No. _____

In the Supreme Court of the United States

THYSSEN-BORNEMISZA COLLECTION FOUNDATION,
an agency or instrumentality of the Kingdom of Spain,
Petitioner,

v.

DAVID CASSIRER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a question nearly identical to the second question presented in *Animal Science Products, Inc., v. Hebei Welcome Pharmaceutical Co., Ltd*., No. 16-1220, on which this Court granted review.

The question presented is: Whether a foreign sovereign's interpretation of its domestic law is entitled to conclusive deference (as held by the Second Circuit in *Animal Science Products*), significant deference, as recognized by the Seventh Circuit and as advocated now by the U.S. Solicitor General, or no deference, as implied by the Ninth Circuit in this action?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Thyssen-Bornemisza Collection Foundation (the "Foundation"), defendant-appellee/cross-appellant in the court below. The Foundation is an agency or instrumentality of the Kingdom of Spain, a foreign sovereign. It is a not-for-profit entity established for educational and cultural purposes; it is a separate legal entity, created under the laws of the Kingdom of Spain. The Foundation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Mr. Claude Cassirer, the original plaintiff in this action, died in 2010. Respondents David and Ava Cassirer, his children, and the United Jewish Federation of San Diego County (collectively, "the Cassirers or Respondents") succeeded to his claims in 2011 and were plaintiffs-appellants/cross-appellees below. The United Jewish Federation of San Diego County has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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This case presents a question nearly identical to the second question presented in *Animal Science Products, Inc., v. Hebei Welcome Pharmaceutical Co., Ltd.*, No. 16-1220, on which this Court granted review on January 12, 2018. Petitioner Foundation respectfully asks this Court to hold this petition pending resolution of *Animal Science Products*, and to dispose of this case in a manner consistent with the Court's decision in *Animal Science Products*.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-65a, is reported at 862 F.3d 951. Three prior opinions of the court of appeals are reported at 580 F.3d 1048, 616 F.3d 1019 (en banc), and 737 F.3d 613. The most recent opinion of the district court, Pet. App. 68a-109a, is reported at 153 F. Supp. 3d 1148. A petition for a writ of certiorari was previously filed in this case on December 10, 2010 (No. 10-786). On March 21, 2011, this Court invited the Solicitor General to file a brief expressing the views of the United States. 562 U.S. 1285. On May 27, 2011, the Solicitor General filed an *amicus curiae* brief, recommending against review and asserting that the FSIA's expropriation exception did not provide jurisdiction over the Kingdom of Spain. On June 27, 2011, this Court denied the petition. 564 U.S. 1037.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2017. The Petition for Rehearing and Rehearing *En Banc* was denied on December 5, 2017.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

RULE INVOLVED

Citing Federal Rule of Civil Procedure 44.1 (Pet. App. 226a) and relying primarily on "independent research" and an amicus brief submitted by the Comunidad Judía de Madrid and Federación de Comunidades Judías de España, Pet. App. 28a (citing and quoting Rule 44.1), the court of appeals reversed the district court. At issue here, and in *Animal Science Products*, is what level of deference should be afforded the formal, reasoned opinion of a foreign sovereign on the proper interpretation of its domestic law.

STATEMENT OF THE CASE

I. The Proceedings In This Case

This case involves a modern-day challenge to the Foundation's ownership of *Rue Saint-Honoré, après-midi, effet de pluie*, oil on canvas, 81 x 65 cm (1897) by Camille Pissarro (the "Painting"), held openly since its public acquisition in 1993, and without challenge until 2001. The Cassirers' predecessor, Ms. Lilly Neubauer, was deprived of the Painting by the Nazis in 1939. She sought restitution or compensation for the loss in 1948, and although the location of the Painting was unknown, she settled her claim with the German government and other competing claimants pursuant to a written settlement agreement in 1958. After 1958, no effort was made by the Cassirers or their predecessors to locate the Painting.

