No. _____

SPECTRUM STORES INC.;
MAJOR OIL CO. INC.; W.C. RICE OIL CO. INC.,

Petitioners,

v.

CITGO PETROLEUM CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners assert private federal antitrust claims to hold an indirect American subsidiary of a foreign sovereign liable for the company's active participation in a conspiracy among private companies and foreign sovereigns whose purpose and effect is to fix the price of a commodity to the detriment of American consumers. The questions presented are:

1. Whether the political question doctrine bars Petitioners' claims because adjudication could have consequences for the conduct of foreign affairs, even though all of the questions that must be decided can be resolved by applying federal antitrust and other statutes to ordinary judicial facts.

2. Whether the act of state doctrine bars Petitioners' claims because adjudication could cast doubt upon the legality of the sovereign conspirators' acts, even though the courts need not invalidate any governmental act of a foreign sovereign performed within its own territory and even though the conspirators have furthered their scheme through an American company acting in the United States.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 STATEMENT

Petitioner Spectrum Stores Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner Major Oil Co. Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner W.C. Rice Oil Co. Inc. is an indirect subsidiary of AEC Resources LLC and Citibank N.A. (as administrative agent), which is wholly owned by Citigroup Inc., a publicly held corporation. No other publicly held company owns 10% or more of W.C. Rice Oil Co. Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Spectrum Stores Inc., Major Oil Co. Inc., and W.C. Rice Oil Co. Inc. ("Spectrum Plaintiffs") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a-35a) is reported at 632 F.3d 938. The opinion of the district court (App. 36a-97a) is reported at 649 F.Supp.2d 572.

JURISDICTION

The court of appeals entered final judgment on February 8, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Reproduced in the Appendix are: 15 U.S.C. §§1, 15, and 26 (App. 98a-101a); and 28 U.S.C. §§1603 and 1605 (App. 102a-09a).

INTRODUCTION

As the Federal Trade Commission stated recently, the Organization of Petroleum Exporting Countries ("OPEC") "is a functioning cartel whose activities would be illegal if undertaken by private companies." App. 165a. The member nations of OPEC might take comfort in the special protections afforded sovereign nations, but private, and especially American, companies cannot. Indeed, the FTC also pronounced that it "would be illegal for U.S. companies to enter into an agreement with OPEC or any OPEC nation for the purposes of restricting output." App. 165a n.6. Accordingly, this suit seeks to hold CITGO Petroleum Corporation ("CITGO") – an American company owned indirectly by Venezuela – liable under federal antitrust law for its participation in a global oil price-fixing conspiracy with the OPEC member nations and private foreign oil companies.

The court below held that the political question and act of state doctrines bar the Spectrum Plaintiffs' claims. That holding rested on the fear that this suit poses a controversial and potentially "damaging" challenge to foreign sovereigns' decisions regarding oil production within their boundaries. The claims actually rest on an uncontroversial proposition: an American company, whether independent or a foreign sovereign's tool, may not further a price-fixing conspiracy whose purpose and effect is raising the price of a commodity in the United States. Indeed, not only has the cartel ventured beyond its members' sovereign territories, it has also entered onto American

soil, through CITGO – the wholly owned instrument of a sovereign member of the conspiracy – to further its price-fixing scheme. Whatever legal protections a foreign sovereign might have when it acts abroad, it surely loses them the moment it steps into the United States to implement a scheme that is prohibited by our laws. If the act of state or political question doctrine removed such conduct from judicial scrutiny, American companies would have *carte blanche* to join international cartels with sovereign members – ExxonMobil could sit at the OPEC table and agree to reduce its oil production from domestic reserves. Foreign sovereigns would have *carte blanche* to further price-fixing conspiracies through American assets – Venezuela could buy American oil fields and then cut production from them to raise prices. American antitrust laws reach such conduct, and neither the Constitution nor federal law shields such conduct from judicial review.

In holding otherwise, the court of appeals contravened this Court's precedents and left the lower courts in a state of disarray on issues that go to the heart of the Constitution's allocation of powers among the federal branches of government. Indeed, just three days ago, this Court granted certiorari in *M.B.Z. v. Clinton, Sec'y of State*, ___ S.Ct. ___, No. 10-699 (May 2, 2011), to consider a question substantially similar to the political question doctrine issue presented here: "Whether the 'political question doctrine' deprives a federal court of jurisdiction to enforce a federal statute that explicitly directs the Secretary of

State how to record the birthplace of an American citizen on a Consular Report of Birth Abroad and on a passport." In *M.B.Z.*, however, the Court might not reach the political question doctrine issue if it concludes that the pertinent statute "impermissibly infringes the President's power to recognize foreign sovereigns." Order, *M.B.Z.*, No. 10-699 (May 2, 2011). Moreover, the political question doctrine issue and the act of state doctrine issue presented by this petition are intimately intertwined. The two doctrines derive from "[t]he same separation of powers principles" – the act of state doctrine is, in effect, the political question doctrine in the context of foreign affairs. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 (D.C. Cir. 1984) (Bork, J., concurring); *compare Baker v. Carr*, 369 U.S. 186, 210-11 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."), *with W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 404, 408 (1990) (act of state doctrine is "a consequence of domestic separation of powers"); *see also* App. 176a ("*Kirkpatrick* thus makes clear that the *political question doctrine* is not a free-form, impressionistic version of abstention, but rather a narrowly cabined legal principle.") (emphasis added). The Court, therefore, should grant this petition to clarify the proper application of both the political question doctrine and the act of state doctrine and, we respectfully suggest, should calendar this case with *M.B.Z.* for purposes of oral argument.

