No. 10- 101393

In the Supreme Court of the United States

In re Refined Petroleum Products Antitrust Litigation

FAST BREAK FOODS LLC, et al.,
Petitioners,

v.

SAUDI ARABIAN OIL COMPANY,
doing business as Saudi Aramco, et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the political question doctrine deprive the federal courts of jurisdiction to adjudicate a Sherman Act and Clayton Act damage case against both private and state-owned businesses operating in the United States that have conspired to fix the prices of refined petroleum products sold in the United States?

2. Does the act of state doctrine bar antitrust claims against every defendant who has conspired to fix the price of refined petroleum products sold in the United States when their conduct was commercial and not official, and where it came to fruition and had its effect in the United States?

PARTIES

Petitioners here are Fast Break Foods LLC, Green Oil Co, Countywide Petroleum Co, and Central Ohio Energy Inc.

Respondents here are Saudi Arabian Oil Company (d/b/a Saudi Aramco), Saudi Petroleum International, Inc., Aramco Services Company, Saudi Refining, Inc., and Motiva Enterprises LLC (collectively "Saudi Aramco"); Petroleos de Venezuela S.A., PDV America, Inc., Citgo Petroleum Corporation, PDV Holding, Inc., and PDV Midwest Refining, LLC (collectively "PdVSA"); Open Joint Stock Company "Oil Company Lukoil" ("OAO Lukoil"), Lukoil Americas Corporation, Lukoil International Trading and Supply Company, Lukoil Pan Americas LLC, and Getty Petroleum Marketing, Inc. (collectively "Lukoil").

Rule 29.6
CORPORATE DISCLOSURE STATEMENT

Petitioners are privately held companies, and none are publicly owned or affiliated in any way with publicly owned companies or have any parent corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas is reported at *In re Refined Petroleum Prods. Antitrust Litig.*, 649 F. Supp. 2d 572 (S.D. Tex. 2009), and reprinted at App. 35a–94a. The opinion of the United States Court of Appeals for the Fifth Circuit affirming the decision of the district court is reported at *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938 (5th Cir. 2011), and reprinted at App. 1a–34a.

JURISDICTION

The judgment of the Fifth Circuit was entered February 8, 2011. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. art. I, § 8:

[Congress shall have t]he power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . .

U.S. Const. art. II, § 2:

[The President] shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur . . . .

U.S. Const. art. III, § 2:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—. . . to controversies between . . . a State, or the citizens thereof, and foreign states, citizens or subjects.

Sherman Act § 1, 15 U.S.C. § 1:

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

Clayton Act § 4, 15 U.S.C. § 15(a):

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent . . . .

STATEMENT OF THE CASE

Respondents' Position in the Refined Petroleum Products Industry

This case relates to the United States domestic market for refined petroleum products ("RPPs"), including gasoline, heating oil, diesel fuel, aviation fuel, lubricants, asphalt, petrochemicals, and refined waxes. Petitioners are American purchasers of these products and Respondents are manufacturers and sellers of these products.

Respondent Saudi Aramco is a Saudi Arabian commercial conglomerate, owned by the government of Saudi Arabia since its establishment in 1988. Its subsidiaries in the production and distribution chain include Saudi Petroleum International, Inc., a Delaware corporation with offices in New York City; Aramco Services Company, another Delaware corporation, with its headquarters in Houston, Texas; Saudi Refining, Inc., another Delaware corporation headquartered in Houston, Texas; and Motiva Enterprises, LLC, a joint venture with Shell Oil Company selling RPPs under the name "Shell" in twenty-six States. (R2. 322, Consol. Compl. ¶¶ 23–26.)[1]

Currently, Saudi Aramco operates, pays taxes, pays profits to ownership, and makes pricing and other management decisions as a commercial entity without interference and direction of the government. And

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[1] Citations are made consistent with the citations to the record in Petitioners'/Consolidated Plaintiffs' Appellants' Brief and Reply Brief.

further, from the government of Saudi Arabia itself, "The Government fully trusts [the petroleum companies] and abstains from interfering with their daily operations . . . . This non-interference policy extends to the companies' internal systems and financial activities. They are given the full freedom and flexibility needed to achieve the highest possible productivity levels."[2] According to Saudi Aramco's website, its "extensive domestic and international operations rely on a global network of wholly owned subsidiaries," including in Houston and New York City.[3] As a result, it boasted of having "in a very short time [] developed from an oil enterprise focusing largely on production to one with operations extending around the world, and reaching vertically from the wellhead to the corner service station." (R2. 317, ¶ 4.)

PdVSA is a commercial oil conglomerate, owned by the government of Venezuela. PdVSA seeks and maintains commercial credit ratings, pays billions of dollars annually in taxes and profits to its government, and makes independent pricing and other relevant management decisions as a commercial conglomerate. To vertically integrate and operate in the United States, PdVSA acquired a number of downstream subsidiaries, including Citgo, PDV America, PDV Holding, and PDV Midwest, and it maintains

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[2] Saudi Arabia Ministry of Petroleum & Mineral Resources, *at* http://www.mopm.gov.sa/mopm/detail.do?content=sp_policy (last visited May 6, 2011).