From 1951 to 1976, the Painting was owned by a succession of American owners. On November 18,

1976, Baron Hans-Heinrich Thyssen-Bornemisza of Switzerland purchased the Painting and it was maintained as part of his collection of 775 artworks (the "Collection") in Switzerland. In 1988, the Baron loaned the Collection, including the Painting, to the Kingdom of Spain, and the Kingdom of Spain established the Foundation, a non-profit, private cultural foundation, to maintain, conserve, publicly exhibit, and promote the Collection. Spain later sought to make the loan permanent, and on June 18, 1993, the Spanish cabinet passed Real Decreto-Ley 11/1993, authorizing the government to sign a contract allowing the Foundation to purchase the Collection as a whole. Since the Foundation's acquisition in 1993, the Painting's location and the Foundation's ownership of it have been identified in numerous publications.

On May 3, 2001, Mr. Cassirer filed a petition in Spain demanding the Painting. The petition was rejected. On May 10, 2005, Mr. Cassirer filed a complaint seeking possession of the Painting. The Foundation and co-defendant the Kingdom of Spain filed motions to dismiss the complaint asserting, among other things, that no exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq*., applied to permit a court to take jurisdiction over either defendant. On August 30, 2006, the district court denied the motions, and the defendants timely appealed.

On interlocutory appeal, a three-judge panel affirmed the district court's decision, in part, but remanded the action to permit the district court to conduct a prudential exhaustion analysis. *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1064 (9th Cir. 2009).

Shortly thereafter, the court of appeals *sua sponte* decided to rehear the case *en banc*. *See Cassirer v. Kingdom of Spain*, 590 F.3d 981 (9th Cir. 2009). The *en banc* court dismissed in part and affirmed in part the district court's order denying the motions to dismiss, finding among other things, that the FSIA's expropriation exception was satisfied, even though the expropriation was not accomplished by either defendant. *See Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1037 (9th Cir. 2010) (*en banc*). Judge Gould, joined by then-Chief Judge Kozinski, issued a dissent, asserting that the Foundation and the Kingdom of Spain should be permitted to retain their sovereign immunity because Germany, not the defendants, committed the violation of international law that was the sole basis for jurisdiction over the sovereign defendants. On December 10, 2010, the Foundation and the Kingdom of Spain filed a timely petition for a writ of certiorari with this Court.

On March 21, 2011, this Court invited the U.S. Solicitor General to file a brief expressing the views of the United States. *Kingdom of Spain v. Estate of Claude Cassirer*, 562 U.S. 1285 (2011). The Solicitor General recommended that certiorari be denied, but asserted that jurisdiction could not be had over the Kingdom of Spain. Brief for the United States as *Amicus Curiae* at 15, *Kingdom of Spain v. Estate of Claude Cassirer*, No. 10-786, (U.S. May 27, 2011) 2011 WL 2135028 ("[W]here a plaintiff alleges that the property is "owned or operated by an agency or instrumentality of the foreign state * * * engaged in a commercial activity in the United States," then there is *jurisdiction over only the foreign agency or instrumentality* that has availed itself of American

markets, *not the foreign state*.") (quoting 28 U.S.C. § 1605(a)(3) (emphasis added) and citing *Garb v. Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006)). The defendants' petition for a writ of certiorari was denied on June 27, 2011. *Kingdom of Spain v. Estate of Claude Cassirer*, 564 U.S. 1037 (2011). On August 12, 2011, the Cassirers dismissed the Kingdom of Spain from the action.

On September 8, 2011, the Foundation filed a second motion to dismiss asserting, *inter alia*, that California Code of Civil Procedure § 338(c) – amended in 2011 to extended the statute of limitations from three to six years – was unconstitutional. The district court granted the Foundation's motion on the ground that Section 338(c) impermissibly invaded the federal government's foreign affairs power and dismissed the claims as time barred. The Cassirers appealed, and the court of appeals reversed, rejecting the district court's finding that Section 338(c) was preempted under *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010). *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 618-619 (9th Cir. 2013). On February 11, 2014, the court of appeals denied the Foundation's petition for rehearing *en banc*.

