No. 17-372

IN THE

Supreme Court of the United States

DOW AGROSCIENCES, LLC, MYCOGEN PLANT SCIENCE, INC., AGRIGENETICS, INC., DBA MYCOGEN SEEDS, LLC AND PHYTOGEN SEED COMPANY, LLC,

Petitioners,

v.

BAYER CROPSCIENCE AG AND BAYER CROPSCIENCE NV,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Federal Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Contrary to Bayer's suggestions (*e.g.*, BIO I, 2, 12, 17), the question presented is not whether the New York Convention requires *de novo* review of the *merits* of an arbitral award. Rather, the question is whether a party challenging a New York Convention award on public-policy grounds is entitled to an independent judicial determination of whether enforcing the award would violate U.S. public policy—here, the constitutional policy that patents are for "limited Times." As a leading commentator has noted,[1] that question presents a "powerful" case for this Court's review. It divides the circuits (Pet. 13-19) and carries exceptional importance both to the United States' public interests and to its role as an attractive venue for international arbitration (Pet. 27-30).

Bayer fails to reconcile the circuits' divided answers to the question presented. On the one hand, Bayer appears to agree (BIO 14) that the courts owe a "responsibility to engage in an 'independent' analysis of whether enforcement of a particular award would violate the public policy of the United States." On the other hand, Bayer endorses the Federal Circuit's mistaken equation (Pet. App. 17a, 19a) of public-policy review with the "manifest disregard" standard and contends (BIO 16-17) that the required independent analysis cannot apply fundamental public policy to new factual scenarios. Bayer's own conflicting positions thus well illustrate the split of authority and the need for this Court's review.

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[1] Dennis Crouch, *International Commercial Arbitration of Patent Cases*, PATENTLY-O (Oct. 8, 2017), https://patentlyo.com/patent/2017/10/international-commercial-arbitration.html.

Bayer does not seriously dispute Dow's showing (Pet. 30-34) that this case involves a fundamental U.S. public policy—namely, the longstanding and constitutionally grounded policy against timewise overextension of the patent monopoly. And Bayer does not deny that the arbitrators' award in this case conflicts with that policy because Bayer's asserted patents improperly extend the term of other now-expired patents and the award comprises $138 million in post-expiration damages. The award could not be upheld under the independent review mandated by the Fifth, Ninth and D.C. Circuits. The Federal Circuit upheld enforcement of the award only by following the Second and Seventh Circuits in conducting a "review" that provides no real protection to even the most basic public policies.

This Court's intervention is needed to resolve the circuit conflict, and to restore the "second look" review that the New York Convention contemplates and that underpinned this Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

ARGUMENT

I. BAYER FAILS TO DISPEL THE CIRCUIT SPLIT OVER THE PROPER SCOPE OF JUDICIAL REVIEW OF PUBLIC POLICY DEFENSES UNDER THE NEW YORK CONVENTION

The petition does not (*contra* BIO 2) seek *de novo* review of the merits of an arbitral award, but rather presents the procedural question whether a reviewing court "must independently determine whether recognition and enforcement of an arbitral award under the

New York Convention would be contrary to the public policy of the United States." Pet. i. The courts of appeals (*contra* BIO 15) are *not* in "lockstep" on that question. Rather, they are irreconcilably divided. Bayer fails to show otherwise.

A. As the petition showed (at 13-15), the Fifth, Ninth and D.C. Circuits, unlike the decision below, require courts assessing public-policy challenges to independently determine whether enforcement of a New York Convention award would violate U.S. public policy, recognizing that "'the question of public policy is ultimately one for resolution by the courts.'" *Enron Nigeria Power Holding, Ltd. v. Fed. Republic of Nigeria*, 844 F.3d 281, 288 (D.C. Cir. 2016) (quoting *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983)); *accord Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1017-18 (5th Cir. 2015); *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1097-98 (9th Cir. 2011).