[3] Saudi Aramco, Int'l Operations, Subsidiaries, *at* http://www.saudiaramco.com/irj/portal/anonymous?favlnk=%2FSaudiAramcoPublic%2Fdocs%2FOur+Business%2FInt%27l+Operations%2FSubsidiaries&ln=en (last visited May 6, 2011).

commercial offices in Argentina, Brazil, Cuba, the United Kingdom, Holland, and, through Citgo, in the United States.[4] PdVSA markets and sells its refined products in the United States through its wholly owned subsidiary, Citgo Petroleum Corporation, a Delaware corporation with its principal place of business in Houston, Texas. (R2. 323–25, ¶¶ 28–34.)[5]

The Lukoil conglomerate is led by a Russian corporation founded in 1991 and privatized in 1993.[6] It is publicly traded on global stock exchanges, including the NASDAQ under the name of Lukoil (OAO). OAO Lukoil itself and through its many Delaware corporate subsidiaries, including Respondents LITASCO, Lukoil Americas, Lukoil Pan Americas LLC, and Getty, engages in the production of crude oil, operates refineries and storage terminals in several countries, and supplies RPPs to storage facilities and terminals and for sale in the United States.[7] Lukoil sells gasoline in the United States, primarily through its Getty Petroleum subsidiary under the name "Getty." (R2. 325–26, ¶¶ 35–39.)

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[4] *See* About PdVSA, PdVSA in the World, *at* http://www.pdvsa.com (last visited May 6, 2011).

[5] *See also* U.S. Energy Info. Admin., Indep. Statistics & Analysis, *at* www.eia.doe.gov/cabs/Venezuela/oil.html (last visited May 6, 2011).

[6] *See* Lukoil Fact Book 2007 at 6, *at* http://www.lukoil.com/materials/doc/DataBook/DBP/2007/FactBook/part1.pdf (last visited May 6, 2011).

[7] *See also id.* at 6–14.

Like the sovereign-owned Respondents, Lukoil operates globally. For example, it made a deal with Respondent PdVSA in 2004 to secure sources of crude oil and to develop "supplies of oil to [the] North American market and oil products for Lukoil['s] retail chain in the USA." (R.2 336, ¶ 55(U).)[8]

The Litigation

Petitioners are each direct purchasers of RPPs from one or more Respondents who brought suit on behalf of a class of distributors and end users, excluding retail buyers. (R2. 321, ¶¶ 16–20.) They filed separate class action complaints in several different federal districts that were subsequently transferred by the Judicial Panel for Multidistrict Litigation to the Southern District of Texas for consolidated or coordinated proceedings with another class action previously filed there, *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, No. 4:06-3569.

After transfer, the defendants identified a substantial number of dispositive motions that they intended to bring against the pleadings of one or more of the pending complaints, including whether each of the defendants was properly served.[9] Petitioners sought and were granted leave to file an Amended and Consolidated Class Action Complaint. The district

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[8] *See also* www.lukoil.com/press.asp?div_id=1&id=2294&year4=2004) (last visited May 6, 2011).

[9] This particular question has not yet been addressed by the lower courts, although the district court's and the Fifth Circuit's opinions seem to have accepted Respondents' statements on the matter. App. 7a n.6.

court identified a number of the defendants' proposed dispositive motions that he considered to be common to both the Consolidated and *Spectrum* pleadings and would be resolved before other issues that he considered individualized between the respective complaints. Briefing proceeded on the "common issues": the application of the political question doctrine, act of state doctrine, comity, indirect purchaser doctrine, and the *Noerr-Pennington* doctrine. No briefing was permitted on the other issues identified by Respondents, including the question of service on foreign corporations and failure to state a claim under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). (R1. 76–77.)

The district court also continued a discovery stay that it had previously entered in the *Spectrum* matter. (R1. 68.) Briefing proceeded, with Respondents supporting their motion to dismiss with a compendium of affidavits, news articles incorporating hearsay, and other materials that Petitioners were not permitted to submit to verification and truth-testing because of the discovery stay.

Petitioners' Consolidated Complaint

The Consolidated Complaint alleged a conspiracy to fix RPP prices in the U.S. market carried out by commercial corporations, some of which are owned by governments and some of which are privately owned, but all of which are engaged in U.S. commerce. It further alleged that some of the co-conspirators are U.S. companies, organized and operating in the United States.

Although fixing crude oil prices is one act in furtherance of that conspiracy, Petitioners have also alleged that the corporate Respondents have: (a) acquired refineries and other facilities in the U.S. to enter and exploit the RPP market; (b) restricted the operating capacities of their crude oil refineries in order to increase the price of RPPs; (c) adopted a common formula for crude oil pricing and RPP pricing that was based on target profit margins on the sale of RPPs in the United States; (d) provided data and technical services that help fix RPP prices in the U.S. market; (e) falsely announced planned reductions in crude oil pumping in order to affect the futures market for crude oil and RPPs; and (f) pumped crude oil but withheld it from the RPP market so as to impact the prices of RPPs. (R2. 329–37, ¶¶ 52–55.)

Respondents moved to dismiss the complaint based upon, *inter alia*, the political question doctrine and the act of state doctrine. In opposition to these motions, Petitioners explained that:

(a) Even if agreements to manage the price of crude oil were immunized from legal scrutiny—which they are not—the Consolidated Complaint nonetheless alleges a viable claim of a conspiracy to fix prices in the U.S. RPP market;

(b) Even if a court restricted its scrutiny of the Consolidated Complaint to agreements relating to crude oil production levels, a single conspiracy can hit at multiple levels and a mechanism by which conspirators raise the price of a raw material input (crude oil) in a finished product (RPPs) that they

produce and sell yields antitrust injury to direct buyers (Petitioners) in the market for the finished product;[10] and

(c) Even if a state mantle shields sovereign activities, it does not protect domestic companies and non-sovereign-aligned RPP producers like Lukoil that participated in the conspiracy.

The Decision in the District Court

Despite the foregoing, the district court dismissed Petitioners' Consolidated and the *Spectrum* Complaints pursuant to Rule 12(b)(6) for failure to state a claim under the political question and act of state doctrines. App. 92a. The district court addressed each of these issues under the pleading standards set forth by *Twombly*, even though it had ordered that the parties *not* brief that issue. App. 43a, 46a, 48a, 75a, 87a.