The Cassirers retained new counsel. Before the district court for a third time, the parties filed cross-motions for summary judgment. On June 4, 2015, the district court issued an order granting the Foundation's Motion for Summary Judgment and denying the Cassirers' Motion for Summary Adjudication. Pet. App. 68a-109a. The district court found that under federal common law choice-of-law rules, Spanish law – not

California law – applied to the Cassirers' ownership claim. Pet. App. 76a-90a. The district court further found that the Foundation was the owner of the Painting, as the Foundation's possession satisfied the elements of "extraordinary" adverse possession (or acquisitive prescription), under Spanish Civil Code Article 1955.[1] Pet. App. 90a-106a. The district court noted that the Cassirers "do not seriously dispute that the Foundation has met the general requirements for extraordinary adverse possession (under the longer six-year period) . . . Plaintiffs do not even address the Foundation's arguments that it possessed the Painting as owner publicly, peacefully, and without interruption for more than six years." Pet. App. 91a.

Rather than challenge the Foundation's satisfaction of extraordinary adverse possession under Article 1955, the Cassirers' expert asserted that Article 1956, which tolls the adverse possession period for principles, accomplices, and accessories to crimes, bars the application of adverse possession because the Foundation was an "accessory" to "crimes against

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[1] Spain's adverse possession laws (Articles 1940-1956) require that the possessor: (1) possess the property for a statutory period (Articles 1955, 1956), (2) possess the property as owner (Article 1941), and (3) possesses the property publicly, peacefully, and without interruption (Articles 1941-1948). Pet. App. 90a-103a. Spanish Civil Code Article 1955 provides that "[o]wnership of movable prescribes by three years of uninterrupted possession in good faith." In the absence of good faith, "[o]wnership of movable property also prescribes by six years of uninterrupted possession, without any other condition." Spanish Civil Code Article 1955 (describing "extraordinary" adverse possession). Pet. App. 95a-96a.

humanity and genocide" – namely, the Holocaust.[2] Pet. App. 201a, 211a. The parties' experts and the court defined "accessory" according to the 1973 Spanish Penal Code, the code in effect when the Foundation purchased the Collection in 1993. Pet. App. 98a-100a. The district court recognized that the "the clear and unambiguous language of the Spanish Penal Code provides," and "the relevant Spanish case law holds" that to demonstrate criminal accessory liability, the "intent or purpose of the accessory's misconduct must be to prevent the offense or crime from being discovered." Pet. App. 100a (citing 1973 Spanish Penal Code Article 17). Because "there is *absolutely no evidence* that the Foundation purchased the Painting (or performed any subsequent acts) with the intent of preventing * * * the Nazis' criminal offenses from being discovered," the district court concluded that Foundation could not be deemed an accessory and Article 1956 could not apply to bar extraordinary

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[2] The Cassirers made a single reference to "accessories" in their Opposition to the Foundation's Cross-motion for Summary Judgment. Pet. App. 211a. Their brief did not, however, specifically allege that the Foundation could be deemed criminally liable as an accessory. *See id.* ("As Plaintiffs' expert on Spanish law, Alfredo Guerrero Righetto, makes clear, beginning in 1995, Spain eliminated the statute of limitations for crimes against humanity and genocide. Guerrero Decl., Ex. 55 ¶ 4.1-4.2. This change in law had the effect of eliminating the availability of acquisitive prescription as to moveable property obtained through these crimes by the perpetrators of crimes, ***or*** accomplices or accessories, including those who engage in acts of concealment.") (emphasis in original). The Cassirers themselves made no reference to "accessory" liability in their cross motion for summary adjudication.

adverse possession under Article 1955. Pet. App. 101a-102a (emphasis added).

The Cassirers appealed and the Foundation cross-appealed. The Cassirers retained new counsel who raised two new arguments on appeal. Relevant to this petition, the Cassirers asserted the district court should have defined "accessory" according to the 1870 Spanish Penal Code – superseded by the 1973 Penal Code in 1950 – which included in the definition the lesser crime of receiving of stolen property (or accessory after-the-fact).

