JUL 8 2011

No. 10-1371

IN THE

Supreme Court of the United States

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, given the complaint allegations challenging the legality of foreign states' crude oil production decisions, the Fifth Circuit's conclusion that Petitioners' claims present a nonjusticiable political question was consistent with this Court's and other circuits' decisions involving the political question doctrine.

2. Whether the Fifth Circuit's alternate holding that the act of state doctrine barred Petitioners' complaint was consistent with this Court's and other circuits' decisions involving the act of state doctrine, where the complaint challenged the legality of foreign states' inherently sovereign decisions about how and when to exploit their crude-oil natural resources.

RULE 29.6 STATEMENT

Respondent Citgo Petroleum Corp. states that it is wholly owned by PDV America, Inc., which is wholly owned by PDV Holding Inc., which is wholly owned by Petróleos de Venezuela, S.A. Citgo Petroleum Corp. has no publicly traded stock.

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BRIEF IN OPPOSITION

Respondent CITGO Petroleum Corp. respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Fifth Circuit's two alternative holdings in this case.

INTRODUCTION

Petitioners filed a complaint alleging that OPEC's[1] Member Countries were engaged in an unlawful antitrust conspiracy in violation of U.S. law. They argued that their claims were justiciable because they only named CITGO as a defendant—an indirect, wholly owned subsidiary of Venezuela's state-owned oil company, Petróleos de Venezuela, S.A. ("PDVSA")—and were not seeking judgment directly against the foreign sovereigns. Based on the

[1] OPEC is the Organization of the Petroleum Exporting Countries.

complaint allegations, both the District Court and the Fifth Circuit recognized that naming one a subsidiary of an OPEC Member Country's state-owned oil company as a defendant did not alter the fact that conspiracy alleged was among OPEC Member Countries and related to their sovereign conduct in producing and exporting crude oil. Given the complaint's allegations, both courts found the claims barred on two alternate grounds: the political question doctrine and the act of state doctrine.

Petitioners' principal argument for certiorari review is that every judge below has misread their complaint. Petitioners are wrong. But in any event, this Court does not grant certiorari to reexamine the case-specific issue of how four (out of four) judges read a particular complaint's allegations.[2] The complaint asserted that OPEC's Member Countries participated in an unlawful conspiracy to limit production of crude oil from their sovereign natural resources. *E.g.*, Pet. App. 110a-11a, Compl. ¶ 1 (alleging an unlawful "conspiracy among the members of [OPEC]" based on foreign nations' "agreed-upon limits on the production of oil"). The District Court and the Fifth Circuit thus correctly construed the complaint as alleging an unlawful antitrust conspiracy based on sovereign conduct by OPEC Member Countries.

In addressing these allegations, the Fifth Circuit (and the District Court) correctly applied this Court's precedents. The Fifth Circuit found that *all six* of

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[2] *E.g.*, Eugene Gressman *et al.*, *Supreme Court Practice* 276 (BNA 9th ed. 2008) ("It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions.").

this Court's factors for identifying a political question were implicated by Petitioners' complaint. Their claims would require a court to intrude on the Executive Branch's authority to craft U.S. foreign policy and safeguard national security through its dealings with foreign nations. In addition, applying this Court's act of state precedents, the Fifth Circuit found that adjudication of this suit would necessarily require ruling on the legality of foreign states' acts with respect to managing their natural resources.

The decision below does not conflict with any decision from this Court or any other circuit. It merely applies settled law to the particular allegations of this complaint. Nor, as Petitioners suggest, is a hold for *M.B.Z.* v. *Clinton*, *cert. granted*, No. 10-699, warranted. That case concerns a political dispute between the Executive and Legislative Branches over the State Department's refusal to implement a statute and the statute's constitutionality. The issues in *M.B.Z.* bear no material similarity to this case and, in addition, the Fifth Circuit's decision rested on alternative, equally dispositive holdings.