Although the Consolidated Complaint overtly pled a price fixing conspiracy in the RPP market by Respondents through their vertically integrated control of the market from raw material to finished product, the district court disregarded any allegations relating to constraints on the RPP market through Respondents' wholly-controlled production and distribution chain. It concluded that Petitioners were merely alleging a price-fixing conspiracy that boiled

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[10] *See, e.g., Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 481 (7th Cir. 2002); *Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 17–18 (3d Cir. 1978).

down to a restraint on crude oil output at the wellhead. *E.g.*, App. 63a.

The district court further found, without allowing discovery, that such acts were attributable only to the acts of the sovereign owners, rather than commercial oil companies and non-sovereign owned producers. *Id.* Also without allowing discovery, the district court made an erroneous finding that Respondents only "purchas[ed] crude oil produced by foreign sovereign members of the conspiracy." App. 70a. The district court's findings and conclusions did not address the Lukoil Respondents, who were not sovereign-owned and were alleged to have made price and other conspiratorial agreements with the sovereign-owned Respondents. Nevertheless, the court's decision dismissed the claims against Lukoil along with the other Respondents.

The only statement in the court's decision that relates to Lukoil at all appears to be the adoption of Respondents' arguments, unsupported by admissible, testable evidence, not the subject of briefing, contrary to the allegations of the Consolidated Complaint, and contrary to verifiable public information, that Petitioners' allegations attack crude oil decisions of the "Russian Federation." App. 49a. In fact, Petitioners presented evidence from Lukoil's own public web page history demonstrating that: (a) it had no governmental affiliation; (b) many of its activities in the production of crude oil and RPPs related to oil of non-Russian origin; (c) that Lukoil representatives met with its co-conspirator Respondents to discuss oil production levels (*e.g.*, R2. 332, ¶ 54(O)–(P)); and (d) that it made RPP production agreements with its co-conspirators to enhance its supplies of RPPs in the United States.

Despite the pleading allegations and the publicly available information provided to the court regarding the operations of Respondents, the varying and far flung locations of price fixing meetings, overt acts in furtherance of the conspiracy done on American soil, the commercial nature of the activities, and the fact that the effects of Respondents' actions are felt directly in U.S. commerce, the district court concluded as a matter of law that the act of state doctrine had no territorial limitation on conduct or impact, that there was no "commercial activity exception," and that the "validity" of any sovereign decisions regarding their crude oil production insulated not only all of their downstream domestic and foreign corporate activities producing RPPs, but the privately owned Lukoil Respondents as well, without further inquiry. App. 78a–86a.

The district court's analysis under the political question doctrine was much more abbreviated. The court identified the six factors set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962): (1) a textually demonstrable commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the possibility of embarrassment from multifarious pronouncements by various departments on one question. App. 88a–89a.

The district court concluded that the fourth *Baker* factor applied because it viewed a decision in the case in either direction would express a lack of respect for "the Executive branch because of its longstanding foreign policy that issues relating to crude oil production by foreign sovereigns be resolved through intergovernmental negotiation." App. 89a. The court relied substantially on Respondents' semi-factual "chronology," regarding which the Petitioners were not permitted any discovery, and a summary of information to which Petitioners could not reasonably be expected to obtain access. There was no evidence of any agreements ever having been reached with foreign oil producers, particularly as relates to OPEC members that routinely rebuff such discussions.[11]

Failing to consider the other *Baker* factors, the district court most critically failed to consider the two first and most important factors: demonstrable textual commitment and judicially discoverable and manageable standards. Proper consideration of both of

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[11] The State Department publication Treaties in Force lists no oil or refined-products agreements with the defendants or their owners, and the United States in its amicus filing in the Fifth Circuit did not enumerate any. *See* Treaties In Force 2010, *at* http://www.state.gov/documents/organization/143863.pdf. Neither have there been identified any actual Executive diplomatic discussions, but instead only public reports of unilateral "lobbying" and "jawboning" that have been routinely rebuffed. *See, e.g.*, *"Jawboning" OPEC is Campaign Issue Again*, Pittsburg Post-Gazette, Apr. 1, 2004, *available at* 2004 WLNR 4800509; New York Daily News, April 1, 2004, *available at* 2004 WLNR 21437274; Newsday, Mar. 6, 2008, *available at* 2008 WLNR 4418616. The United States does not even recognize OPEC as a sovereign organization. *Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916, 922 n.9 (11th Cir. 2003).

these factors would have shown that the Constitution has exclusively committed to Congress the power to regulate foreign trade, and that Congress has in turn committed to the courts the responsibility of interpreting and applying the Sherman Act to private civil enforcement actions – which the federal courts have been doing for over a century based on standards that are obviously "judicially discoverable and manageable."

The Decision of the Fifth Circuit

After briefing and oral argument in the Fifth Circuit, the panel hearing the matter requested that the Executive branch give the court its views on the application of the political question doctrine and the act of state doctrine in the case. The government submitted a brief as *amicus curiae* expressing the view that the case implicated Executive branch foreign affairs and national security powers, threatening prospective foreign commerce, and that the adjudication of the case threatened interference with what it viewed as its long term "management" of issues relating to foreign crude oil imports. App. 23a.

Nothing in Petitioners' Consolidated Complaint or subsequent arguments attacks any nationalization of oil industries, nor how foreign sovereigns license their crude oil production, nor even their decisions to license production to their own wholly-owned corporations and thereby enter the commercial market directly. Petitioners' suit questions only – in part – whether, when sovereigns turn over production and manufacturing decisions to their captive corporations, those corporations can be sued when they engage in

price fixing in the production and sale of their products in the private United States market.