On July 10, 2017, the court of appeals issued a lengthy opinion affirming in part and reversing in part the district court's decision. Pet. App. 1a-65a The opinion affirmed the district court's findings that federal common law's choice-of-law test should be applied, as the FSIA is the sole basis of jurisdiction, and that Spanish law must be applied to determine ownership. Instead of finding the argument waived, the opinion went on to devote nearly twenty pages of analysis to the Cassirers' accessory-after-the-fact argument, raised for the first time on appeal. Relying primarily on "independent research," and an amicus brief submitted by the Comunidad Judía de Madrid and Federación de Comunidades Judías de España, Pet. App. 28a, the court of appeals reversed the district court. The court of appeals did not disturb or find fault with the district court's findings that the Foundation satisfied Article 1955's extraordinary adverse possession ownership requirements. The court found that the Cassirers' new *allegation* of criminal accessory after-the-fact liability may operate to strip the Foundation of a vested property right. Pet. App. 33a-

48a. But rather than remand the action so that the district court could consider the Cassirers' new accessory claim in the first instance, the court of appeals *found* that 1870 Penal Code Article 16 affirmatively applies to define "accessory" in Article 1956 and remanded the action on the limited question of whether the Foundation actually meets the 1870 Penal Code definition of "accessory." Pet. App. 47a-48a.

On September 7, 2017, the Foundation filed a Petition for Rehearing and Rehearing *En Banc*. Pet. App. 112a-131a. On September 18, 2017, the Kingdom of Spain, through its Ministry of Education, Culture, and Sports, submitted an amicus brief in support of the Foundation. Pet. App. 132a-183a. Noting that it was "deeply concerned about the Panel's failure to correctly interpret and apply provisions of the Spanish Civil Code," Pet. App. 188a, the Kingdom of Spain provided the court of appeals with a formal opinion, signed by the Head State Attorney on behalf of the Office of State Attorneys, that addressed the proper "[a]pplication of the special adverse possession rule under art. 1956 of the Spanish Civil Code." Pet. App. 141a. With reference to the history of Article 1956, its interpretation in Spanish case law, and the presumption of innocence, particularly where no criminal charge has been brought, the Kingdom of Spain formally appeared in this action to advise the court of appeals of the proper interpretation of its domestic laws. Pet. App. 135a-183a.

In its formal statement, the Kingdom of Spain does not dispute that, where there have been findings of criminal (and derivative civil) liability, Article 1956 may abrogate Article 1955's six-year acquisitive

prescription period. Pet. App. 135a-138a, 141a-146a. But there were no findings of criminal liability prior to ownership vesting in the Foundation in 1999. And because the five-year statute of limitations for accessory liability expired in 1998, there cannot, as a matter of law, be future findings of criminal liability against the Foundation. Pet. App. 146a-160a.

On September 27, 2017, the court of appeals ordered the Cassirers to respond to the Foundation's petition. On December 4, 2017, the court of appeals granted the Kingdom of Spain's motion to file an amicus brief. The very next day, the court of appeals denied – without explanation or reference to the Kingdom of Spain's formal statement on the proper interpretation of its laws – the petition. Pet. App. 110a-111a. The Order makes no reference to the Kingdom of Spain's formal statement on the proper interpretation of its laws and provides no evidence that the court of appeals considered, much less afforded any deference to, the Kingdom of Spain's statement regarding the proper interpretation of its own laws. Because the court of appeals made a *finding* that Article 1956 applies to toll the running of the adverse possession deadline which expired in 1999, leaving for the district court's consideration the limited question of whether the Cassirers can prove that the Foundation is an accessory after-the-fact, this petition marks the Foundation's first and only opportunity to challenge the court of appeal's failure to afford *any deference* to the Kingdom of Spain's statement regarding the proper interpretation of its domestic laws. The Foundation filed, and the court of appeals granted, a motion to stay the mandate pending the Court's resolution of this petition.