STATEMENT OF THE CASE

A. The Global Oil Price-Fixing Conspiracy

OPEC was formed in 1960 by a group of oil-producing nations to coordinate their production and thereby "stabilis[e]" the price of oil. *International Ass'n of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries ("IAM")*, 649 F.2d 1354, 1355 (9th Cir. 1981); App. 6a. The cartel's membership was long limited to sovereign nations, and its aim was accomplished solely through limits on crude oil production within the members' respective sovereign territories. *See IAM*, 649 F.2d at 1355, 1357-58. Today, however, the cartel includes private oil companies, and reaches far beyond its members' borders and far beyond the mere production of oil. Whatever its original structure or purpose, it has become a global, public-private, commercial enterprise whose aim is to maximize profits, at the expense of consumers in this Country and throughout the world.

The private members of this modern cartel include, among others, Lukoil, a Russian company with one of the world's largest private oil reserves, and CITGO. App. 111a-12a, 116a, 131a. CITGO is an American corporation that owns several domestic oil refineries, which supply refined petroleum products ("RPPs") to thousands of domestic gasoline stations. In 1990, Petróleos de Venezuela, S.A. ("PdVSA"), the national oil company of OPEC member Venezuela, acquired indirect 100% ownership of CITGO. App. 115a, 134a. Collectively, the cartel's members,

who often meet in Vienna to set production limits and formulate strategy, control more than three-quarters of the world's proven recoverable oil reserves. App. 110a-11a, 121a-22a, 125a-26a, 132a-34a.

Besides suppressing oil production within their respective territories, the sovereign conspirators have furthered the conspiracy by acquiring oil fields, refineries, and distribution facilities outside their territories, including in the United States, Europe, and Asia. App. 131a-36a. Venezuela's acquisition of CITGO is one example; Venezuela is also developing oil fields in Cuba and has acquired significant refining capacity in Europe. App. 111a-12a, 118a-21a, 132a-36a. Kuwait provides another example, having acquired oil fields in Australia, Indonesia, and Tunisia, and having acquired major refineries in Europe and Asia. Indeed, OPEC's Long-Term Strategy calls for investment in "refining capacity" in "consuming countries." App. 133a-36a.[1]

In addition, the members export and sell crude oil and RPPs in a global marketplace at supra-competitive profit-maximizing prices. App. 114a, 118a-24a, 130a-37a. Indeed, the conspiracy's avowed

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[1] These acquisitions prevent a buyer cartel from exerting downward pressure on the oil cartel's prices. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 606 (7th Cir. 1997) (Posner, J.) ("The bigger a buyer is, the more likely it is to be able to obtain a discount from a member of a cartel, since the volume of its purchases may compensate the member for endangering the cartel by granting a discount.").

purpose and direct, substantial, and foreseeable effect is to increase the price of oil and RPPs globally, including in the United States, which is a key target of the conspiracy. App. 110a-13a, 117a-21a, 123a-24a, 130a-32a, 134a-37a.

B. The Proceedings Below

The Spectrum Plaintiffs asserted three antitrust counts arising under 15 U.S.C. §§1 and 15. The district court thus had jurisdiction under 28 U.S.C. §§1331 and 1337.

Count I would hold CITGO liable as a principal for willingly participating in the global oil price-fixing conspiracy. App. 117a-21a, 130a, 134a-36a, 140a. Counts II and III would hold CITGO liable for its relationship with its parents, including Venezuela. CITGO is the key commercial pawn through which Venezuela, a member of the conspiracy, brings its anticompetitive scheme to fruition in the United States. It has become Venezuela's captive buyer and refiner of crude oil, eliminating the threat it might pose to the cartel's, and particularly Venezuela's, success. If CITGO is a separate entity from its parents, Count II would hold CITGO liable for willingly agreeing to participate in its parents' price-fixing conspiracy. App. 132a, 141a. If CITGO and its parents, including Venezuela, constitute a single economic unit, Count III would hold CITGO liable for its parents' participation in the global price-fixing conspiracy. App. 131a-32a, 134a, 142a.

The consequences of the Spectrum Plaintiffs' claims are modest. They seek relief only against CITGO: a declaration that its conduct is unlawful, damages, disgorgement of profits, an injunction barring it from continued violations, and costs. App. 143a-44a. Even if CITGO is held liable, Venezuela and the other sovereign cartel members will still be free to extract as little crude oil from their territories as they want – and even to coordinate their production levels to fix prices – notwithstanding the antitrust laws. The only consequence of Counts I and II will be that CITGO, like any other American company, will be precluded from participating in the global oil conspiracy. The only consequence of Count III will be that foreign sovereigns will not be able to facilitate or otherwise further their price-fixing conspiracy through American subsidiaries, such as CITGO.

CITGO moved to dismiss. The Judicial Panel on Multidistrict Litigation consolidated this case with several similar actions that were subsequently filed in other jurisdictions. App. 3a-6a. In these later-filed actions, the plaintiffs ("Consolidated Plaintiffs") then filed a consolidated complaint naming additional defendants, including CITGO's corporate affiliates – PDVSA, PDV America Inc., PDV Holding Inc., and PDV Midwest Refining LLC – as well as Saudi Arabian Oil Co. and OAO Lukoil. App. 4a-6a.

The district court dismissed both complaints under the act of state and political question doctrines. App. 36a-97a. Both sets of plaintiffs timely appealed. After the case was briefed and argued, the Government, at

the court of appeals' request, submitted an *amicus* brief urging dismissal under the act of state and political question doctrines. *See* App. 12a n.11, 24a n.14.

The court of appeals affirmed. First, the court held that the suits are nonjusticiable under the political question doctrine because they "challenge . . . matters [that] deeply implicate concerns of foreign and defense policy." App. 3a-4a. "[C]ouch[ing] the conduct of foreign relations and national security policy in antitrust terms," the court reckoned, "does not provide standards for making or reviewing foreign policy judgments." App. 27a (quotation marks omitted). Further, the court said, "By adjudicating this case, [it] would be reexamining critical foreign policy decisions," namely, "the Executive Branch's longstanding approach of managing relations with foreign oil-producing states through diplomacy." App. 23a.