COUNTERSTATEMENT

A. Organization Of The Petroleum Exporting Countries.

OPEC is a voluntary intergovernmental organization of sovereign Member Countries that are net exporters of crude oil. OPEC itself does not own, produce, refine, or sell crude oil or petroleum products; it provides a forum for its Members. It operates under an international legal instrument, the multilateral OPEC Statute, which specifies that

OPEC is "guided by the principle of the sovereign equality of its Member Countries." OPEC Statute, Chap. 1, Art. 3. Decisions about crude oil production levels are made by each Member Country in an exercise of sovereignty over natural resources. The Member Countries' laws—like many nations—reserve control over natural resource exploitation, including crude oil production, to the government.[3]

B. Petitioners' Complaint.

Petitioners allege "a conspiracy among the members of [OPEC], an admitted price-fixing cartel, to raise, fix, and stabilize the price of gasoline and other oil-based products in the United States," and that "[t]he primary elements of OPEC's international conspiracy are agreed-upon limits on the production of oil by OPEC's eleven member nations." Compl. ¶ 1. They further allege that this conspiracy ultimately increased the price of gasoline and other refined petroleum products (referred to as "RPPs") in the United States. *Id.*

While naming only CITGO as a defendant, the complaint's allegations were directly aimed at the

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[3] *See* Algeria Const. ch. 3, art. 17; Angola Const. part 1, art. 11; Ecuador Const. arts. 247, 248; Iran Const. ch. 4, art. 45; Iraq Const. § 4, art. 111-12; Kuwait Const. part 2, art. 21; Libyan Petroleum Law No. 25; Nigeria Const. ch. 4, art. 44(3); Qatar Const. part 2, art. 29; Saudi Arabia Basic Law of Governance ch. 4, art. 14; United Arab Emirates Const. part 2, art. 23; Venezuela Const. title 6, ch. 1, art. 302. These foreign laws were included in the record below, as was the law of Indonesia, *see* Indonesia Const. ch. 14, art. 33(3), which suspended its membership in January 2009 while this case was pending. In *amicus* briefs filed below, these nations "emphasize[d] that each nation views its natural resources as exclusively under its sovereign control." Pet. App. 12a n.11.

legality of OPEC and its Member Countries' conduct. *E.g.*, *id.* ¶ 31 ("*OPEC's members* agree on production quotas that limit the amount of oil that each member may produce. * * * [They] have artificially restricted their production capacity as part of *their* price-fixing conspiracy.") (emphases added); *id.* ¶ 32 (prices increase "[a]s a result of *OPEC's conspiracy* in restraint of trade alleged herein") (emphasis added); *id.* ¶ 51 ("Concerted production increases and decreases by OPEC members * * * directly affect and determine changes in the prices of gasoline and other oil-based products in the United States."); *id.* ¶ 60 ("OPEC and its member nations depend on the concerted, agreed-upon acts of all members to achieve the conspiracy's price-fixing purpose.").

The complaint described CITGO's role in the purported conspiracy as "enter[ing] into an agreement with OPEC and its members to facilitate, enable, and provide direct assistance to the cartel's price-fixing scheme." *Id.* ¶ 3; *see also id.* ¶ 16 (identifying OPEC and its Member Countries as CITGO's co-conspirators); *id.* ¶¶ 20-29, 51, 62, 66 (describing CITGO's role in the purported conspiracy among OPEC Member Countries). Count I asserted that "CITGO is a co-conspirator with the members of OPEC" and that its participation in "OPEC's price-fixing conspiracy" violated U.S. antitrust law. Count II alleged that "CITGO is a co-conspirator with Venezuela and PDVSA" in violation of U.S. antitrust law.[4] And Count III alleged that CITGO was liable for Venezuela's violation of U.S. antitrust law in

[4] Petitioners fail to mention that they conceded in the District Court that Count II of their complaint is barred by *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), because CITGO is not capable of "conspiring" with its corporate parents.

participating in the "OPEC conspiracy." *Id.* ¶¶ 83-85. Petitioners sought, among other things, to recover damages "incurred as a result of the OPEC price-fixing cartel" and to disgorge CITGO of "all unlawful profits earned by the OPEC price-fixing cartel." *Id.* at Relief Sought.