REASONS FOR GRANTING THE PETITION

I. This Court Granted Review of *Animal Science Products*, in which the Second Circuit Held that a Foreign Government's Interpretation of Its Own Laws Is Entitled to Conclusive Deference, In Conflict with the Holdings of Other Circuits and the Position of the Solicitor General

Animal Science Products involves a multi-district antitrust class action brought by direct and indirect purchases of vitamin C (including the petitioner Animal Science Products) against Chinese manufacturers and exporters of vitamin C (including the respondent Hebei Welcome Pharmaceutical Co.). The plaintiffs – whose counsel also represents the Cassirers in the most recent appeal – alleged that the defendants conspired to fix the price and supply of vitamin C sold and exported to U.S. companies to maintain China's position as a leading exporter of vitamin C. *In re Vitamin C Antitrust Litig*., 584 F. Supp. 2d 546 (E.D.N.Y. 2008). The defendants moved to dismiss the complaints. They did not deny the allegations against them, but asserted that their actions to coordinate prices and limit production levels were compelled by Chinese law. The defendants contended, therefore, that the plaintiffs' claims were barred under a number of theories, including the act of state doctrine and principles of international comity. *Id.* at 550-551. The Ministry of Commerce of the People's Republic of China (the "Ministry") filed an unsworn amicus brief in support of the defendants' motion to dismiss, asserting that the defendants "were

compelled under Chinese law," to collectively set a price for vitamin C exports. *Id.* at 554.

The plaintiffs disputed the Ministry's interpretation of Chinese law, submitting evidence that the defendants' unlawful actions had been voluntary and were not mandated by Chinese law. The district court denied the defendants' motion to dismiss. 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," as "the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position." *Id.* at 557. Finding the record to be "simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions," the district court denied the motion. *Id.* at 559.

After further discovery, the defendants moved for summary judgment. *See In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522 (E.D.N.Y. 2011). The Ministry submitted a further statement reiterating its position that the defendants' actions were compelled by Chinese law, although the statement neglected to discuss or cite to any specific government directives or evidence. *Id.* at 542 n.24. In response, the plaintiffs cited additional evidence supporting their contrary view, including documents in which China expressed the inconsistent position that it "gave up export administration of vitamin C" in 2002. *Id.* at 552.

The district court denied the defendants' motion for summary judgment. *Id.* at 567. 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 542. 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 551; *see also id*. at 542 n.24. The court also noted that the Ministry's most recent statement did not "read like a frank and straightforward explanation of Chinese law," but rather "like a carefully crafted and phrased litigation position." *Id.* at 552. Finally, 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." *Ibid.* The district court "respectfully decline[d] to defer to the Ministry's interpretation." *Id.* at 551-552.

The district court then held that Chinese law did not require respondents to fix the price and quantity of vitamin C exports and 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 553-555. 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 565. The case proceeded to trial where the jury found that the defendants had conspired to fix the price and limit the output of vitamin C. The district court entered judgment for plaintiffs, awarding $147 million in damages.

The court of appeals reversed. *See In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016). Finding that the district court abused its discretion by failing to defer to the Ministry's amicus brief at the motion to

dismiss phase, the appellate court declined to "address the subsequent stages of th[e] litigation." *Id.* at 178 n.2. The court of appeals acknowledged that there is "competing authority" on that question, and that some courts have declined to "accept such statements as conclusive." *Id*. at 186-187. But the court of appeals 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 189. Based on the Ministry's submissions, the court of appeals held that "Chinese law required [respondents] to engage in activities in China that constituted antitrust violations here in the United States." *Id*. at 189-190. The court then determined that the remaining comity factors "clearly weigh in favor of U.S. courts abstaining from asserting jurisdiction." *Id*. at 192.