Second, the court held that the case was barred by the act of state doctrine because, it believed, "adjudication of this suit would necessarily call into question the acts of foreign governments with respect to exploitation of their natural resources" and "[t]he granting of any relief to Appellants would effectively order foreign governments to dismantle their chosen means of exploiting the valuable natural resources within their sovereign territories." App. 31a, 33a. The court also determined that "[t]he act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity." App. 32a n.16 (quotation marks omitted).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Holding That the Political Question Doctrine Bars This Suit Conflicts with Decisions of This Court and Other Circuits.

Viewing this suit as a "challenge" to "matters [that] deeply implicate concerns of foreign and defense policy, concerns that constitutionally belong in the executive and legislative departments," the court below held the Spectrum Plaintiffs' claims barred by the political question doctrine. App. 3a-4a. But the political question doctrine turns not on the court's assessment (whether guided by the Executive or not) of possible practical consequences of adjudication, but rather on whether the resolution of a particular *question* that *must* be decided in order to adjudicate the claim is constitutionally committed to the political branches. And the questions that must be decided here can be resolved by applying federal statutes – which create a substantive standard of conduct, the requested modes of relief, a private right of action, and subject-matter jurisdiction; and which specify the circumstances under which a foreign sovereign's instrumentality is immune from liability – to ordinary judicial facts. Thus, even if adjudication might have consequences for the conduct of foreign affairs, the political question doctrine does not bar this suit because the political branches have made their constitutionally authoritative policy determinations and embodied those determinations in federal statutes, which the courts are constitutionally obligated to

apply. By focusing on possible consequences of adjudication divorced from the specific questions to be decided under a straightforward application of federal statutes, the court below in effect nullified duly enacted federal statutes. This Court's guidance on this constitutionally important issue is much needed.

A. This Court's Precedents Establish That a Claim Is Justiciable If the Questions That Must Be Decided Can Be Resolved by Applying Federal Statutes to Ordinary Judicial Facts.

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). But although "the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government," *United States v. Pink*, 315 U.S. 203, 222-23 (1942), the Court has admonished repeatedly that "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Japan Whaling*, 478 U.S. at 229-30 (quoting *Baker*, 369 U.S. at 211). Indeed, "courts have historically decided, *as a matter of routine*, cases having a *substantial impact* on foreign . . . policy." App. 178a (collecting decisions) (emphases added). This is because the doctrine "is one of 'political questions,'

not one of 'political cases.'" *Baker*, 369 U.S. at 216-17 & n.43. Thus, the doctrine does not bar a claim merely because it could have "political" consequences or affect the interests of the political branches. Rather, the doctrine requires courts to undertake a "discriminating inquiry into the precise facts and posture of the particular case" in order to determine whether "the particular question posed" is constitutionally committed to the political branches. *Id.* at 211, 217; *see also, e.g.*, *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 458-59 (1992) (although case "raises an issue of great importance to the political branches, . . . [t]he . . . doctrine presents no bar to our reaching the merits of this dispute").

Further, regardless of the political consequences of deciding the questions posed by a case, if adjudication of those questions "calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented," then the "case[ ] present[s] a justiciable controversy." *Japan Whaling*, 478 U.S. at 230. "[I]t goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts" – indeed, "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and [the courts] cannot shirk this responsibility merely because [a] decision may have significant political overtones." *Id.* This principle is as venerable as the political question doctrine itself: in *Marbury v. Madison*, 5 U.S. 137 (1803), the Court not only created the doctrine, but also declared

that "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it [is] clear that the individual who considers himself injured[ ] has a right to resort to the laws of his country for a remedy." *Id.* 165-68, 170-71.

Japan Whaling is a particularly instructive case. The plaintiffs sought a writ of mandamus compelling the Secretary of Commerce to carry out his statutory duty to certify that Japan was "diminish[ing] the effectiveness of" a certain treaty, even though that would have entailed "dishonor[ing] and repudiat[ing]" a recent agreement with Japan declaring the opposite and even though certification would have triggered the Secretary of State's statutory duty to sanction Japan. 478 U.S. at 226-29. "[C]ognizant of the interplay between [those federal laws] and the conduct of this Nation's foreign relations, and . . . recogniz[ing] the premier role which both Congress and the Executive play in [that] field," the Court nonetheless held that the claim was not barred by the political question doctrine because "the challenge to the Secretary's decision not to certify Japan for [diminishing the effectiveness of the treaty] present[ed] a purely legal question of statutory interpretation." *Id.* at 230. Indeed, this Court has *never* held a case nonjusticiable where the application of a federal statute could resolve a question posed by the case, even though adjudication of that question might have implicated a matter constitutionally committed to the political branches. *See, e.g.*, *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 319-20 (1978) (although "it is within the

exclusive power of the Executive Branch to determine which nations are entitled to sue," question whether foreign sovereigns are "entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff" was justiciable); *Baker*, 369 U.S. at 212 ("once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area"); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380, 386, 389-90 (1948) (although "the determination of sovereignty over an area is for the legislative and executive departments," "it is a matter of statutory interpretation as to whether or not statutes are effective beyond the limits of national sovereignty").

B. The Decision Below Contravenes This Court's Precedents.

"[C]ouch[ing] the conduct of foreign relations and national security policy in antitrust terms," the court below said, "does not provide standards for making or reviewing foreign policy judgments." App. 27a (quotation marks omitted). But the Spectrum Plaintiffs' claims do not require the court to make or review foreign policy judgments. Rather, the questions actually posed here can be resolved by the application of federal statutes to ordinary judicial facts. In light of the principles just discussed, therefore, the political question doctrine does not bar this suit.