Bayer misses the point in responding (BIO 12-14) that these circuits will not uphold a public-policy defense unless the resisting party has invoked a sufficiently important policy. The question presented does not concern that substantive standard, as all agree that only a violation of a fundamental policy could warrant relief. And each of the cited cases involved such a fundamental policy. *See Enron*, 844 F.3d at 287 (resisting party had "adequately identified a well-defined public policy [against allowing a party to profit from its own fraud] for purposes of" the Convention); *Asignacion*, 783 F.3d at 1017 (noting the "well defined and dominant" public policy of "provid[ing]

'special solicitude to seamen'") (citations omitted); *Ministry of Def.*, 665 F.3d at 1097-1100 (assuming a strong policy prohibiting transfers of wealth to the Iranian government).

What mattered in each case instead was whether enforcing the award in question would violate that policy—a question each court decided independently. In *Ministry of Defense*, the Ninth Circuit distinguished "between confirmation and payment"—ruling that any public policy against *paying* an award to Iran did not affect the antecedent step of *confirming* the award. 665 F.3d at 1098-99. In *Asignacion*, the Fifth Circuit conducted a "careful review of the record" before deciding for itself that there was "no evidence that the [foreign] arbitral award was inadequate" to satisfy the foundational public policy favoring seamen. 783 F.3d at 1020. And in *Enron*, the resisting party's objection failed not because the United States lacks a sufficiently serious interest in deterring fraud, but because the evidence was insufficient to prove that enforcing the award would benefit a fraudster. 844 F.3d at 289-91.

Thus, in the Fifth, Ninth and D.C. Circuits, a court faced with a public-policy challenge to a New York Convention award must independently decide whether enforcing the award would violate fundamental U.S. public policy.

B. The Second, Seventh and Federal Circuits, in contrast, apply a different procedural framework. Contrary to Bayer's assertion (BIO 14), these courts do *not* "conduct[] an independent review" of public-policy challenges. Indeed, the Seventh Circuit in *Baxter International, Inc. v. Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2003), held that, so long as a question of

antitrust policy had been "put to, and resolved by, the arbitrators," their answer was "conclusive." *Id.* at 832. As the dissent explained, the majority took a "giant step"—and an incorrect one—in holding "that *Mitsubishi* … denies our prerogative to refuse to enforce awards that command unlawful conduct" or otherwise violate "public policy." *Id.* at 836 & n.4 (Cudahy, J., dissenting).

Bayer errs in arguing (BIO 15) that *Baxter* involved an impermissible "effort to relitigate the arbitrator's decision on the merits." There, to be sure, the challenger sought independent review of a public-policy issue that had been put to the arbitrators, and the Seventh Circuit refused such review and instead deferred to the arbitrators' interpretation of the Sherman Act's requisites. But the Convention provides for no such deference on the "merits" of public-policy concerns.

If *Baxter* had arisen in a circuit that requires independent review of public-policy challenges, the result would have been different. A "careful review of the record," *Asignacion*, 783 F.3d at 1020, conducted with cognizance that "'the question of public policy is ultimately one for resolution by the courts,'" *Enron*, 844 F.3d at 288 (quoting *W.R. Grace*, 461 U.S. at 766), would have led to the conclusion that the award ought not to have been enforced because it "order[ed] the parties to violate the antitrust laws," *Baxter*, 315 F.3d at 838 (Cudahy, J., dissenting). There thus is a clear conflict between the rules applicable in these circuits: The Seventh Circuit upheld enforcement of an award that three of its sister circuits would have thrown out.

The same is true of the Second Circuit's decision in *Banco de Seguros del Estado v. Mutual Marine Office,*

Inc., 344 F.3d 255 (2d Cir. 2003), which Bayer cites without discussion. The awards there implicated an "explicit" public policy against subjecting a foreign state to prejudgment attachment. *Id.* at 264 (internal quotation marks omitted). But, departing from the approaches of the Fifth, Ninth and D.C. Circuits, the Second Circuit upheld enforcement of the award without deciding for itself whether enforcement would comport with that public policy. *Id.*

The Federal Circuit's decision deepens this split by declining to apply independent analysis to Dow's public-policy defense before upholding enforcement of the tribunal's $455 million award. Pet. App. 15a-19a. Bayer acknowledges (BIO 9, 17) that the Federal Circuit applied a "narrow standard of review," and makes no serious attempt to reconcile that narrow standard with the independent review required by the Fifth, Ninth and D.C. Circuits.

