that the declaration was incomplete or inconsistent with the Soviet Union's past statements on the question. This Court's holding that the Commissariat's declaration was "conclusive" under those circumstances does not suggest that *every* submission by a foreign government is entitled to the same weight.

3. The court of appeals also reasoned that a foreign government's characterization of its own laws should be afforded "the same respect and treatment that we would expect our government to receive in comparable matters." Pet. App. 26a. That concern for reciprocity is sound, but it does not support the court's conclusion. When the Department of Justice litigates questions of U.S. law in foreign tribunals, it expects that its views will be afforded substantial weight, and that its characterizations of U.S. law will be accepted because they are accurate and well-supported. But the Department historically has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant material. And the Department is not aware of any foreign-court decision holding that

the Department's representations are entitled to such conclusive weight.[2]

C. The Court Of Appeals' Error Warrants Further Review

The degree of deference that a court owes to a foreign government's characterization of its own law is an important and recurring question, and foreign sovereigns considering making their views known to federal courts should understand the standards that will be applied to their submissions. The court of appeals' decision warrants further review because it departs from the decisions of other circuits and creates uncertainty about the proper treatment of foreign governments' characterizations of their laws.

The court of appeals acknowledged that there is "competing authority" on the question presented, and it expressly disagreed with the Seventh Circuit's decision in *Amoco Cadiz*. Pet. App. 20a-21a. Respondents observe (Br. in Opp. 23-24) that the court in *Amoco Cadiz* ultimately adopted the French government's interpretation of French law. The court did so, however, only because it found that interpretation "plausible" based

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[2] The understanding that a government's expressed view of its own law is entitled to substantial but not conclusive weight is consistent with two international treaties that establish mechanisms by which one state may obtain from another an official statement characterizing its laws. Those treaties specify that "[t]he information given in reply shall not bind the judicial authority from which the request emanated." European Convention on Information on Foreign Law art. 8, June 7, 1968, 720 U.N.T.S. 154; see Organization of American States, Inter-American Convention on Proof of and Information on Foreign Law art. 6, May 8, 1979, O.A.S.T.S. No. 53, 1439 U.N.T.S. 111 (similar). Although the United States is not a party to those treaties, they further confirm that the court of appeals' rule is out of step with international practice.

on all of the circumstances, including the French government's statements in other contexts. 954 F.2d at 1312. The Seventh Circuit did not treat the French government's submission as conclusive.

Other courts of appeals have rejected foreign governments' characterizations of their own laws even where, as here, those governments appeared in U.S. court. In *McNab*, for example, the Eleventh Circuit declined to accept "the Honduran government's current interpretation of its laws," as reflected in an amicus brief, because that interpretation was inconsistent with earlier statements by Honduran officials. 331 F.3d at 1242. And in *McKesson*, the D.C. Circuit rejected "Iran's contention that its corporate law requires shareholders * * * to physically appear at a company's office * * * in order to collect dividends." 271 F.3d at 1108. The D.C. Circuit declined to adopt that construction because it was not supported by the affidavits submitted by Iran's experts. *Id.* at 1108-1109. The approach reflected in those decisions is consistent with the role of federal courts under Rule 44.1, and inconsistent with the rule of conclusive deference that the Second Circuit applied in this case.

II. THIS COURT SHOULD DENY REVIEW OF PETITIONERS' CONTENTION THAT THE COURT OF APPEALS ERRED BY REVIEWING THE DENIAL OF RESPONDENTS' MOTION TO DISMISS

Petitioners contend (Pet. 19-22) that the court of appeals erred by reviewing the denial of respondents' motion to dismiss in an appeal from a judgment following a trial on the merits. Petitioners are correct that the denial of the motion to dismiss was effectively superseded when the district court revisited the comity issue later in the litigation. But the comity question was

properly before the court of appeals, and the court's unexplained decision to focus on the motion to dismiss does not appear to have affected its ultimate conclusion. That decision thus does not warrant this Court's review, particularly because the issue was not briefed below or expressly addressed by the court of appeals.

A. "The general rule is that 'a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.'" *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (citation omitted). Accordingly, although most interlocutory orders are not themselves appealable, an "appeal from [a] final judgment opens the record and permits review of all rulings that led up to the judgment." 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3905.1, at 250 (2d ed. 1992).

In some circumstances, however, an interlocutory order is effectively superseded by subsequent developments in the district court. In *Ortiz* v. *Jordan*, 562 U.S. 180 (2011), for example, this Court held that a court of appeals generally may not review "an order denying summary judgment after a full trial on the merits" because "the full record developed [at trial] supersedes the record existing at the time of the summary-judgment motion." *Id.* at 184. A defendant is still free to challenge the sufficiency of the plaintiff's proof, but that challenge "must be evaluated in light of the character and quality of the evidence received in court." *Ibid.*

In this case, respondents raised their comity defense in a motion to dismiss, a motion for summary judgment, and a motion for judgment as a matter of law under Rule 50(b). Pet. App. 41a & n.3. Each time, the district court rejected that defense based on a progressively

more developed record. Under the circumstances, the court of appeals erred in focusing on the "denial of [respondents'] motion to dismiss" and ignoring "the subsequent stages of th[e] litigation." *Id.* at 2a n.2. The district court ultimately decided the comity question based on a more complete record, which "supersede[d] the record existing at the time of the [motion to dismiss]." *Ortiz*, 562 U.S. at 184.