The Spectrum Plaintiffs' claims would not, as the court below said, require "reexamin[ation of] critical foreign policy decisions." App. 23a. Adjudication would not cause the courts to compel the Executive to adopt any particular policy toward the global oil price-fixing conspiracy. The court below was concerned in particular that "[a]ny ruling on the merits of the instant case would by its very nature involve a policy determination at odds with [the Executive's] longstanding policy" of "managing the complex U.S. relationships with foreign oil-producing states upon which this country still depends for its domestic energy needs, rather than resorting to the far blunter instrument of antitrust litigation against them." App. 28a (quotation marks omitted). But that policy, as the court acknowledged, has meant only that "the Department of Justice [itself] has . . . declined to bring a Sherman Act case on behalf of the United States" against the sovereign members of OPEC. App. 23a-24a. The Spectrum Plaintiffs, in contrast, seek to bring a *private* action solely against an *American company*. A favorable ruling might *imply* that the Government could bring a meritorious public enforcement action against the sovereign conspirators, but the claims do not *require* decision as to whether the Government must or should bring such an action.

The only potentially "political" questions that *must* be decided in order to adjudicate the Spectrum Plaintiffs' claims require *adherence* to the political branches' pertinent policy decisions, which are embodied in applicable and constitutionally binding

federal statutes. This case requires the courts to decide (1) whether CITGO unlawfully agreed with foreign sovereigns and private companies to fix oil prices to the detriment of American consumers (Counts I and II), and (2) whether Venezuela unlawfully participated in that same conspiracy and used CITGO to further Venezuela's unlawful conduct on United States soil (Count III). App. 136a-37a, 140a-42a. Federal antitrust statutes prohibit price-fixing agreements. *See* App. 98a; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940). Thus, as the FTC has stated publicly, it "would be illegal for U.S. companies to enter into an agreement with OPEC or any OPEC nation for the purposes of restricting output." App. 165a n.6. Federal antitrust statutes also provide a private right of action for persons injured by such unlawful conduct and the particular remedies sought here. *See* App. 98a-99a, 101a. Federal statutes create subject-matter jurisdiction over such claims. *See* 28 U.S.C. §§1331, 1337(a). The Foreign Sovereign Immunities Act ("FSIA") denies sovereign immunity if the conduct is commercial in nature, App. 102a-03a; *see infra* at 37-38 (showing that activity at issue is commercial), or if the foreign instrumentality is an American company or indirectly owned by the sovereign, App. 102a; *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). And all of the factual findings to which these statutes would be applied are of the kind that the courts regularly make, and are not themselves committed to the political branches. *See Johnson v. Collins Entm't Co.*, 199 F.3d 710, 729 (4th Cir. 1999) (Luttig, J.,

concurring) ("If the Congress sees fit to provide citizens with a particular cause of action, then [the] federal courts should entertain that action – and unbegrudgingly.").

If statements by the Executive expressing a policy against itself suing the sovereign members of OPEC could defeat jurisdiction over this private antitrust suit against an American company, the Executive branch – and specifically the subordinate executive officials and agencies that have issued those statements – would in effect have the power to rescind or amend duly enacted federal statutes. That result would be unconstitutional under any circumstances, *see Clinton v. City of New York*, 524 U.S. 417, 438-40 (1998) (President cannot "unilateral[ly] . . . repeal[ ] or amend[ ] parts of duly enacted statutes"), but particularly here where the Executive's *only* expression of opposition to a *private* antitrust suit against an American participant in the global oil price-fixing conspiracy comes in its *amicus* brief in this case, *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").[2]

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[2] The appellate court incorrectly asserted that the United States has a "longstanding" policy of preferring "diplomacy" to "*private* litigation." App. 23a (emphasis added); *see also* App. 29a n.15, 35a.

The court of appeals nonetheless thought that this suit would require the courts to "wad[e] . . . into the sphere of foreign relations" because "[a]ny merits ruling . . . , whether it vindicates or condemns the acts of OPEC member nations, would reflect a value judgment on their decisions and actions." App. 24a, 34a. It is true that a merits ruling with respect to Count III would require a judgment as to the legality of Venezuela's conduct, but adjudication of Counts I and II would not – at most, it might *suggest* such a judgment. *See infra* at 28-34. Either way, however, that judgment would not be the courts'; it would be the political branches', whose laws the courts would be faithfully applying. Indeed, foreign sovereigns are not exempt from the reach of the antitrust laws. *See Pfizer*, 434 U.S. at 317-18 (foreign sovereign is "person" for purposes of federal antitrust laws); App. 100a (acknowledging that "foreign state" may be subject to suit "based upon a commercial activity, or an act, that is the subject matter of its claim under this section").[3]

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[3] The legislative history of the FSIA confirms that foreign states and their instrumentalities may be sued under the federal antitrust laws. *See* App. 152a ("Neither the term 'direct effect' nor the concept of 'substantial contacts' embodied in section 1603(e) is intended to alter the application of the Sherman Antitrust Act . . . to any defendant."). Indeed, the FSIA is necessary because, unless they state otherwise, federal regulatory statutes often apply to foreign sovereigns just as they apply to private actors. *See* App. 151a.

The court was also concerned about what it perceived as "likely" "damaging consequences of this litigation" that would "frustrat[e] . . . various objectives of vital interest to the United States' national security": the "immediate disruption of oil imports into the United States, the undermining of relationships with OPEC nations on issues such as counterterrorism and nuclear non-proliferation, the undermining of relationships with non-OPEC nations that have a stake in the questions presented here, and the frustration of other national priorities, including foreign investment in the United States by nations such as Saudi Arabia." App. 24a-25a (quotation marks omitted). Except possibly for the risk of frustrating foreign investment, these potential consequences rest on the court's view that this suit "effectively challenge[s] the structure of OPEC and its relation to the worldwide production of petroleum" and "ask[s the court] essentially to reprimand foreign nations and command them to dismantle their international agreements." App. 3a, 23a, 33a (emphasis added).