Nevertheless, the Fifth Circuit affirmed the district court's dismissal of all claims and, like the district court, never discussed the participation of the private Lukoil entities at all. Rather, it draped a presumed sovereign mantle over Lukoil's private corporate actions as being coextensive with those of the political leadership of the Russian State, notwithstanding that the selfsame State has itself sanctioned Lukoil for price fixing of certain RPPs.[12]

The Fifth Circuit failed to consider Congress' plenary foreign commerce powers and its intent to vest the Sherman Act and the federal courts with their fullest powers to adjudicate cartel cases threatening U.S. commerce. The Fifth Circuit considered only the foreign relations interests of the Executive branch without enunciating any boundaries or standards much beyond accepting Executive branch assertions that it controls oil import management.

Accordingly, as it relates both to the political question and act of state doctrines, the Fifth Circuit summarized its view as, "Any merits ruling in this case, whether it vindicates or condemns the acts of OPEC member nations, would reflect a value judgment on their decisions and actions – a diplomatic

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[12] *See Russia Examines Price Fixing in Oil Market*, United Press Int'l, July 16, 2008, *at* http://www.upi.com/Science_News/Resource-Wars/2008/07/16/Russia-examines-price-fixing-in-oil-market/UPI-19211216224413; Katya Golubkova, *Russian Anti-Trust Body Fines LUKOIL $224 Million*, Reuters, Nov. 5, 2009, *at* http://www.reuters.com/article/idUSL517956720091105.

determination textually committed to the political branches," and "[t]he granting of *any* relief to [Petitioners] would effectively order foreign governments to dismantle their chosen means of exploiting the valuable natural resources within their sovereign territories." App. 24a, 33a (emphasis added). This result extends an effective immunity even to non-state actors operating in U.S. commerce.

Despite the allegations in the Consolidated Complaint and the publicly available and undisputed information about Respondents' origins and commercial operations, the Fifth Circuit relied substantially on the decisions in *Int'l Assoc. of Machinists & Aerospace Workers v. Org. of Petroleum Exporting Countries,* 477 F. Supp. 553 (C.D. Cal. 1979), *affirmed on other grounds,* 649 F. 2d 1354 (9th Cir. 1981) ("*IAM*"), an indirect purchaser case that was brought against OPEC and its *sovereign* members in their licensing and concession operations that predated complete nationalization and vertical integration of a downstream industry that carried them directly onto United States shores and into U.S. commerce.

Inasmuch as *IAM* also predated this Court's clarification of the reach of the act of state doctrine in *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l,* 493 U.S. 400 (1990) (discussed *infra*), *IAM* represents neither an instructive precedent nor an accurate summary of law applicable to the current commercial oil industry. *IAM* did not and cannot reach the issues presented in this case, which relate only to commercial operations of oil companies acting in and directly affecting U.S. commerce.

REASONS TO GRANT THE PETITION

I. The Fifth Circuit's Decision Conflicts With the Decisions of this Court on Important Federal Questions and Creates an Unwarranted Bar to Private Actions Addressing Blatant Violations of the Sherman Act.

Under the decisions announced below, there is virtually *no limit* to the shroud protecting the conspiracy to inflate the price of RPPs sold in the United States. So long as a restraint on crude oil production is one element of that conspiracy, the conspiracy is free from any private legal challenge, even if the co-conspirators consist of private companies (like Lukoil and Getty), commercial companies organized and located in the United States (like Citgo and Motiva), or, by extension, private companies that are organized and located in the United States (under the decision, Exxon Mobil and Chevron are free to join the conspiracy with impunity).

Similarly, by virtue of the Fifth Circuit's broad statement that the courts cannot examine foreign governments' "chosen means of exploiting the valuable natural resources within their sovereign territories," the conspiracy is free from private legal challenge, even if the co-conspirators expressly collude to fix the price for "sovereign gasoline" at every local service station in the U.S.

Such an outcome is at least ironic, inasmuch as it was the machinations of the early oil industry that substantially motivated the passage of the Sherman Act in 1890. In an industry that has regularly been

examined for anti-competitive conduct ever since, the activities outlined in Petitioners' pleadings are not even a new pattern. Like one of the classic cases in the history of antitrust case law, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this is a horizontal price fixing case wherein the desire to control the price of gasoline – and other RPPs – by oil conglomerates led to top-to-bottom agreements on pricing, refining, and crude oil pumping volumes. *Id.* at 170–76. The only difference is the identity of the corporations' owners.

This cannot be the law, and is it certainly not consistent with the decisions of this Court. The only way in which the Fifth Circuit was able to arrive at such a limitless outcome was by disregarding prior decisions of this Court.

The fundamental consideration for the refusal to adjudicate a "political question" is that the question before the court is entrusted to one of the political branches. *See Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality). The six tests set forth in *Baker* are all variations of that single inquiry, not independent of it. A determination that the first *Baker* factor – a "textual commitment" – is present should resolve the matter here, not merely be the first gate. *Id.* (*Baker* factors "are probably listed in descending order of both importance and certainty"); *see also Saldano v. O'Connell,* 322 F.3d 365, 369 (5th Cir. 2003) (the first factor is "[t]he dominant consideration") (quotation marks omitted).

The broad assumption by the courts below that the assertion of potential foreign affairs and national security irritations overrides the constitutional

commitment of this foreign trade dispute to Congress directly conflicts with this Court's jurisprudence.

Even if the Court is not persuaded that there is a direct conflict with its prior decisions involving the political question doctrine, it should review this case to address important federal questions that should be resolved by this Court. Since *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221 (1986), this Court has not reviewed any decision involving the applicability of the political question doctrine due to concerns that a claim interferes with the Executive's "foreign relations" functions.