On April 3, 2017, the plaintiffs filed a petition for a writ of certiorari, presenting three questions. Brief of Petitioner-Appellees at 12, *Animal Science Products, Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220 (April 3, 2017), 2017 WL 1353281 ("*Animal Science Products* petition"). The plaintiffs' second question asked 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. *Animal Science Products* petition at 1. The plaintiffs acknowledged that a foreign government's statement of its own laws "[is] certainly entitled to respect," but asserted that the measure of respect "should not require a district court to ignore all contrary evidence simply because the foreign government appears as an *amicus curiae*." *Id.* at 6. Citing decisions from other Circuits that applied

different standards of deference, the petition asserted that the Second Circuit's conflicting "deference-on-appearance-standard" leaves foreign sovereigns and litigants "to navigate a patchwork of inconsistent federal rules." *Ibid.*; *see also id*. at 23-29 (citing *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1108-1109 (D.C. Cir. 2001); *Chavez v. Carranza*, 559 F.3d 486, 494-495 (6th Cir. 2009); *United States v. McNab*, 331 F.3d 1228, 1241 (11th Cir. 2003); *In re Oil Spill by the Amoco Cadiz off the coast of France on March 16, 1978*, 954 F.2d 1279, 1312 (7th Cir. 1992); *Access Telecom, Inc. v. MCI Telecomms. Corp*., 197 F.3d 694, 714 (5th Cir. 1999)).[3]

On June 26, 2017, this Court invited the Solicitor General to file a brief expressing the views of the United States. *Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co.*, 137 S. Ct. 2320 (2017), 2017 WL 2722422. The Solicitor General recommended that this Court grant the petition, limited to the second question presented.

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[3] The petition made passing reference to *Richmark Corporation v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992), asserting that the court of appeals "reflexively deferred" to the legal interpretation of the Chinese government. *See Animal Science Products* petition at 23-24 (citing *Richmark*, 959 F.2d at 1474 & n.7). But the *Richmark* court made no statement – much less a holding – regarding the proper level of deference to afford a foreign government's interpretation of its own laws. Rather, the court of appeals accepted the defendant foreign corporation's interpretation of the State Secrets Act because "[w]e have neither the power nor the expertise to determine for ourselves what [the People's Republic of China's] law is" but then concluded that the defendant's interest in secrecy were outweighed by the plaintiffs' interests in obtaining discovery. *Richmark*, 959 F.2d at 1474 n.7.

> 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.

Brief for the United States as *Amicus Curiae* at 12, *Animal Science Products, Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220 (Nov. 14, 2017), 2017 WL 5479477 ("S.G. Brief"). The Solicitor General noted that

> 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.

S.G. Brief at 7-8 (emphasis added). In advocating review of the *Animal Science Products* petition, the

Solicitor General noted that the "precise weight" to be afforded a foreign government's statement of its laws should be based on a number of 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." *Id.* at 8. The Solicitor General appears to suggest that in some circumstances, as where the above-mentioned flaws are absent, conclusive deference to the foreign government's interpretation *is* appropriate. *Ibid*. (citing *McNab* and *McKesson* and noting that federal courts "should not, however, treat a foreign government's characterizations as conclusive *in all circumstances*") (emphasis added). This Court adopted the Solicitor General's recommendation and granted the *Animal Science Products* petition on January 12, 2018. *Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 734 (2018), 2018 WL 386563.

II. The U.S. Court of Appeals for the Ninth Circuit's Failure to Afford Any Deference to the Kingdom of Spain's Interpretation of Its Own Domestic Laws Conflicts with Precedent of Other Circuits and with the Positions Taken by the U.S. Solicitor General, which Recognize that a Foreign Government's Interpretation of Its Own Laws Is Entitled to Some Level of Deference

In *United States v. Pink*, 315 U.S. 203 (1942), this Court acknowledged that foreign sovereigns' interpretations of their domestic laws are entitled to respect and deference. *Id.* at 219. Since that time,

courts across the country continue to recognize that a sovereign's interpretation of its own law is entitled to deference. *See, e.g., Société Nationale Industrielle Aérospatiale*, 482 U.S. at 546 ("American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state."); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002) ("We also agree with other Courts of Appeals that have suggested that a foreign sovereign's views regarding its own laws merit – although they do not command – some degree of deference. * * * Where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas.").