The Spectrum Plaintiffs' claims, however, neither seek nor would compel such results. Indeed, if the claims against CITGO succeed, Venezuela and the other member nations will still be free to fix prices by agreeing to extract as little oil from their own territories as they choose. The only concrete consequence of Counts I and II will be that *American companies* will not be free to participate in or further price-fixing conspiracies with foreign sovereigns; the only concrete consequence of Count III will be that member

nations will not be able to further their anticompetitive scheme on American soil through an American subsidiary. Because it owns CITGO, Venezuela would presumably be indirectly liable for any monetary damages awarded against CITGO, but Venezuela could avoid such future liability, yet continue to conspire to fix oil prices, simply by divesting its interest in its American subsidiary.[4] To the extent that such "damaging consequences" resulted from adjudication of this suit, they would be the consequences of the policy decisions about the regulation of anticompetitive conduct and sovereign immunity embodied in the constitutionally binding federal antitrust laws and FSIA.

C. All of the *Baker* Markers Are Absent.

The appellate court found present all six markers that are "[p]rominent on the surface of any case held to involve a political question." *Baker*, 369 U.S. at 217; *see* App. 19a-30a. But because, as explained

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[4] Plaintiffs have limited ability to obtain and execute a judgment against the member nations. First, without direct assistance from the State Department, it is virtually impossible to effect personal service upon a foreign sovereign. *See* 28 U.S.C. §1608(a); *cf. Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916 (11th Cir. 2003). Second, American courts are powerless to enjoin a foreign sovereign from taking action abroad. *See IAM*, 649 F.2d at 1361; App. 160a. Third, a foreign sovereign can immunize itself against a damages judgment simply by not using an American asset to further its conspiracy. *See* 28 U.S.C. §§1609, 1610(a)(2).

above, the application of federal statutes would resolve all the potentially "political" questions that must be decided here, there is no need to look for the *Baker* markers – none will be found. First, although there is "a textually demonstrable constitutional commitment" of foreign affairs to the political branches, *Baker*, 369 U.S. at 217, these branches have exercised their authority and embodied their determinations in the federal antitrust laws and the FSIA, U.S. CONST. art. III. Second, the federal antitrust laws and the FSIA provide ample "judicially discoverable and manageable standards for resolving" the questions presented by the Spectrum Plaintiffs' claims. *Baker*, 369 U.S. at 217. And third, because the courts would "decid[e]" the claims by "adher[ing]" to the political branches' policy determinations embodied in the applicable federal statutes, the court would not be called upon to make an "initial policy determination of a kind clearly for nonjudicial discretion," "express[ ] lack of the respect due coordinate branches of government," or create the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

D. The Doctrine Is in Disarray Among the Circuits.

In focusing on possible political consequences of adjudication rather than the specific questions posed by the claims, and in failing to appreciate the constitutional significance of having federal statutes whose application to ordinary judicial facts would resolve

the questions posed, the Fifth Circuit placed itself in direct opposition to the Third, Eighth, Ninth, and Eleventh Circuits. The D.C. Circuit has sharply divided on these issues, prompting Judge Edwards to remark that the D.C. Circuit's political question doctrine is "in a state of disarray." *Zivotofsky v. Secretary of State*, 610 F.3d 84, 85 (D.C. Cir. 2010) (Edwards, J., dissenting from denial of rehearing *en banc*). Particularly in light of the Fifth Circuit's decision here, Judge Edwards' assessment is valid for the lower courts as a whole. The Court should grant certiorari here to clarify the scope of the political question doctrine, the perceived indeterminacy of which has confused courts and resulted in the "*sub silentio* expan[sion of] executive power in an indirect, haphazard, and unprincipled manner." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 857 (D.C. Cir. 2010) (*en banc*) (Kavanaugh, J., concurring), *cert. denied*, 131 S.Ct. 997 (2011). Indeed, this Court appears to have recognized as much by recently granting certiorari in *Zivotofsky*. *See M.B.Z.*, No. 10-699. Consequently, we only briefly summarize the confusion across the Circuits.

In *Khouzam v. Attorney General*, 549 F.3d 235 (3d Cir. 2008), Khouzam "challenge[d] the legality of his detention and imminent removal" to Egypt under a federal statute and related regulations allowing removal if the Attorney General, in consultation with the Secretary of State, determined that diplomatic "assurances" that the detainee would not be tortured if returned were "sufficiently reliable." *Id.* at 238,

241-43 (quotation marks omitted). Khouzam argued that Egypt's assurances were "categorically unreliable." *Id.* at 238-39. Although "foreign affairs may be affected by a judicial decision," the Third Circuit found that the political question doctrine did not bar the suit, emphasizing at the outset that "the Constitution [does not] commit[ ] to the Executive the authority to determine whether the removal of a particular alien comports with immigration statutes and regulations," and then repeatedly returning to the fact that the application of a federal statute and regulations would resolve the specific questions posed by the claim. *Id.* at 249-53.

In *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774 (9th Cir. 2005), Peabody argued that "the issue of the legality of [its] lease provision was a nonjusticiable political question, on the theory that because the [Department of the Interior] had approved the mining leases, the court would have to make an 'initial policy choice' between the positions of the DOI and the EEOC," which claimed that the lease violated the Civil Rights Act. *Id.* at 778. The Ninth Circuit held the claim justiciable because "[r]esolving whether and how Title VII applies is a matter of statutory interpretation and thus involves simply implementing policy determinations Congress has already made." *Id.* at 784; *see also Chiles v. Thornburgh*, 865 F.2d 1197, 1216 (11th Cir. 1989) ("Resolution of [the actual] claims requires the interpretation of the Constitution, statutes, and regulations[,] which is entirely within the power of the federal judiciary. . . .");

Romer v. Carlucci, 847 F.2d 445, 461-63 (8th Cir. 1988) (*en banc*) (claim justiciable because "the issues presented . . . are purely legal ones of statutory interpretation," as adjudication "would simply require [the court] to follow congressional directives mandating that its project be completed in an environmentally safe manner").