Bayer also does not refute Dow's showing that the award could not have been enforced if the court below had reviewed the public-policy defense independently.[2] Nor could Bayer make such a showing, given that the award rests on patents the PTO has already found invalid on public-policy grounds (*see* Pet. 7-8, 31-33), and comprises tens of millions of dollars in damages purportedly accruing for seven years *after* the patents will expire (*see* Pet. 9, 33-34). Thus, if Dow had brought its public-policy challenge in one of the

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[2] Contrary to Bayer's intimation (BIO 11-12), the Federal Circuit did not state that the result would have been the same under any standard of review of a public-policy challenge. Rather, the Federal Circuit referred (Pet. App. 15a) to the similarity across the circuits of the *substantive standard* for the importance of the asserted public policy.

jurisdictions that requires independent review, the result would likely have been different from the one reached by the Federal Circuit below.[3] This Court's review is necessary to resolve this conflict.

II. BAYER FAILS TO DISPEL THE CONFLICT BETWEEN THE FEDERAL CIRCUIT'S DECISION AND THE NEW YORK CONVENTION

Far from refuting Dow's showing (Pet. 19-26) that the decision below conflicts with the New York Convention, Bayer appears to agree with Dow (BIO 14) that the courts have a "responsibility to engage in an 'independent' analysis of whether enforcement of a particular award would violate the public policy of the United States." Yet Bayer *also* agrees (BIO 9, 17) that the Federal Circuit undertook only a "narrow" review of the public-policy defense. Bayer cannot reconcile the Federal Circuit's narrow review with that court's obligation to consider Dow's public-policy defense for itself.

A. The New York Convention's language, structure, and history (*see* Pet. 20-26) all call for independent judicial examination of whether enforcing an arbitral award would comport with a fundamental public policy. Bayer disregards the Convention's text, which belies its contention (BIO 17) that Dow's construction has "no support." And contrary to Bayer's contention (BIO 16-17), nothing in the Convention suggests that the courts cannot "decide unsettled questions of law at the award-enforcement stage," or

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[3] Bayer suggests (BIO 13 n.*) that the Federal Circuit applied Fourth Circuit law, but that is not clear from the decision. Even if it were, it still would deepen the circuit split.

that public-policy review is available only where the law is "clearly established" in the sense that the courts have previously found a violation on identical facts. Any such requirement would transform the public-policy defense into a version of the "manifest disregard" standard, which is not among the available grounds for relief under the Convention. The Federal Circuit's treatment of the two as synonymous (Pet. App. 17a, 19a) conflicts with the Convention, which calls for independent judicial review of public-policy challenges.

Nor does precedent support Bayer's "clearly established law" requirement. While this Court has stated that "general considerations of supposed public interests" will not support a public-policy defense, and that the asserted policy must be "well defined and dominant" and grounded in "laws and legal precedents," *W.R. Grace*, 461 U.S. at 766, on the very same page the Court made clear that "the question of public policy is ultimately one for resolution *by the courts*," *id.* (emphasis added). Bayer disregards the latter point, which informs the meaning of the passage: Courts must ground their analysis of public-policy defenses in express and recognized policy concerns (not in vague conceptions of the public interest)—but if an award implicates such a policy, the court itself must determine whether enforcement would offend it.

B. The remainder of Bayer's merits arguments are misdirected. There is no question that the New York Convention generally has a "pro-enforcement bias" and that judicial review is ordinarily limited. BIO 18 (internal quotation marks omitted); *see* Pet. 4-5. And it is common ground that only "fundamental" public policies can support a challenge to enforcement. *See*

Pet. 5, 26; BIO 18. Dow accordingly has not suggested that public-policy review should entail a "full re-examination" into whether an award is *correct*, and Bayer errs in relying (BIO 17-18) on authorities arguing against such "re-examination."[4]