In the interim, there has been an escalation of the Executive's efforts to block civil litigation with increasingly generalized assertions of "foreign relations," "foreign investment," or "national security" concerns. *See, e.g., Sarei v. Rio Tinto*, 487 F.3d 1193, 1205–06 (9th Cir. 2007), and cases cited therein; *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 284–85 (S.D.N.Y. 2009) (Executive concerns about "irritation" in foreign affairs and "chilling effect" on doing business in a pariah state not entitled to deference). Such increasing demands for Executive deference are fueling the perceived vagueness of the political question doctrine as a whole.[13]

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[13] *See, e.g., Doe v. Bush*, 323 F.3d 133, 140 (1st Cir. 2003) (doctrine is a "famously murky one"); *Comm. Of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 933 (D.C. Cir. 1988) ("No branch of the law of justiciablity is in such disarray as the doctrine of the 'political question'"); Note, *Politics as Usual? The Political Question Doctrine in Holocaust Restitution Litigation*, 32 Cardozo L. Rev. 723 (2010); Note, *Precatory Executive Statements And Permissible Judicial Responses In The Context Of Holocaust-*

The issue of the reach of the national security concerns of the President, which were substantially addressed by this Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), should also be addressed again by this Court. In this regard, the holding of the court in *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614 (D.D.C. 1980), should be considered, as it relates to separation of powers, oil import management by the Executive branch, and national security concerns.

Rejecting government arguments that presidential authority to impose user fees to reduce the demand for imported oil could be based on national security concerns, the court in *Duncan* ruled that notwithstanding the undoubted "severe consequences for national security" posed by the threat of significant interruption of imported oil, "[w]hat is required of the Court, a duty the Court does not shirk, is to determine whether the President's action falls within the relevant statutory authority granted him by the Congress of the United States." *Id.* at 616–19. The President had neither the congressional authority nor inherent power out of national security concerns to act

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Claims Litigation, 106 Colum. L. Rev., 1119 (2006); S. Korman, *The New Deference-Based Approach To Adjudicating Political Questions In Corporate ATS Cases: Potential Pitfalls And Workable Fixes*, 9 Rich. J. Global L. & Bus. 85, 85, 88–89 (Winter, 2010) (political question doctrine is a paradox and a deferential analysis leaves open the possibility of executive branch intrusion); L. M. Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. Marshall L. Rev. 441, 442 (2004) (effort to make the political question problem into a doctrine is a "fool's errand"); L. Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L. J. 597, 600 (1976) ("A doctrine that finds some issues exempt from judicial review cries for strict and skeptical scrutiny.").

in a way contrary to congressional intent. *Id.* at 620–21 (citing *Youngstown,* 343 U.S. at 588).

Given the swelling attempts by the Executive to impinge on congressional authority by way of the political question doctrine, *Baker* and its progeny should be revisited by the Court and either clarified or reexamined to give proper guidance to the courts and enunciate the constitutional powers of the courts to adjudicate private Sherman Act cases against transnational commercial enterprises directly affecting U.S. commerce. Failing to correct the errors below and set clear standards permitting the private prosecution of price fixing claims against transnational conglomerates operating in the United States will raise a wall around additional efforts to create other mineral cartels, some of which are currently underway.[14]

The outcome below if left undisturbed also will affect the degree to which the United States may use one of its most robust tools to defend U.S. commerce in the face of cartels threatening United States trade and commerce: the private attorneys general bringing private causes of action.[15]

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[14] The Federation of Russian States has been vocal about its interest in forming a natural gas OPEC. *See, e.g.,* www.csmonitor.com/2008/1030/p01s04-wogn.html (last visited May 6, 2011).

[15] *See, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634–35 (1985); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972).

Article III of the Constitution on its face envisioned that the courts would render judgments on matters *likely* to cause foreign affairs "irritation," even without further specific statutory commitment, and the lower courts need the guidance of this Court clarifying the scope of their jurisdiction.

II. The Fifth Circuit's Application Of the Political Question Doctrine in a Sherman Act Damages Case is Contrary to the Decisions of this Court.

This is apparently the first reported case in which a federal court has applied the political question doctrine in a Sherman Act case. There are only two preceding circuit court antitrust decisions touching on the doctrine at all. Both decisions declined to dismiss the action, but under different analyses and applications.

In *Indus. Inv. Dev. Corp.* v. *Mitsui & Co., Ltd.*, 594 F.2d 48, 52–53 (5th Cir. 1979), the Fifth Circuit upheld a Sherman Act conspiracy case (in an analysis that alternated between political question and act of state reasoning) involving the cancellation of a joint venture to secure a concession decree and license from the Republic of Indonesia relating to timber harvesting. The court held that the instigation of foreign government involvement "does not mechanically protect conduct otherwise illegal in this country from scrutiny by the American courts" and that "[t]here are *no special political factors* which outbalance this country's legitimate interest in regulating anticompetitive activities both here and abroad." *Id.* at 52–53 (emphasis added). And further: "Precluding all inquiry into the motivation behind or circumstances

surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to [Indonesian] executive department action." *Id.* at 55.

The Ninth Circuit is the only other circuit court to have addressed the issue of whether and when the political question doctrine bars the adjudication of a Sherman Act case, holding that it did not, under different facts than presented here. In *Northrup Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1036-39 (9th Cir. 1983), at issue was the breakdown in a "teaming" arrangement between the parties encouraged by the government to produce a new fighter aircraft that would be developed and marketed to the United States and various foreign countries, including Iran and Israel. The Ninth Circuit reversed a dismissal of Sherman Act litigation between the partners, holding that the "mere fact that the challenged conduct occurred in a regulated industry does not alter its private commercial character." *Id.* at 1047.

The Fifth Circuit's contrary analysis here is in conflict with the consistent rulings of this Court and the lower courts that where Congress has acted within its commerce powers, including the passage of the Sherman Act and specific grant of jurisdiction to the United States courts, the Executive branch and its foreign relations interests must yield. The Treaty Clause, U.S. Const. art. II, § 2, does not curtail Congress' power under the Foreign Commerce Clause, *id.* art. I, § 8. *Downes v. Bidwell*, 182 U.S. 244, 313 (1901) (White, J., concurring). The power of Congress over foreign commerce is plenary and absolute. *Gibbons v. Ogden*, 9 Wheat 1, 22 U.S. 1, 193–94 (1824);

Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1393–94 (1987). This plenary power is interpreted to extend to all commerce which has a substantial effect on commerce between the United States and foreign countries. *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 641 (2d Cir. 1956).