The D.C. Circuit has sometimes taken the same approach as the Third, Eight, Ninth, and Eleventh Circuits. In *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), *rev'd on other grounds*, *Republic of Iraq v. Beaty*, 129 S.Ct. 2183 (2009), the plaintiffs, invoking the FSIA's "terrorism exception," claimed that Iraq had tortured them in violation of "local, federal, and international law." 529 F.3d at 1188-89. Shortly before the suit was filed, however, the President had issued several official statements declaring that suits against Iraq "constituted an unusual and extraordinary threat to the national security and foreign policy of the United States." 529 F.3d at 1196-97. Yet, the court held that "[t]he present actions undoubtedly present questions fit for judicial determination . . . regardless whether their resolution might affect the foreign relations of the Nation":

> The political question doctrine does not call upon [the courts] to decide whether a lawsuit that raises only justiciable questions contravenes the foreign policy of the United States; if the political branches decide tort suits against a foreign sovereign are contrary to the foreign policy of the Nation, then they

> may by law remove them from our jurisdiction. Nor has Iraq explained how the President, by making general statements or taking actions not specific to these cases, can set to naught a duly enacted jurisdictional statute.

Id. at 1197-98; *see also Population Inst. v. McPherson*, 797 F.2d 1062, 1070 (D.C. Cir. 1986) (although adjudication "will likely have some effect on the Executive's latitude in conducting foreign affairs," claim was justiciable because it merely called for "statutory interpretation").

More recent decisions of the D.C. Circuit, however, have taken the approach adopted by the Fifth Circuit in this case. *See Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009), *reh'g en banc denied*, 610 F.3d 84, *cert. granted*, *M.B.Z.*, No. 10-699; *El-Shifa*, 607 F.3d at 837, 840; *cf. id.* at 851-52 (Ginsburg, J., concurring) (arguing that the court "expand[ed] the political *question* doctrine," so that "even a straightforward statutory case, presenting a purely legal question, is non-justiciable if deciding it could merely reflect adversely upon a decision constitutionally committed to the President"); *id.* at 855-57 (Kavanaugh, J. concurring) (arguing that "[t]he Supreme Court has never applied the political question doctrine in cases involving statutory claims of this kind" because doing so "would not reflect benign deference to the political branches[, but r]ather . . . would systematically favor the Executive Branch over the Legislative").

II. The Fifth Circuit's Holding That the Act of State Doctrine Shields an American Company from Antitrust Liability Conflicts with the Holdings of This Court and Other Circuits.

The Spectrum Plaintiffs seek only to hold an American company, CITGO, liable under federal antitrust law for its role in a global oil price-fixing conspiracy with the OPEC member nations and private oil companies. They seek to redress injuries suffered by Americans in the United States and to ensure that an American company, whether acting independently or as a foreign sovereign's tool, does not participate in or deliberately further an illegal price-fixing conspiracy in the United States. The court of appeals' ruling that the act of state doctrine bars the Spectrum Plaintiffs' claims conflicts with the decisions of this Court and other Circuits.

A. The Ruling Below That the Spectrum Plaintiffs' Claims Are Barred Because They Cast Doubt Upon the Acts of Foreign Sovereigns Is Contrary to the Decisions of This Court and Other Circuits.

As demonstrated below, the Spectrum Plaintiffs' antitrust claims would not require the courts to declare unlawful any foreign sovereign's act within its own territory. The court of appeals' conclusion that the act of state doctrine nevertheless bars these claims is directly contrary to this Court's holding in *Kirkpatrick*, a decision the court below failed even to

cite. It is also contrary to the decisions of other Circuits that have correctly followed this Court's holding in *Kirkpatrick*. *See, e.g.*, *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1026-27 (6th Cir. 1990); *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1085, 1088-93 (9th Cir. 2009), *cert. denied*, 131 S.Ct. 65 (2010).

1. In *Kirkpatrick*, this Court unanimously held that the act of state doctrine applies only if "the relief sought or the defense interposed would . . . *require*[ ] a court in the United States *to declare invalid* the official act of a foreign sovereign performed *within its own territory*." 493 U.S. at 405 (emphasis added). This Court continued: "Act of state issues only arise when a court *must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine." *Id.* at 406.

The plaintiff in that case brought racketeering and unfair-competition claims against Kirkpatrick, alleging that it had bribed Nigerian officials to win a contract. *Id.* at 401-03. The claims required proof that Kirkpatrick "intended to wrongfully influence the decision to award the Nigerian Contract by payment of a bribe, that the Government of Nigeria, its officials or other representatives knew of the offered consideration for awarding the Nigerian Contract to Kirkpatrick, that the bribe was actually received or anticipated and that but for the payment or anticipation of the payment of the bribe, [the plaintiff] would have been awarded the Nigerian Contract." *Id.* at

403. The act of state doctrine nonetheless did not bar the claims because they did not require the courts to "invalidate[ ]" Nigeria's action. *Id.* at 405, 407 (quotation marks omitted). This Court explained: "Regardless of what the court's factual findings may suggest as to the legality" of Nigeria's conduct, "its legality [was] simply not a question to be decided in the present suit, and there [was] thus no occasion to apply the rule of decision that the act of state doctrine requires." *Id.* at 406-08; *see also id.* at 406 ("The issue in this litigation is not whether [the alleged governmental] acts are valid, but whether they occurred.") (quotation marks omitted). Indeed, this Court expressly repudiated prior dictum suggesting, as the appellate court held here, that the act of state doctrine "bars any factual findings that may cast doubt upon the validity of foreign sovereign acts." *Id.* at 406-08.

2. Nothing in the Spectrum Plaintiffs' complaint would require the courts to declare invalid any act of any foreign sovereign within its own territory. For purposes of the act of state doctrine, a foreign sovereign's acts do not occur "within its own territory" if they are "consummated" abroad. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 140 (1938). Rather, a foreign sovereign's acts occur within its own territory only if those acts are "fully executed within the foreign state." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 414 (1964).