C. The District Court's Dismissal.

A number of complaints raising similar allegations were consolidated in the Southern District of Texas. While most of the plaintiffs joined a consolidated amended complaint (referred to below as the "Consolidated Complaint"), Petitioners proceeded on their original complaint. Fifteen sovereign nations filed *amicus* briefs emphasizing the governmental nature of a country's decisions on how and when to develop its national resources and confirmed the serious foreign relations implications of these cases. The District Court dismissed the complaints on alternative grounds, holding that the complaints presented a nonjusticiable political question and also were barred by the act of state doctrine. Pet. App. at 43a, 50a-98a.[5]

1. Addressing the act of state doctrine first, the District Court extensively discussed this Court's precedents and found "the factual predicate for applying the act of state doctrine * * * exists." *Id.* at 59a; *id.* at 53a-58a (discussing *Underhill* v. *Hernandez*, 168 U.S. 250 (1897); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*,

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[5] The United States Chamber of Commerce also filed an *amicus* brief explaining the serious risks for American businesses that adjudication of the cases would present.

493 U.S. 400 (1990)). The alleged price-fixing actions of OPEC Member Countries "are governmental acts undertaken by recognized sovereigns within their own territory" and "the outcome of [Petitioners'] claims, if allowed to continue, would turn upon the legality of those acts." Pet. App. 59a-60a.

The court emphasized that "the antitrust conspiracy for which plaintiffs seek redress is a conspiracy between sovereign states to limit the production of crude oil from their territories" and that "the price-fixing at issue is caused by the production decisions of the sovereign state members of the conspiracy." *Id.* at 62a, 63a; *see also id.* at 60a-64a (quoting Compl. ¶¶ 1, 3, 20-23, 28, 30, 35, 51, 61). All of the alleged price-fixing conduct flowed from "decisions of foreign oil producing states to restrict their crude oil production levels and to enter agreements with each other to do the same," which are sovereign acts. Pet. App. 69a-70a.

The court rejected the argument that Petitioners had circumvented the act of state doctrine by naming only CITGO as a defendant. *Id.* at 73a. To determine whether CITGO had facilitated an unlawful conspiracy among OPEC's sovereign members, a court would necessarily have to rule on "the legality of the decisions and agreements reached by foreign sovereigns regarding the production of crude oil within their own territories." *Id.* at 74a. But precedents from this Court require treating foreign sovereigns' conduct as lawful. *Id.* at 74a-78a (discussing *Kirkpatrick*, *Underhill*, and *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927)). As the court recognized, the complaint did not plausibly allege that CITGO's conduct, separate from that of

the foreign sovereigns, violated antitrust law. Pet. App. 78a-79a.[6]

2. The District Court alternatively dismissed the complaint under the political question doctrine. While Petitioners argued that the price-fixing conspiracy they alleged was unrelated to sovereign decisions about a state's own natural resources, their complaint plainly alleged that the price-fixing of refined petroleum products in the United States was caused by foreign sovereigns' crude oil production decisions at home. *Id.* at 91a-92a.

Applying *Baker* v. *Carr*, 369 U.S. 186 (1962), the court focused in particular on whether adjudication of the complaint would express a lack of respect for the Executive Branch. Pet. App. 93a-96a. Because the Executive Branch has a long history of using diplomacy to ensure a reliable supply of crude oil—and thereby ensure, among other things, national security—adjudicating Petitioners' claims would "threaten to disrupt the operation of longstanding diplomatic relationships nurtured by the Executive Branch across decades" and "threaten to undermine the constitutional responsibility of the Executive Branch to conduct foreign affairs." *Id.* at 95a.

D. The Fifth Circuit's Unanimous Affirmance.

At the invitation of the Fifth Circuit, the United States Departments of State, Treasury, Energy, and

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[6] The court also declined to treat the act of state doctrine as coterminous with the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. § 1602 *et seq.* Petitioners offered "no authority" for that argument. Pet. App. 80a. And the court declined to read a territorial limitation or commercial-activity exception into the doctrine. *Id.* at 81a-91a.

Justice filed an *amicus* brief. The Government supported affirmance on both political question and act of state grounds. It detailed the history of the Executive's delicate calibration of, and control over, the Nation's sensitive relationships with foreign oil-producing states, and it explained that the allegations invited judicial second-guessing of how to manage relationships with the foreign oil-producing states on which the Nation depends for domestic and national defense energy needs and for cooperation on issues like counter-terrorism. The Government also supported affirmance under the act of state doctrine, because the alleged conspiracy was based on sovereign acts of foreign states and would require ruling on the legality of those sovereign acts.[7] The nations of Algeria, Venezuela, Nigeria, Saudi Arabia, Indonesia, Iraq, the Russian Federation, Kuwait, Qatar, the United Arab Emirates, and Mexico also submitted *amicus* briefs in support of affirmance, as did the United States Chamber of Commerce.