Any international trade agreement that the Executive branch might attempt to reach that conflicts with legislation that Congress has previously passed would be without any force and effect unless Congress assents, as Congress alone is concerned with foreign commerce. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658–60 (4th Cir. 1953), *aff'd.*, 348 U.S. 296 (1955); *Miss. Poultry Ass'n v. Madigan*, 992 F.2d 1359, 1365 (5th Cir. 1993) ("It is not within the purview of the [Executive agency], however – or of the courts for that matter – to alter, frustrate, or subvert congressional policy."); *Int'l Bancorp, LLC v. Societe des Bains de Mer et du Cercle des Etrangers a Monaco*, 329 F.3d 359, 367–68 (4th Cir. 2003) ("[N]o precedent suggests that the intersecting foreign affairs power the Constitution vests in the Executive in any way curtails the foreign trade power the Constitution vests in Congress . . . .").

This Court has long ago, and often, reiterated that the Sherman Act was intended by Congress to "enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests." 21 Cong. Rec. 2456 (1890) (comments of sponsor,

Senator Sherman).[16] Senator Sherman also specifically noted that the intent in passing the Sherman Act was to protect U.S. commerce from trusts "imported from abroad." *Id.* at 2460; *see also D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co.*, 236 U.S. 165, 173–74 (1915). Congress intended to "arm the Federal courts within the limits of their constitutional power." *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 559 (1944) (quoting 21 Cong. Rec. 2457 (statement of Sen. Sherman)).

"In enacting the Sherman Act, Congress mandated competition as the polestar by which all must be guided in ordering their business affairs. *It did not leave this fundamental national policy to the vagaries of the political process, but established a broad policy to be administered by neutral courts . . . .*" *City of LaFayette v. La. Power & Light Co.*, 435 U.S. 389, 406 (1978) (emphasis added).

"Congress intended to extend the substantive reaches of the Sherman Act to the farthest reaches of its power under the Commerce clause" to regulate foreign commerce. *Gough* v. *Rossmoor Corp.*, 487 F. 2d 373, 376 (9th Cir. 1973).

"In enacting the Sherman Act, there can be little doubt that Congress intended to exercise its power to

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[16] *See also* House Debates of the Sherman Act, 21 Cong. Rec. at 4090 (1890). "[I]t is within the Jurisdiction of the Federal Government to legislate concerning interstate and foreign commerce." *Id.* at 4095. "It is for us to enact the law and for courts to construe and enforce it. If we do our duty it is reasonable to believe that the co-ordinate branch of the Government will do its duty." *Id.* at 4099.

the fullest extent under the Commerce Clause." *Chatham Condo. Assoc.* v. *Century Village, Inc.*, 597 F.2d 1002 (5th Cir. 1979) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 328 (1936) (Cardozo, J., dissenting)). The jurisdictional reach of the Sherman Act is coextensive with the broad ranging power of Congress under the Commerce Clause. *Id.* at 1007.

"The Sherman Act embodies a Congressional policy to exercise 'the utmost extent of (Congress') Constitutional power in restraining trust and monopoly agreements." *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 679 (5th Cir. 1981) (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194–95 (1974)). Congress "explicitly authorized the treble damage action by aggrieved private persons as a supplement to judicial action initiated by the Executive branch. *The treble damage action is therefore a constitutional exercise of the commerce power . . . .*" *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 34 (5th Cir. 1972) (emphasis added).

Applying this mandate, the courts have adjudicated private treble damage price fixing cases against conspiracies of domestic and foreign sellers of natural resources, including cases with diplomatic and foreign sovereign ownership components. A very short survey of such instances includes price-fixing cases regarding uranium, vanadium, sisal, potash, copper products, rubber products, and diamonds.[17]

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[17] *See United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (allowing case against American members of cartel which was conspiring with Mexican government); *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (allowing case against conspiring American and Canadian vanadium producers

Any and all of these cases could have and probably did cause diplomatic upsets, and certainly the 1970s *Uranium* cases did exactly that, where the governments of Australia, South Africa, Canada, and others were instrumental in coordinating the pricing cartel activities of their national uranium ore producers and vigorously opposed U.S. court proceedings.[18] However, the cases proceeded, uranium continued to be imported, and war did not break out with our northern neighbor.

Given: (1) the textual commitment of foreign commerce matters to Congress, which invested the courts with specific jurisdiction to adjudicate Sherman Act price fixing damage claims involving foreign commerce; and (2) the substantial experience of the

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assisted by agents of the Canadian government); *In re Copper Antitrust Litig.*, 98 F. Supp. 2d 1039 (W.D. Wis. 2000) (allowing claims against Japanese copper supplier, even though United States and Japan are members of "The International Copper Study Group" studying supply and demand of this natural resource); *In re Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d 777 (N.D. Cal. 2007) (allowing claims against domestic and foreign sellers of rubber chemicals, even though U.S. government was a member of "The International Rubber Study Group," which proclaimed that it "shall be *the forum* for discussion of matters affecting the supply and demand for natural as well as synthetic rubber."); *In re Indus. Diamonds Antitrust Litig.*, 119 F. Supp. 418 (S.D.N.Y. 2000) (claims against diamond producers and suppliers, even though numerous foreign governments participated in the notorious diamond cartel).