Even on the broadest theory asserted in the Spectrum Plaintiffs' Complaint – Count III, which

would hold CITGO liable as Venezuela's instrument for implementing the anticompetitive scheme – adjudicating the Spectrum Plaintiffs' claims would not require the courts to declare invalid "the crude-oil production decisions of foreign sovereigns," let alone "effectively order foreign governments to dismantle their chosen means of exploiting the valuable natural resources within their sovereign territories." App. 33a, 34a n.18. The Spectrum Plaintiffs seek relief only against CITGO, and holding that Venezuela, through CITGO, has violated federal antitrust law would require only a holding that Venezuela has entered into an unlawful antitrust conspiracy, not a holding regarding the validity or legality of its oil production decisions or any other action Venezuela has taken solely within its own territory.

"[I]t is . . . well settled that conspiracies under the Sherman Act are not dependant on any overt act other than the act of conspiring." *Socony-Vacuum*, 310 U.S. at 224 n.59. Rather, an "offensive agreement or conspiracy alone, whether or not followed by efforts to carry it into effect, is a violation of the Sherman Law." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402 (1927). Indeed, "[i]t is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful." *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). Accordingly, it is only the act of agreeing to fix prices – not the individual production limits imposed by Venezuela or other sovereign conspirators within their territories implementing the agreement

– that would need to be held illegal here. And there can be no question that the agreement among Venezuela, other oil-producing nations, and private oil companies to fix prices is inescapably extraterritorial. Indeed, such a multinational agreement by definition transcends the territorial boundaries of any one nation and implicates each sovereign conspirator in matters beyond its own territorial jurisdiction. Venezuela's central anticompetitive act – agreeing with the other member nations and an international collection of private oil companies to fix oil prices – cannot occur within its own borders.

3. Regardless of whether a foreign sovereign's act-of-state protection stops at its own borders, there can be no doubt that such protection stops at ours. Thus, even if the act of state doctrine were not narrowly confined to acts occurring wholly within a foreign sovereign's own territory, the doctrine surely would not shield from challenge foreign sovereigns' acts targeting the United States, breaching its territorial boundaries, or employing American assets to further the anticompetitive goals of an international price-fixing conspiracy.

Here, the Spectrum Plaintiffs have alleged that a fundamental purpose and a direct, substantial, and foreseeable effect of the conspiracy has been to increase the price of RPPs in the United States. The many decisions refusing to "give effect to foreign government confiscations without compensation of property located in the United States," regardless of where the confiscatory decrees are promulgated,

establish that the doctrine does not shield Venezuela's anticompetitive assault on the American market from scrutiny just because it was launched from Caracas (or Vienna). *See, e.g.*, *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 686-87 (1976) (applying doctrine "insofar as [Cuba's confiscatory decree] purported to take the property of Cuban nationals located within Cuba," but not insofar as decree purported to reach assets in United States); *Allied Bank v. Banco Credito Agricola*, 757 F.2d 516, 522 (2d Cir. 1985) (act of state doctrine inapplicable to Costa Rica's extinguishment of debt payable to American company in United States); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965) (Friendly, J.).

And the gravamen of Count III is that Venezuela, as a member of the cartel, has not only targeted American consumers, but also penetrated the territorial boundaries of the United States by acquiring and using commercial assets in this Country to implement its anticompetitive scheme. CITGO provides Venezuela with a tool through which to refine its price-fixed crude oil and to distribute RPPs to American consumers. *Supra* at 5-7. It matters not whether Venezuela acquired its American commercial facilities in its own name or through a wholly owned American subsidiary like CITGO. The act of state doctrine is a shield, not a sword – a foreign sovereign cannot raise the act of state defense with one hand while deliberately targeting and physically entering the United States with the other. Were it otherwise,

foreign sovereigns would be free to buy up American oil fields and cut production to raise prices of their own natural resources.[5]

4. The Spectrum Plaintiffs' narrower claims – Counts I and II, which treat CITGO as an independent entity – seek to hold only CITGO liable for its willing participation in a price-fixing conspiracy. Adjudicating these claims would not require the courts to declare unlawful *any* foreign sovereign's act, let alone such an act within the foreign sovereign's territory. Rather, the Court need only declare unlawful *CITGO's* act of joining a price-fixing conspiracy.

Section 1 of the Sherman Act makes clear that the Court need not declare unlawful the act of any co-conspirator in order to find CITGO liable for conspiring to fix prices. Rather, that statute makes unlawful the acts of "[e]very person" who agrees to restrain trade. App. 98a. Further, the antitrust laws do not require that each conspirator be a named defendant or bar a court from granting relief against one conspirator subject to its jurisdiction simply because other, unnamed co-conspirators are beyond its reach. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (rejecting defendants' attempt to implead co-conspirators). It is likewise well settled

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[5] Significantly, the FSIA does not immunize foreign sovereigns for commercial acts causing a "direct effect in the United States" or "carried on in the United States." App. 103a. As discussed below, the act of state doctrine is no broader than the FSIA.

that the act of state doctrine does not shield from judicial scrutiny the acts of private parties who conspire with foreign governments or officials to violate American laws. *See United States v. Sisal Sales Corp.*, 274 U.S. 268, 273-76 (1927) (act of state doctrine did not shield American companies from antitrust liability even though foreign sovereign had furthered conspiracy by enacting "favorable" legislation at their request); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962) ("As in *Sisal*, . . . respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.").

The FTC has acknowledged the self-evident proposition that it "would be illegal for U.S. companies" – like CITGO – "to enter into an agreement with OPEC or any OPEC nation for the purposes of restricting output." App. 165a n.6.