1. The Fifth Circuit, in unanimously affirming the District Court's two alternative bases for dismissing Petitioners' complaint, rejected the argument that the District Court misread the complaint. The Court of Appeals unanimously agreed that the complaint "allege[s] an overarching conspiracy between OPEC member nations" to fix prices and "focuses solely on crude-oil production limits as the method used to

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[7] Petitioners suggest that the Government's *amicus* brief would be "unconstitutional" if it purported to rescind duly enacted statutes, *Clinton* v. *City of New York*, 524 U.S. 417 (1998), and (somewhat less feverishly) argue that the submission runs afoul of *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988), because it was offered in litigation. Pet. 17. Neither statement is legally credible.

implement the alleged price-fixing conspiracy[.]" Pet. App. 13a; *see also id.* at 14a ("the core of the alleged conspiracy" in Petitioners' complaint "consists of agreements entered into by foreign sovereign states to limit production of crude oil"); *id.* at 15a ("Appellants allege an overarching conspiracy between sovereign nations to fix prices of crude oil and RPPs by limiting the production of crude oil.").

2. On the merits, the Fifth Circuit first addressed the political question doctrine. It quoted *Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. 221, 230 (1986) for the holding that 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.' " Pet. App. 18a-19a. And it looked to this Court's decision in *Baker* as setting forth the seminal test for the doctrine's applicability, including six factors "any one of which is sufficient to indicate the presence of a nonjusticiable political question." *Id.* at 19a (citing *Vieth* v. *Jubelirer*, 541 U.S. 267, 277 (2004), which describes *Baker* as setting forth "six independent tests for the existence of a political question").

The Fifth Circuit focused on *Baker*'s direction that cases implicating foreign relations require a " 'discriminating analysis' " of the history of the Political Branches' management of the question posed, its susceptibility to judicial handling, and the possible consequences of judicial action. Pet. App. 20a (quoting 369 U.S. at 211-12). On the facts alleged in the complaint, the Court of Appeals concluded that "the matter before us plainly

constitutes a political question." *Id.* In fact, *each* of the six *Baker* factors indicated the presence of a nonjusticiable political question.[8]

The court found a textual commitment of the issues to the Political Branches—the first factor—because the complaint essentially seeks "to reprimand foreign nations and command them to dismantle their international agreements." Pet. App. 23a. "A pronouncement either way on the legality of other sovereigns' actions falls within the realm of delicate foreign policy questions committed to the political branches." *Id.* A court would have to reexamine "critical foreign policy decisions, including the Executive Branch's longstanding approach of managing relations with foreign oil-producing states through diplomacy rather than private litigation, as discussed in the government's amicus brief and in several official statements of administration policy." *Id.* And any merits ruling would necessarily express

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[8] Those six factors are:

> [1.] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2.] a lack of judicially discoverable and manageable standards for resolving it; or [3.] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4.] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5.] an unusual need for unquestioning adherence to a political decision already made; or [6.] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 19a (quoting *Baker*, 369 U.S. at 217) (alterations added by Fifth Circuit).

a judicial value judgment on foreign nations' natural resources policies. *Id.* at 24a.[9]

As this Court has directed, the Fifth Circuit gave " 'serious weight to the Executive Branch's view of the case's impact on foreign policy.' " *Id.* at 24a n.14 (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004)). The Government's view was clear: adjudicating Petitioners' claims would frustrate vital national security interests and objectives and likely result in consequences such as "the immediate disruption of oil imports into the United States [and] the undermining of relationships with OPEC nations on issues such as counterterrorism and nuclear non-proliferation." Pet. App. 25a. In addition, because petroleum is essential to the military and national defense, adjudicating the claims risked disrupting access to petroleum for ongoing military engagements and national defense generally—plainly issues committed to the Political Branches. *Id.* (citing *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)).