The cases cited in the *Animal Science Products* petition acknowledge that where a foreign government formally appears in a case to interpret its own law, and the interpretation is reasonable and not inconsistent with prior representations, the deference afforded the foreign government is substantial and significant. *See, e.g., In re Oil Spill by the Amoco Cadiz*, 954 F.2d at 1312 ("A court of the United States owes substantial deference to the construction France places on its domestic law."); *see also id*. ("Courts of this nation routinely accept plausible constructions of laws by the agencies charged with administering them * * * Giving the conclusions of a sovereign nation less respect than those of administrative agency is unacceptable.") (internal citations omitted); *Access Telecom, Inc*., 197

F.3d at 714. Where, however, there are fundamental flaws with the foreign government's statement, most courts recognize that significant deference is not warranted. *Ibid.*; *McNab*, 331 F.3d at 1241-1242; *McKesson HBOC, Inc.*, 271 F.3d at 1108-1109; *Chavez*, 559 F.3d at 494-495; *Access Telecom, Inc.*, 197 F.3d at 714; *see also Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 148 (2d Cir. 2008), *vacated on other grounds, sub nom. Duran v. Beaumont*, 560 U.S. 921 (2010). The absence of any evidence of deference to the Kingdom of Spain's statement regarding the proper application of its own laws conflicts with the Second Circuit and with the standards articulated by other circuits particularly where, as here, there is no fundamental flaw in the statement itself.

The court of appeal's lack of deference also conflicts with the standard advocated by the Solicitor General, who asserts that while a foreign government's characterization of its own law is not conclusive, it is entitled to "substantial weight." S.G. Brief at 6; *see also* Brief of Respondent United States in Opposition at 16-17, *McNab v. United States*, 540 U.S. 1177 (2004) (No. 03-622), 2003 WL 23119191 (endorsing the federal courts' developed practice of granting "substantial-but measured-deference to a foreign nation's representations respecting its own laws"). Neither the Solicitor General nor the *Animal Science Products* parties question the basic premise – ignored by the court of appeals in *Cassirer* – that a sovereign's straightforward and reasoned interpretation of its own law is entitled to *some* level of deference.

The court of appeal's failure to provide *any deference* to the Kingdom of Spain's interpretation of Spanish law

runs afoul of the long-recognized principles of respect recognized by this Court, by the appellate courts, and by the Solicitor General that a foreign government is entitled to respect and its reasoned and supported statement of its own law is entitled to some – if not significant – deference.

III. The Court Should Hold this Petition Pending Resolution of *Animal Science Products*

The Court should hold this petition pending the resolution of the *Animal Science Products* petition. This Court's ruling in *Animal Science Products* is likely to make clear that a foreign sovereign's interpretation of its own laws is entitled to some level of deference. Moreover, the ruling is likely to clarify what level of deference a court is to apply, be it reasonable, substantial-but-measured, significant, or conclusive.

To ensure similar treatment of similar cases, the Court routinely holds petitions that implicate the same issue as other cases pending before it, and, once the related case is decided, resolves the held petitions in a consistent manner. *See, e.g., Flores v. United States*, 137 S. Ct. 2211 (2017); *Merrill v. Merrill*, 137 S. Ct. 2156 (2017); *Innovention Toys, LLC v. MGA Entm't, Inc.*, 136 S. Ct. 2483 (2016); *see also Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam) (noting that the Court has "GVR'd in light of a wide range of developments, including [its] own decisions"); *id*. at 181 (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." (emphasis omitted)). Equal

treatment is especially important where, as here, the issue centers on the treatment of and respect due to a foreign sovereign. *See, e.g., Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487-488, 497 (1983) (acknowledging need for uniformity under FSIA so that foreign states do not perceive unequal treatment).

Because both the *Animal Science Products* petition and this petition squarely implicate the level of deference a court should give a foreign sovereign's interpretation of its own laws, the Court should follow that course here and ensure that these cases are resolved in a consistent manner. If, having granted certiorari in *Animal Science Products*, the Court rules that the statements of domestic law provided by foreign sovereigns are entitled to reasonable, significant, or even conclusive deference, then it would be fundamentally unfair to permit the judgment in this case to stand, as there is no evidence that the court of appeals afforded the Kingdom of Spain's interpretation of Spanish law *any* deference. If this Court affirms the Second Circuit's conclusive deference standard or adopts the lesser standard – reasonable or significant, as advocated by the Solicitor General – it should thereafter grant, vacate, and remand in this case to allow the court of appeals to evaluate the Kingdom of Spain's interpretation of its laws with proper consideration and deference. Only if this Court concludes that a sovereign's statement of its domestic law is entitled to no deference should the Court deny the Foundation's petition.