The court below appears to have concluded that CITGO alone could not be held liable under the antitrust statutes because (that court believed) the Spectrum Plaintiffs had "failed to allege actions taking place within the United States that stand independent from the alleged production conspiracy." App. 34a n.18. But the factual relationship between CITGO's actions and the acts of foreign governments is irrelevant for purposes of the act of state doctrine. Although holding that CITGO violated federal antitrust law by agreeing to fix oil prices might entail *finding*, as a *factual* matter, that foreign sovereigns also agreed to fix oil prices, federal antitrust law does

not require a reciprocal *holding* regarding the *legality* of CITGO's co-conspirators' conduct. Consequently, because the "legality [of the sovereigns' conduct] is simply not a question to be decided" under the Spectrum Plaintiffs' narrower claims, the doctrine plainly provides no basis for dismissal, regardless of what the factual findings "may *suggest* as to the legality" of the sovereigns' conduct. *Kirkpatrick*, 493 U.S. at 406-08 (emphasis added). Because, as in *Kirkpatrick*, the Court need not "decide . . . the effect of official action by a foreign sovereign," the act of state doctrine "is not in [this] case." *Id.* at 406. The appellate court's contrary holding thus stands in direct conflict with a decision of this Court and the decisions of other Circuits that have followed this Court's guidance.

B. The Fifth Circuit's Extension of the Act of State Doctrine to Foreign Sovereigns' Commercial Acts Conflicts with a Decision of the Second Circuit and the Considered Judgment of a Plurality of This Court, Congress, and the Executive Branch.

The court below acknowledged that foreign sovereigns are not immune from suit under the FSIA when they act "not as a regulator of a market, but in the manner of a private player within it." App. 32a n.16 (quotation marks omitted). But it joined the Ninth and Eleventh Circuits in holding that "'[t]he act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign

immunity.'" *Id.* (quoting *IAM*, 649 F.2d at 1360); *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1254 n.2 (11th Cir. 2006). This conclusion directly contradicts the holding of the Second Circuit, *see Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 72-73, 79 (2d Cir. 1977), and the considered judgment of a plurality of this Court, Congress, and the Executive Branch.

1. Under the act of state doctrine, this Court has, to date, presumed the validity only of "the public and governmental acts of sovereign states." *Dunhill*, 425 U.S. at 694-706; *see also Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) ("Under [the act of state] doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders. . . ."). In *Dunhill*, the four-Justice plurality, noting that the Court's "cases have not yet gone so far" as to treat a foreign sovereign's "private and commercial acts" as protected acts of state, concluded that the doctrine "should not be extended to include" such acts. 425 U.S. at 695. The plurality recognized the need for harmony between the act of state doctrine and the doctrine of sovereign immunity. The Court noted that the Executive Branch had "abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions." *Id.* at 698. To shield a foreign government's

commercial acts from scrutiny under the act of state doctrine would thus afford a backdoor "immunity which our Government would not extend them under prevailing sovereign immunity principles in this country" and thereby "undermine the policy supporting the restrictive view of immunity, which is to assure those engaging in commercial transactions with foreign sovereignties that their rights will be determined in the courts whenever possible." *Id.* at 699. The plurality thus concluded that "the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label 'Act of State' than if it is given the label 'sovereign immunity.'" *Id.* at 705.

Codifying the restrictive understanding of sovereign immunity in the FSIA just months after *Dunhill*, App. 103a-04a, Congress explicitly approved of the *Dunhill* plurality's refusal to extend the reach of the act of state doctrine to commercial activity. Like the *Dunhill* plurality, Congress feared that the abrogation of sovereign immunity for commercial acts would be "frustrate[d]" by "elevat[ing] the foreign state's commercial acts to the protected status of 'acts of state,'" thereby "permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine." App. 154a n.1 (quotation marks omitted). Accordingly, Congress indicated its understanding "that the [act of state] doctrine would not apply to the cases covered by [the FSIA], whose touchstone is a concept of 'commercial activity' involving

significant jurisdictional contacts with this country." *Id.* Congress nonetheless "found it unnecessary to address the act of state doctrine" in the FSIA precisely because "decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine." *Id.* In keeping with these clear signals from the Judicial and Legislative Branches, the Executive Branch has likewise concluded that the act of state doctrine applies only if the challenged conduct "is governmental, rather than commercial." App. 156a.

2. Whether a foreign sovereign's act is commercial rather than governmental is determined by its nature rather than purpose, and thus the dispositive question is whether the act is of the type in which private actors engage. As the *Dunhill* plurality explained, "[i]n their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead they exercise only those powers that can also be exercised by private citizens." 425 U.S. at 695-96, 704. Drawing on *Dunhill*, the Supreme Court held unanimously in *Republic of Argentina v. Weltover Inc.*, 504 U.S. 607 (1992), that in ascertaining whether a foreign government's act is governmental or commercial in nature, "the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the

type of actions by which a private party engages in trade and traffic or commerce." *Id.* at 612-14 (quotation marks omitted); *see* App. 102a. Thus, in *Weltover*, Argentina's issuance of sovereign debt was held commercial rather than governmental even though Argentina issued the bonds to stabilize the Argentine currency. 504 U.S. at 609, 614-15. Although *Weltover* involved the FSIA, the same test applies in the context of the act of state doctrine – after all, *Weltover* looked to the *Dunhill* plurality's analysis for guidance on this question.

3. There can be no doubt that the acts of Venezuela and the other sovereign conspirators in agreeing to fix oil prices "must be characterized as commercial acts. Indeed, it is typically private individuals rather than foreign states that indulge in this anticompetitive practice." App. 169a-71a; *see also* App. 162a; *Socony-Vacuum*, 310 U.S. at 189-94, 218-24 (conspiracy among producers, refiners, and marketers to fix spot oil prices held illegal *per se*). The commercial nature of the conspiracy is particularly evident in light of the fact that the member nations have brought private parties, including CITGO and Lukoil, the world's second largest private oil producer, into the conspiracy. Because private actors can and do agree to fix the price of commodities such as oil, the member nations' act of agreeing to fix oil prices is commercial in nature and therefore not a public, governmental act protected by the act of state doctrine.

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari. Given the relationship between the questions presented here and in *M.B.Z.*, No. 10-699 (in which the Court recently granted certiorari), the Court may wish to calendar this case with *M.B.Z.* for purposes of oral argument.

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