The other *Baker* factors similarly indicated a nonjusticiable question. There is a " 'lack of judicially discoverable and manageable standards for resolving' the claims presented," Pet. App. 26a (quoting *Baker*, 369 U.S. at 217), because the claims "would require a court to recast what are foreign policy and national security questions of great import

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[9] The Fifth Circuit's analysis looked to both this Court's holdings that matters of foreign relations are generally committed to the Political Branches (*Haig* v. *Agee*, 453 U.S. 280, 292 (1981); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952); *United States* v. *Pink*, 315 U.S. 203, 222-23 (1942)), and this Court's emphasis that not every case touching on foreign relations is nonjusticiable (*Banco Nacional de Cuba*, 376 U.S. at 423; *Japan Whaling*, 478 U.S. at 229). Pet App. 21a-23a.

in antitrust terms." Pet. App. 26a. The Sherman and Clayton Acts "are decidedly inadequate" to resolve whether OPEC should be dismantled and a global marketplace established that would operate without agreements between sovereigns. *Id.* at 26a-27a. The remaining *Baker* factors weighed against adjudicating the case, because a ruling on the merits would "involve a policy determination at odds with this longstanding policy of diplomatic engagement, expressing a lack of the respect owed to the Executive Branch, which is constitutionally responsible for the conduct of foreign affairs," and "inevitably result[ing] in embarrassment from the Judicial Branch's conflicting pronouncement about the United States' mode of engagement with foreign nations that control a critical resource on which this country depends." *Id.* at 28a-29a.

3. The Fifth Circuit also affirmed the District Court's judgment under the act of state doctrine. *Id.* at 30a. The court emphasized that " 'judicial review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government.' " *Id.* (quoting *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972)). The court reiterated that adjudication of this suit "would necessarily call into question the acts of foreign sovereigns with respect to exploitation of their natural resources," which is an conduct that both this Court and the Fifth Circuit have recognized to be inherently sovereign. Pet. App. 31a-32a (citing *United States* v. *California*, 332 U.S. 19, 38-39 (1947); *United States* v. *Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977)). The court noted that its decision comported with the decision of the Ninth Circuit addressing similar allegations of antitrust

violations involving OPEC, which were also dismissed on act of state grounds. Pet. App. 32a-34a (citing *Int'l Ass'n of Machinists* v. *OPEC*, 649 F.2d 1354 (9th Cir. 1979)).

Finally, the Fifth Circuit rejected Petitioners' request to devise an extraterritorial limitation or commercial exception to save their complaint from the act of state doctrine. As the court emphasized, "the relevant acts are necessarily intraterritorial" because "a country's decisions about how much of its oil to extract take place exclusively within that country." *Id.* at 34a n.18. And in declining to carve out a commercial activity exception, the court followed the consistent holding of other appellate courts on this issue. *Id.* at 32a n.16.

This petition for certiorari followed.[10]

REASONS FOR DENYING THE WRIT

The petition satisfies none of the factors this Court generally examines when considering whether to issue a writ of certiorari. The petition only attempts to invoke two such factors. But there is no conflict with another court of appeals on the same issues or with relevant decisions of this Court. S. Ct. Rule 10(a), (c). Petitioners do not suggest that the unique issues the petition presents are likely to affect other parties. The petition should be denied.

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[10] The Consolidated Complaint plaintiffs also filed a petition for certiorari, which is currently pending, No. 10-1393.

I. The Fifth Circuit's Political Question Ruling Creates No Conflict With Any Decision From This Court Or Another Circuit.

While Petitioners assert that all they seek is a "straightforward" application of the antitrust law's private right of action, Pet. 10-11, their allegations are anything but a "straightforward" private antitrust action. The Fifth Circuit recognized that Petitioners were ignoring their complaint's allegations and relief sought—including disgorging CITGO of "all unlawful profits earned by the OPEC price-fixing cartel." The complaint asks a U.S. court to declare unlawful foreign sovereigns' conduct and their participation in OPEC, on the theory that it can affect the price of downstream petroleum products in the United States. *See, e.g.*, Compl. ¶¶ 1, 16, 31, 51, Counts I-III, & Relief Sought.