B. Although it was erroneous, the court of appeals' focus on the motion to dismiss does not appear to have affected the outcome below and would not likely affect any proceedings on remand. Because the court incorrectly believed that the Ministry's brief had to be accepted as conclusive, it declined to consider other material in the motion-to-dismiss record—a conclusion that would have applied equally to the more extensive record developed later. And if this Court grants review and holds that the Ministry's brief is not entitled to conclusive weight, the court of appeals can reconsider the foreign-law issue on remand in light of all of the pertinent record materials.[3]

Petitioners assert (Pet. 22) that the court of appeals' focus on the motion to dismiss was dispositive because "[r]espondents' 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." It is true that, absent a Rule 50(b) motion, "an appellate court is 'powerless' to review the sufficiency of the evidence after trial."

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[3] Indeed, the court of appeals stated that, but for the Ministry's brief, "the district court's careful and thorough treatment of the evidence before it * * * at both the motion to dismiss and summary judgment stages would have been entirely appropriate." Pet. App. 30a n.10.

Ortiz, 562 U.S. at 189 (citation omitted). It is also true that "[a] motion under Rule 50(b) is not allowed unless the movant sought relief on similar grounds" under Rule 50(a). *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 485 n.5 (2008). For two reasons, however, those principles did not preclude the court of appeals from deciding the comity question.

First, comity does not concern "the sufficiency of the evidence." *Ortiz*, 562 U.S. at 189. Both the determination of foreign law and the ultimate decision whether to dismiss a claim on comity grounds are made by the court, not the jury. Fed. R. Civ. P. 44.1; see Pet. App. 42a. Indeed, "given the important role that comity plays" in protecting interests that transcend the parties to a particular case, a court may overlook a party's failure to raise the issue. *Gucci Am., Inc.* v. *Weixing Li*, 768 F.3d 122, 138-140 (2d Cir. 2014).[4]

Second, petitioners have forfeited their Rule 50(a) argument. Petitioners did not object when respondents raised comity in their Rule 50(b) motion. D. Ct. Doc. 702, at 24-31 (May 10, 2013). Where, as here, "the nonmoving party fails to object to a Rule 50(b) motion on the grounds of waiver, the objection itself is deemed waived." *Gronowski* v. *Spencer*, 424 F.3d 285, 297 (2d Cir. 2005). And petitioners forfeited the argument again by failing to raise it on appeal. Pet. C.A. Br. 44-45.

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[4] Contrary to respondents' suggestion (Br. in Opp. 15), principles of international comity do not bear on the court's subject-matter jurisdiction. See *Cooper* v. *Tokyo Elec. Power Co.*, 860 F.3d 1193, 1209-1210 (9th Cir. 2017); cf. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514-516 (2006). Courts thus have the power, but not a jurisdictional obligation, to raise comity *sua sponte*.

C. The comity issue thus was properly before the court of appeals, even though the court erred by focusing on the motion to dismiss rather than on the full record. Petitioners assert (Pet. 19-20) that this aspect of the court of appeals' decision conflicts with decisions of the Fifth, Sixth, and Tenth Circuits holding that a court of appeals may not review the denial of a motion to dismiss after a trial on the merits. But those decisions involved motions to dismiss for failure to plead facts sufficient to state a claim, not motions based on international comity. And even if the court of appeals' decision created a circuit conflict, this case would not be an appropriate vehicle in which to resolve it because the issue was neither briefed below nor explicitly addressed by the court of appeals. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

III. PETITIONERS' CONTENTION THAT COURTS MAY NOT DISMISS SHERMAN ACT CLAIMS BASED ON INTERNATIONAL COMITY DOES NOT WARRANT THIS COURT'S REVIEW

Petitioners contend (Pet. 29-34) that a federal court may never invoke principles of comity to dismiss a Sherman Act claim. Petitioners did not raise that argument below, and the court of appeals' implicit conclusion that comity-based dismissals are sometimes permissible does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

A. This Court has long held that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993). In Section 402 of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA),

Pub. L. No. 97-290, Tit. IV, 96 Stat 1246 (15 U.S.C. 6a), Congress confirmed that understanding and clarified the application of the Sherman Act to conduct involving foreign commerce. Under the FTAIA, the Sherman Act generally does not reach "commercial activities taking place abroad, *unless* those activities adversely affect domestic commerce" or "imports to the United States." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 161 (2004) (*Empagran*).