The Cassirers may attempt to argue that the issue in *Animal Science Products* is not fairly presented by this case, insofar as the court of appeals did not issue

a holding on the level of deference to be afforded a foreign sovereign's interpretation of its domestic law when it denied the Foundation's petition. But such a distinction neither renders the issue not fairly presented nor precludes consideration by this Court.[4] This Court has long recognized that, except in exceptional cases, it will not review a question that was *neither* "pressed [n]or passed upon below." *United States v. Williams*, 504 U.S. 36, 41-45 (1992); *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see also Verizon Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 535 U.S. 467, 530 (2002) (recognizing that any issue "'pressed or passed upon below' by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari") (quoting *Williams*, 504 U.S. at 41). Notably, however, this rule operates in the disjunctive, "permitting review of an

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[4] This is particularly true in light of this case's present posture. The Foundation presently asks only that this Court hold this petition and – assuming that the Court holds in *Animal Science Products* that some level of deference is owed a foreign sovereign's interpretation of its own law – grant, vacate, and remand here so that the court of appeals may apply *Animal Science Products*. Of course, if *Animal Science Products* were to become moot or be dismissed as improvidently granted, then the Foundation would either urge the Court to grant plenary review in this case or summarily vacate and remand so that the court of appeals may issue a holding as to the proper deference to be afforded the Kingdom of Spain's statement of its own domestic laws. *See, e.g., United States v. United Cont'l Tuna Cor*p., 425 U.S. 164, 181-182 (1976) (remanding action to the court of appeals so that court may consider issue presented for the first time on appeal and passed over by court); *Wood v. Strickland*, 420 U.S. 308, 327 (1975) ("[B]ecause the District Court did not discuss it, and the Court of Appeals did not decide it, it would be preferable to have the Court of Appeals consider the issue in the first instance.").

issue not pressed *so long as it has been passed upon* * * *." *Williams*, 504 U.S. at 41 (emphasis added); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon * * *.'") (quoting *Williams*, 504 U.S. at 41).

But the question presented *could not be pressed* below. The Cassirers' eleventh hour accessory after-the-fact argument raised for the first time on appeal was neither "pressed [by them] [n]or passed" on by the district court because they did not raise that argument in either their motion for summary adjudication or in opposition to the Foundation's motion for summary judgment. *Williams*, 504 U.S. at 41. To that end, the court of appeals should have found the argument waived. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). But rather than properly recognize the argument as waived or remand the issue for the district court to examine in the first instance the proper interpretation of Spanish law, the court of appeals *held* – based largely on its own "independent research" – that a long-superseded Spanish Penal Code provision *should* be interpreted to permit a modern-day owner of its vested property right. The Foundation – and the Kingdom of Spain – therefore, could not bring the error to the court of appeals' attention until the rehearing stage.

Even after the Kingdom of Spain appeared in the case to provide the court of appeals with the proper interpretation of its law, the court rejected the foreign sovereign's formal statement – without acknowledgment or explanation – when it denied the Foundation's petition for rehearing. Thus, this petition

marks the first opportunity to challenge the court of appeal's failure to afford the Kingdom of Spain any deference. Further, the court of appeal's acknowledgment of Rule 44.1, its receipt of the Kingdom of Spain's *amicus* brief, and the complete lack of evidence to suggest that the court of appeals afforded *any deference* to the Kingdom of Spain make clear that the court "passed" on the issue below, obviating any concerns that the question presented here is not fairly presented.

CONCLUSION

The Court should hold this petition pending the disposition of the *Animal Science Products* petition, and then dispose of this petition consistent with its ruling in that case.

Respectfully submitted,

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