A. There Is No Conflict Between The Fifth Circuit's Decision And This Court's Precedents.

Petitioners argue that "The Decision Below Contravenes This Court's Precedents" (Pet. 14-20), but none of the few cases they cite involves the political question doctrine *at all*—let alone an application of the political question doctrine in conflict with the Fifth Circuit's decision. Yes, the antitrust laws prohibit price-fixing, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and the Foreign Sovereign Immunities Act contains a statutory exception for commercial activities, *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003). Neither of those cases, however, is remotely in conflict with the Fifth Circuit's holding that allegations about an

unlawful OPEC conspiracy raised a nonjusticiable political question.[11]

Petitioners' real disagreement with the Fifth Circuit relates to its (and the District Court's) reading of their complaint. *E.g.*, Pet. 19-20 (disputing that the complaint challenges OPEC's structure and its Member Countries' decisions, even while admitting that Venezuela "would presumably be indirectly liable for any monetary damages"); *see also id.* at 14-16. A plaintiff's record-specific disagreement with how a court of appeals (and a district court) read a complaint does not create a conflict with this Court's precedents that merits certiorari review. And despite Petitioners' contention that all four judges below misread their complaint, Petitioners acknowledge that their claims would require a court to decide whether OPEC's Member Countries are engaged in an unlawful conspiracy under U.S. law when they make natural resource decisions for their nations. *Id.* at 16, 18. The Fifth Circuit's and District Court's recitation of the complaint's allegations were searching, accurate, and beyond challenge.

The petition also argues that there is a conflict with this Court's precedents because the Fifth Circuit erred in its findings as to *each* of the six independent *Baker* factors that indicate

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[11] A complaint triggering the political question doctrine may be, and often is, based on a federal statute. *See, e.g., Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007); *United States* v. *Martinez*, 904 F.2d 601 (11th Cir. 1990); *Smith* v. *Reagan*, 844 F.2d 195 (4th Cir. 1988); *see also Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972) ("Congress may not confer jurisdiction on Art. III federal courts to * * * resolve 'political questions' ") (citation omitted)).

nonjusticiable political questions. Pet. 20-21. According to the petition, the Fifth Circuit had "no need to look for the *Baker* markers" because "none will be found." *Id.* at 21. Just the opposite is true, on both counts. *Baker* and its progeny *require* courts to assess these independent factors, and that is what the Fifth Circuit did. The court correctly identified the six factors, analyzed them in the fact-specific context of this case as the Court has directed lower courts to do, and found all six satisfied. While petitioners disagree, a losing party's objection to the application of settled law to the facts of its case presents no question meriting certiorari review.

Finally, the Fifth Circuit properly hewed to this Court's caution in *Baker* and *Japan Whaling* that not all cases touching on foreign relations raise nonjusticiable political questions.[12] The Court of Appeals engaged in precisely the sort of "discriminating analysis" those cases direct lower courts to undertake, Pet. App. 20a, and detailed why its analysis came out the way it did. *Id.* at 18a-30a.

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[12] Petitioners describe *Japan Whaling* as "particularly instructive," Pet. 13, but the question presented there was not remotely similar. *Japan Whaling* involved whether a court could adjudicate the U.S. Secretary of Commerce's refusal to implement a statute. It has some surface similarities to *M.B.Z.* v. *Clinton*, *cert. granted*, No. 10-699, which involves whether a court can adjudicate the U.S. Secretary of State's refusal to implement a different statute. Neither case has any similarity to the circumstances of Petitioners' case, which asks the judiciary to adjudicate the conduct of foreign nations, not U.S. officials, and to unravel decades of Political Branch foreign policy judgments at the behest of private plaintiffs. In any event, the Fifth Circuit explained why *Japan Whaling* did not render the complaint justiciable, and Petitioners' disagreement seeks nothing more than (alleged) error correction. *See* Pet. App. 22a-23a (distinguishing *Japan Whaling*).

That analysis did not, as Petitioners contend, "focus[ ] on possible consequences of adjudication divorced from the specific questions to be decided." Pet. 11. The court focused on the specific questions that the complaint required to be decided concerning the lawfulness of foreign sovereign conduct. In doing so, the Court of Appeals adhered to the core principles of the political question doctrine, including whether the case involved the sort of foreign relations " 'policy choices and value determinations' " reserved for the Political Branches, Pet. App. 19a (quoting *Japan Whaling*, 478 U.S. at 230), and the "six independent tests" identified in *Baker* for determining the presence of a nonjusticiable political question, *id.* (citing *Vieth*, 541 U.S. at 277).