Instead, the question is whether a court applying the public-policy defense should decide for itself whether enforcing an award would violate a fundamental public policy. And on *that* question, the authorities are clear: The Convention authorizes a reviewing court to "consider the merits of an award so as to satisfy [itself] that there is nothing in the award that would infringe the fundamental values of th[e] State." UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 247 (2016 ed.). The Convention's drafters "generally conceded that the competent authority had to go behind the award itself to discover whether anything contrary to public policy was involved." UN Econ. & Social Council, Comm. on the Enforcement of Int'l Arbitral Awards, Summary Record of the Seventh Meeting, Mar. 29, 1955 (UN Doc. E/AC.42/SR.7), at 4. The Restatement explains that "[i]dentifying public policy, and determining the extent to which recognition or enforcement of an award would offend it, entails an exercise of judgment by courts." RESTATEMENT (3D) U.S. LAW OF INT'L COMM. ARBITRATION § 5-14 Reporter's Note c (Tentative Draft

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[4] Bayer's citation (BIO 4) to UNESCO's Report of the Committee on the Enforcement of International Arbitral Awards, Mar. 28, 1955 (UN Doc. E/AC.42/4/Rev.1), is particularly inapt. The quoted comment regarding a supposed "inten[t] to limit the application" of the public-policy defense, *id.* at 13, refers to a word that does not appear in the Convention's final text.

2010). Bayer derides (BIO 18) such authorities as "cherry-picked," but they accurately reflect the scheme set forth in the Convention.

Bayer's own secondary authorities actually support the petition's analysis. The UNESCO Comments, for example, acknowledge "general[] agree[ment]" among the drafters that "courts should remain free to refuse the enforcement of a foreign arbitral award if such action should be necessary to safeguard the basic rights of the losing party or if the award would impose obligations clearly incompatible with the public policy of the county of enforcement." UN Econ. & Social Council, UN Conference on Int'l Commercial Arbitration, Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Mar. 6, 1958 (UN Doc. E/Conf.26/2), at 5 (UNESCO Comments). They also refute Bayer's suggestion (BIO 17-18) that eliminating the 1927 Geneva Convention's "principles-of-the-law" provision was intended to "narrow the scope of public policy review," explaining that "compatibility with 'public policy' was a sufficiently broad criterion" to render the "principles-of-the-law" defense superfluous. UNESCO Comments 7. Further, the Comments caution against an approach that would "detract[] from the judicial safeguards available to the losing party or from the controls over the consistency of an arbitral award with public policy of the country of enforcement." *Id.* at 12.

The approach reflected in the Convention's text and the pertinent authorities does not require reexamination of an award's merits, except to the extent an arbitrator purports to decide issues sounding in public policy. That form of reexamination, however, is appropriate, because public policy questions are

reserved "for resolution by the courts," *W.R. Grace*, 461 U.S. at 766, and "the national courts of the United States [must] have the opportunity at the award-enforcement stage to ensure" enforcement comports with public policy, *Mitsubishi*, 473 U.S. at 638.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

Bayer's arguments against the petition's importance are likewise mistaken. Bayer contends (BIO 19) that "courts *do* have" an opportunity to consider public-policy challenges. But in practice, the courts of appeals have never barred enforcement of a New York Convention award on public-policy grounds (*see* BIO 15)—not even one that (as in *Baxter*) compelled an antitrust violation or (as in this case) awarded damages that upset the "carefully guarded" and vitally important "balance between fostering innovation and ensuring public access to discoveries," *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2406-07 (2015). So whatever "review" the courts may be performing, it does not ensure protection of important national public policies in international arbitration. *Mitsubishi*'s "'second look' has not yet occurred." Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 Nw. U. L. Rev. 453, 457 (1999).

Bayer also wrongly suggests (BIO 19-21) that Dow's approach would somehow impair international commerce. Parties are free to "set ground rules for resolving disputes," and those rules will be enforced under the Convention (*contra* BIO 19)—*unless* enforcement would violate a fundamental public policy. This safety valve is itself one of the Convention's ex-

press "ground rules," and parties contract for international arbitration with the expectation it will apply in appropriate cases.

Nor will any harm come of allowing the courts to give force to this ground rule. To the contrary, permitting effective judicial review of public-policy issues will *increase* confidence in international arbitration, encouraging parties to arbitrate their disputes. *See* Pet. 28. Conversely, parties engaged in international disputes will not agree to arbitrate if doing so risks runaway awards like the $455 million award here, enforced in violation of fundamental public policy.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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