Comity is often described as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895). The Sherman Act does not expressly incorporate principles of comity. But the comity doctrine had already been established when the Sherman Act was enacted, see, *e.g.*, *id.* at 165-166, and it thus formed a part of the "contemporary legal context in which Congress acted," *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 532 (1983). This Court has often looked to that context in "ascertain[ing] the intended scope" and application of the Sherman Act's broadly worded provisions. *Ibid.*

Consistent with that understanding, courts of appeals have long held that courts may, in unusual circumstances, dismiss private Sherman Act claims based on principles of comity. See, *e.g.*, *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1297-1298 (3d Cir. 1979); *Timberlane Lumber Co.* v. *Bank of Am.*, 549 F.2d 597, 613-615 (9th Cir. 1976). Those courts have considered a variety of factors, including:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Timberlane, 549 F.2d at 614; see *Mannington Mills*, 595 F.2d at 1297-1298 (similar ten-factor test). Congress did not disturb those decisions when it enacted the FTAIA. To the contrary, the House Report accompanying the FTAIA cited *Timberlane* and specified that the FTAIA "would have no effect on the courts' ability to employ notions of comity." H.R. Rep. No. 686, 97th Cong., 2d Sess. 13 (1982).

Comity-based dismissals should be rare, 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." *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990). But in the United States' view, federal courts may, in extraordinary circumstances, dismiss private Sherman Act claims based on principles of comity.[5]

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[5] Although courts may engage in a comity analysis in private Sherman Act suits, they should not do so in actions brought by federal agencies. The government's decision to bring an enforcement action "represents a determination that the importance of antitrust

B. The United States does not endorse all aspects of the court of appeals' comity analysis. For example, under the circumstances presented here, respondents' argument that Chinese law required them to engage in the challenged conduct might have been better analyzed under the rubric of the foreign sovereign compulsion doctrine rather than through a comity analysis. Cf. U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for International Enforcement and Cooperation* § 4.2.2, at 32-34 (2017). The court also gave inadequate weight to the interests of the U.S. victims of the alleged price-fixing cartel and to the interests of the United States in enforcement of its antitrust laws. Pet. App. 34a-35a. Conversely, the court gave too much weight to China's objections to this suit. *Id.* at 35a. Unlike a statement from the Executive Branch, a foreign sovereign's objection to a suit does not, in itself, necessarily indicate that the case will harm U.S. foreign relations. But petitioners do not seek this Court's review of the court of appeals' specific application of comity principles; they argue that the court should not have performed a comity analysis at all. That aspect of the court's decision does not conflict with any decision of this Court or another court of appeals.

1. In *Hartford Fire*, this Court declined to decide whether a court may dismiss a Sherman Act claim based on comity. 509 U.S. at 798. The Court has not explicitly

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enforcement outweighs any relevant foreign policy concerns." U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for International Enforcement and Cooperation* § 4.1, at 28 (2017). Given the primacy of the Executive Branch in the realm of foreign policy, courts should not "second-guess the executive branch's judgment as to the proper role of comity concerns" in antitrust enforcement actions. *United States* v. *Baker Hughes Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C. 1990).

revisited that issue in the intervening years, but petitioners assert (Pet. 31-32) that the Court implicitly foreclosed comity-based dismissals in *Empagran*. That is not correct. In *Empagran*, the Court considered the FTAIA's directive that the Sherman Act reaches conduct involving non-import foreign commerce only if the conduct's effect on U.S. commerce "gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2); see *Empagran*, 542 U.S. at 174. The Court held that, when a Sherman Act violation "adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect," a plaintiff who suffers only foreign harm may not sue. 542 U.S. at 164.

In reaching that conclusion, this Court rejected the plaintiffs' argument that courts should deal with the problems posed by foreign-injury cases by "abstaining where comity considerations so dictate." *Empagran*, 542 U.S. at 168. The Court deemed that approach "too complex," and instead interpreted the FTAIA to "exclude independent foreign injury cases *across the board*." *Ibid.* In so holding, however, the Court did not purport to resolve the question left open in *Hartford Fire* or to bar courts from invoking comity principles in cases that fall within the scope of the Sherman Act as clarified by the FTAIA.

2. Petitioners are also wrong in asserting (Pet. 32-33) that other courts of appeals have rejected the approach to comity reflected in *Timberlane* and *Manningston Mills*. To the contrary, one of the decisions they cite "commend[ed] the[] analysis" in those cases and agreed that "[a] district court should not apply the antitrust laws to foreign conduct or foreign actors if

such application would violate principles of comity." *Industrial Inv. Dev. Corp.* v. *Mitsui & Co.*, 671 F.2d 876, 884 & n.7 (5th Cir. 1982), vacated, 460 U.S. 1007 (1983). The remaining decisions on which petitioners rely simply interpreted the Sherman Act's extraterritorial reach; they did not address any case-specific comity arguments, much less hold that such arguments are categorically foreclosed. *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538-539 (8th Cir. 2007); *Empagran S.A.* v. *F. Hoffmann-Laroche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005), cert. denied, 546 U.S. 1092 (2006).

C. Even if the comity question otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider it. As petitioners acknowledge (Reply Br. 13), they did not argue below that comity-based dismissals are categorically impermissible, and the court of appeals therefore did not consider that argument. This Court's "traditional rule * * * precludes a grant of certiorari" where, as here, "'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioners identify no sound reason to depart from that rule here.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the second question presented.

Respectfully submitted.

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