B. There Is No Circuit Conflict Either.

Appellate courts have consistently recognized the importance of the Political Branches' international relations concern regarding oil policy—a "sensitive area" that "intimately involve[s]" the Executive and Legislative Branches. *Int'l Ass'n of Machinists*, 649 F.2d at 1360-61 (holding that "[i]t is clear that OPEC and its activities are carefully considered in the formulation of American foreign policy"); *see also, e.g., Occidental of UMM al Qaywayn, Inc.* v. *A Certain Cargo of Petroleum*, 577 F.2d 1196 (5th Cir. 1978) (dismissing action to determine rights to oil in the Persian Gulf under political question doctrine). The Fifth Circuit's decision here thus is in full accord with how other efforts to adjudicate OPEC's behavior have been resolved.

The petition's bold assertion that the decision is in "direct opposition" to the Third, Eighth, Ninth, and Eleventh Circuits is belied by the very cases the

petition discusses, none of which involve OPEC, foreign nations' natural resources, or even foreign governments. Pet. 22. Those cases apply the same legal principles, drawn from the same precedents of this Court, to case-specific circumstances far afield from this complaint's allegations. The only real difference among the purportedly conflicting decisions is the factual circumstances to which the political question analysis was applied in each case. That is not a circuit split; that is what happens when courts apply settled law to individual constellations of facts.

The Third Circuit's decision in *Khouzam* v. *Attorney General*, 549 F.3d 235 (3d Cir. 2008), exemplifies that the only difference is in the factual circumstances presented by each case. *Khouzam*—an immigration case involving whether an individual facing deportation would be tortured if he was returned to Egypt—applied the same *Baker* factors as the Fifth Circuit, but proceeded "with particular caution" because an "individual['s] liberty hangs in the balance." *Id.* at 250. The Third Circuit found that the *Baker* factors did not render nonjusticiable "whether the removal of a particular alien comports with immigration statutes and regulations" since adjudicating that question only required addressing whether the federal government had complied with the legal constraints on removing aliens. *Id.* at 251-52. This case presents no conflict with the Fifth Circuit's decision, which does not involve individual liberties or the federal government's compliance with immigration law.

Nor does the Ninth Circuit's decision in *EEOC* v. *Peabody Western Coal Co.*, 400 F.3d 774 (9th 2005)

conflict with the Fifth Circuit's decision or involve conduct by foreign governments. It analyzed the *Baker* factors in the context of whether an EEOC Title VII complaint against a company for giving a hiring preference to members of one Native American tribe was a "political question" because the Department of Interior had approved a mining lease including the preference. The court held that the *Baker* factors do not preclude courts from reviewing agency action and do not render nonjusticiable controversies between departments of the federal government. *Id.* at 784-85. The Fifth Circuit's decision involved neither a request to review agency action nor an internal controversy among departments of the federal government.

The supposed conflicts with the Eighth and Eleventh Circuits appear only as parenthetical references. Pet. 23-24 (citing *Chiles* v. *Thornburgh*, 865 F.2d 1197, 1216 (11th Cir. 1989) and *Romer* v. *Carlucci*, 847 F.2d 445, 461-63 (8th Cir. 1988). These cases likewise do not present questions concerning the lawfulness of foreign government actions. *Chiles* involved a challenge to the detention of illegal aliens seeking to determine the federal Government's duties in operating a detention facility. 865 F.2d at 1216. And *Romer* involved a challenge to the adequacy of an environmental impact statement relating to proposed missile sites in Colorado and Nebraska. 847 F.2d at 461.[13]

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[13] After discussing these supposed "direct" conflicts, the petition also points to D.C. Circuit case law. But nothing about a justiciability analysis in a reversed case (*Simon* v. *Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), *rev'd sub nom*, *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183 (2009)), or whether Congress can order the State Department to list Israel on the passport of

These various applications of the political question doctrine are just that: case-specific examples of the political question doctrine in action. There is no circuit split for the Court to resolve.

II. The Fifth Circuit's Alternative Act Of State Holding Does Not Conflict With Any Decision From This Court Or Another Circuit.