[18] *See, e.g.*, *United Nuclear Corp. v. Gen. Atomic Co.*, 629 P.2d 231, 263 (N.M. 1980) (citing *United States v. First Nat'l City Bank*, 396 F.2d 897, 903 (2d Cir. 1968)); *see also In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1149 (N.D. Ill. 1979) and *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1253 (7th Cir. 1980).

courts in adjudicating those claims (the first two *Baker* factors), the lower courts' inquiry could and should have stopped there. However, even if the remaining *Baker* factors were still arguably viable in this context and outweighed constitutional commitment and congressional intent, the result should still come down in favor of adjudicating a Sherman Act private damage case.

III. The Fifth Circuit's Decision Conflicts With Decisions of this Court and Other Circuits Which Have Held that the Act of State Doctrine Does Not Apply to Extraterritorial or Commercial Conduct that Merely Embarrasses Foreign Governments.

Petitioners maintain that the lower courts erred in concluding at the pleading stage that Petitioners' case relates only to foreign governmental acts and decisions. However, even if those conclusions were correct, at that point the act of state analysis starts, rather than concludes.

The Fifth Circuit's decision particularly is in conflict with prior decisions of this Court on an important federal question that has been otherwise adhered to by the lower courts. It ignored this Court's holding in *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l*, 493 U.S. 400 (1990), on the formulation and application of the act of state doctrine with its three threshold inquiries.

The Fifth Circuit inexplicably adhered to an earlier analysis more strictly tied to constitutional separation-of-powers concerns of the political question doctrine:

that the involvement of the courts in the dispute might frustrate the conduct of United States foreign policy. App. 28a–31a. As a result, the Fifth Circuit erroneously concluded, "Recognizing that the judiciary is neither competent nor authorized to frustrate the longstanding foreign policy of the political branches by wading so brazenly into the sphere of foreign relations, we decline to sit in judgment of the acts of the foreign states that comprise OPEC." App. 33a.

Kirkpatrick was an action brought under various federal and state statutes, including the Robinson-Patman Act, 15 U.S.C. § 13, *et seq.*, relating to a contract for the construction and equipping of an aeromedical center at a Nigerian air force base, the awarding of which required a bribe to Nigerian officials. Upon reaching this Court, the issue was analyzed thus: "[W]e must decide whether the act of state doctrine bars a court in the United States from entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign, but that does require imputing to foreign officials an unlawful motivation (the obtaining of bribes) in the performance of such an official act." *Kirkpatrick,* 493 U.S. at 401.

This Court determined that the courts were not forestalled from entertaining the action. "The act of state doctrine is not some vague doctrine of abstention," but rather applies only when the court *must declare invalid* a noncommercial, regulatory action taken by a foreign sovereign within its territory. *Id.* at 406. "The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments." *Id.* at 409, *quoted and applied in, Lamb v. Phillip Morris, Inc.*, 915 F.2d

1024, 1027 (6th Cir. 1990) (sustaining antitrust claims relating to procurement of price controls and favorable tax treatment from governments of Venezuela, Argentina, Brazil, Costa Rica, Mexico, and Nicaragua for export of tobacco to United States).

Before *Kirkpatrick*, applications of the doctrine in antitrust cases were decided on the ground, later rejected by this Court in *Sisal Sales* as incorrect *dictum*, that the antitrust laws had no exterritorial application and could not be applied if a legal claim "impugns" the motivations of a foreign state. *Lamb,* 915 F.2d at 1026–28 (6th Cir. 1990) (citing *Kirkpatrick* and other cases). Retreating to that pre-*Kirkpatrick* standard, the Fifth Circuit here enunciated an even broader standard wherein even the activities of United States domestic companies, including the Lukoil entities that are not sovereign-related at all, receive the benefit of any sovereign relationship of their cartel partners (whether official or commercial in nature) anywhere those activities take place *or* have an effect.

That result goes much too far, effectively throwing a mantle over an entire industry. Now, according to the Fifth Circuit, Lukoil, Exxon Mobil, British Petroleum, and any other non-sovereign petroleum-products company can participate in OPEC-style meetings anywhere in the world, including the United States, and use their refineries and all their domestic distribution apparatus to restrict the supply of RPPs under the mantle of the sovereign-owned participants. That is contrary to the law and public policy of the United States and is a result that this Court in *Kirkpatrick* and all its progeny were clearly trying to avert.

Kirkpatrick reiterated and explained the three threshold inquiries for the doctrine's application: First, are the acts official or something else; second, were they conducted on sovereign territory; and third, *must* the court decide whether the acts are invalid? The Fifth Circuit, in resorting to pre-*Kirkpatrick* jurisprudence, avoided all three inquiries entirely.

A. A Finding that the Acts Complained of Were Official Rather than Commercial is Required and Was Not Made.

With regard to the first threshold question, the Fifth Circuit not only declined to "adopt[] a commercial activity exception" to the doctrine, it declared that "[n]either the Supreme Court nor any circuit have adopted" one. [App. 32a n.16] That is a clear doctrinal misstatement and error in conflict with this Court's holdings – and its own jurisprudence – requiring that threshold inquiry. As this Court earlier had made clear, "the concept of an act of state should not be *extended*" to commercial activity. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976) (plurality) (emphasis added).

Rather than gaining sovereign protection, "when a government becomes a partner in any trading company, it devests [sic] itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. . . . [I]t descends to a level with those whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted." *Bank of U.S. v. Planters' Bank of Georgia*, 22 U.S. 904, 907 (1824). "[T]here is a Constitutional line between the State as government and the State as

trader . . . ." *State of New York v. United States*, 326 U.S. 572, 579 (1946).

The Fifth Circuit's contrary analysis leads to potentially absurd results. For example, should the United States government somehow acquire a controlling stake in a major American automobile company and take an active part in management, no court previously would have suggested that its activities in manufacturing and selling automobiles were official functions. As this Court made clear in *Alfred Dunhill*, "If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function . . . ." *Alfred Dunhill*, 425 U.S. at 696 (quotation marks and citations omitted).

"The act of state doctrine only precludes judicial inquiry into the legality, validity, and propriety of the acts and motivations of sovereigns acting in their government roles within their own boundaries. *It does not preclude judicial resolution of all commercial consequences stemming from the occurrence of such public acts*." *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380–81 (5th Cir. 1980) (emphasis added); *see also Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines,* 965 F.2d 1375, 1386, 1389–90 (5th Cir. 1992).

The test for determining an official state act versus commercial activity was also ignored by the Fifth Circuit in this case. The determination of whether a foreign sovereign's act is commercial rather than regulatory is determined not by its purpose but by its

nature. *See generally Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (foreign government's acts are "commercial" rather than governmental when it "acts, not as a regulator of a market, but in the manner of a private player within it"). The dispositive question is whether the act is of a type in which private actors engage. *See generally Republic of Aus. v. Altmann*, 541 U.S. 677 (2004) (allowing suit to proceed against Austria for Nazi-era appropriation of property); *Weltover,* 504 U.S. at 614-615 (allowing suit to proceed against Argentina for default on bonds); *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (allowing suit to proceed against Nigerian Central Bank for default on letter of credit).

The sale of sovereign mineral resources on the open market yields the same result. In *Globe Nuclear Servs. & Supply (GNSS), Ltd. v. AO Techsnabexport*, 376 F.3d 282, 288 (4th Cir. 2004), for example, the court rejected the argument that the defendant's actions were entitled to immunity because its activities were an extension of Russia "regulating" its inventory of uranium products "in a way that no private player can." The defendant's "stylized usage" of the term "regulating" had the same flaws that this Court noted derisively when it ruled that the issuance of government bonds is not "regulating" Argentina's money supply any more than a contract to buy bullets for an army is "regulating" its bullet supply. *Id.* at 289 (citing *Weltover*, 504 U.S. at 614–15).

"[*S]hort of actually selling* [mineral] *resources in the world market*, decisions and conduct concerning them are uniquely governmental in nature." *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp.

343 (S.D. Tex. 1989), *aff'd*, 954 F.2d 1061 (5th Cir. 1992) (emphasis added); *see also Lyondell-Citgo Refining L.P. v. Petroleos de Venezuela, S.A.*, No. 02-795, 2003 WL 21878798, at *9 (S.D.N.Y. Aug. 8, 2003) (declining to apply the doctrine in breach of contract action against PdVSA – a Respondent here – for cutting supply of oil to refiners defended on basis of *force majeure* caused by reduction orders of Venezuelan oil ministry). Contracts to ship oil are quintessentially commercial, even though the granting of a license to export is governmental. *Guevara v. Republic of Peru*, 468 F.3d 1289, 1300 (11th Cir. 2006).

A conspiracy to fix the price of gasoline and other RPPs "must be characterized as [a] commercial act[]. Indeed it is typically private individuals rather than foreign states that indulge in this anticompetitive practice." Note, *Applicability of the Antitrust Laws to International Cartels Involving Foreign Governments*, 91 Yale L.J. 765, 779–80 (1981-82).

B. The Presumption that Official Acts Must Be Declared Invalid to Assess the Liability of Companies for Commercial Acts Was Both Doctrinally and Factually Erroneous.

Even under the Fifth Circuit's erroneous conclusion that Petitioners' case related only to oil pumping decisions, which it does not, the "validity" of those decisions is not in question insofar as the question of oil company RPP pricing is concerned.

That otherwise lawful acts may nonetheless be considered as overt acts in furtherance of a conspiracy is a basic tenet of conspiracy law applied by the courts

daily. *See, e.g., United States v. U.S. Gypsum Co.*, 333 U.S. 364, 401 (1948). "It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful." *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946).

As *Kirkpatrick* noted, the issue there – and here – is not whether certain decisions were "valid", but whether they occurred. *Kirkpatrick*, 493 U.S. at 406; *Sharon v. Time, Inc.*, 599 F. Supp. 538, 546 (S.D.N.Y. 1984). And if private companies procured those decisions, injured parties are free to seek damages from them. *Kirkpatrick*, 493 U.S. at 407; *see also Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 391–92 (3d Cir. 2006). There is no insulation from antitrust liability because the illegal scheme may involve some acts by agents of foreign governments that owned certain of the Respondents. *See generally Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 304 & n.5 (3d Cir. 1982) (citing, *inter alia*, *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)).

C. The Court Failed to Consider Whether any of the Conspiratorial Overt Acts Were Extra-Territorial, Had Extra-Territorial Impact, and Were Inconsistent With U.S. Law and Policy.

The Fifth Circuit failed to recognize and apply the third *Kirkpatrick* test as well.

A foreign sovereign's acts occur within its own territory "'only insofar as they were able to come to *complete fruition* within the dominion of the [foreign] government.'" *Airline Pilots Ass'n, Int'l v. TACA Int'l Airlines*, 748 F.2d 965, 970 (5th Cir. 1984) (emphasis

added) (quoting *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715–16 (5th Cir. 1968)).

"Acts of foreign governments purporting to have an extraterritorial effect" fall "outside the act of state doctrine" and will be recognized "only if they are consistent with the law and policy of the United States." *Allied Bank Intern. v. Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985). *Cf. Oscanyan v. Arms Co.*, 103 U.S. 261, 277 (1880).

Even under the most restrictive reading of Petitioners' complaint, had the Fifth Circuit adhered to the holdings of this Court, it still had no basis to conclude that the conspiratorial acts complained of were consistent with United States antitrust law and policy.

CONCLUSION

Foreign and domestic oil companies cannot have their price fixing agreements honored in United States courts. This petition for a writ of certiorari should be granted, and the decisions of the lower courts reversed and the cause remanded.

Respectfully submitted,

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