As an alternate and independent basis for affirming the District Court's decision, the Fifth Circuit held that the act of state doctrine precludes a federal court from judging the legality of OPEC Member Countries' oil production decisions. As the Fifth Circuit correctly recognized, the act of state doctrine prohibits " 'the courts of one country [from] sit[ting] in judgment on the acts of the government of another, within its own territory.' " Pet. App. 30a (quoting *Underhill*, 168 U.S. at 252). No decision of this Court or any other circuit casts doubt upon that conclusion.

A. The Fifth Circuit Straightforwardly Applied The Act Of State Doctrine.

Petitioners contend that the Fifth Circuit's act of state decision is flawed because it misunderstood their complaint's allegations. As Petitioners see it, their claims that OPEC Member Countries are in an unlawful antitrust conspiracy do not require a court to rule on the validity of the foreign sovereigns' acts because only CITGO is a defendant. *E.g.*, Pet. 2, 7-8,

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someone born in Jerusalem (*Zivotofsky* v. *Sec'y of State*, 571 F.3d 1227 (D.C. Cir. 2009), *cert. granted sub nom, M.B.Z.* v. *Clinton*, No. 10-699) creates a conflict with the quite different facts and political circumstances of the Petitioners' complaint.

26, 29, 32. So they want certiorari review of whether the Fifth Circuit properly determined that their allegation that CITGO "facilitate[d]" OPEC Member Countries' alleged unlawful conspiracy (*see* Compl. ¶ 3) could not be isolated from their allegation that OPEC Members were in an unlawful conspiracy.

But such case-specific disputes about how allegations in a particular complaint interrelate neither call into question the correctness of Fifth Circuit law nor raise questions of national import meriting certiorari. Anyhow, Petitioners' argument collapses on itself. To be found liable for conspiracy, CITGO has to conspire with someone. And in this case, that someone is a group of foreign sovereign nations. There is no way to find that CITGO "facilitate[d]" an unlawful antitrust conspiracy among OPEC's Members without also determining that the Members are themselves, in fact, in an unlawful antitrust conspiracy. This Court has long made clear that such an inquiry is out of judicial bounds. *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 309 (1918) ("[W]hen it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision."); *see also Underhill*, 168 U.S. at 252.

1. The petition asserts that the Fifth Circuit's decision is "directly contrary" to this Court's holding in *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 493 U.S. 400, 406 (1990), and to appellate decisions following *Kirkpatrick*. Pet. 26-27. But instead of pointing to anything "contrary" about the *Kirkpatrick* decision, Petitioners' principal

criticism seems to be that the Fifth Circuit did not cite *Kirkpatrick* in its opinion while discussing other act of state precedents from this Court. *Id.* This Court does not grant review because a lower court, properly applying the correct rule of law, did not cite every possible decision on an issue.

In any event, nothing in *Kirkpatrick* is contrary to the Fifth Circuit's decision—or to the District Court's decision, which extensively discussed *Kirkpatrick*. Pet. App. 53a-60a, 71a-74a. *Kirkpatrick* held that "[a]ct 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." 493 U.S. at 406 (emphasis in original). That is this case. The Fifth Circuit explained that "adjudication of this suit would necessarily call into question the acts of foreign governments with respect to exploitation of their natural resources." Pet. App. 31a. The doctrine applies because, using the language of *Kirkpatrick*, the "outcome of the case turns upon" the legality of sovereign acts. 493 U.S. at 406. The allegedly unlawful character of "OPEC's price-fixing conspiracy," Compl. ¶ 78, is a necessary element of Petitioners' claims—indeed, it is the foundation upon which those claims are built. *Id.* ¶¶ 1, 3-4, 78-79, 81, 84 (alleging that OPEC is a price-fixing conspiracy implemented by countries' production levels, that CITGO facilitates this conspiracy and provides "material assistance" OPEC Member Countries furthering their "unlawful conspiracy," and that CITGO is vicariously liable for Venezuela's "unlawful price-fixing"). That is precisely what the District Court also held, citing *Kirkpatrick*. Pet. App. 53a-60a, 71a-74a.

Both courts recognized that resolving Petitioners' claims would necessarily involve determining whether the decisions of foreign nations to set and implement particular production levels were illegal. Because CITGO's supposed antitrust violations are all derivative of Venezuela's and the other Member Countries' allegedly unlawful conduct, the claims depend on finding the Member Countries' conduct unlawful—an inquiry foreclosed by the act of state doctrine. *See Ricaud*, 246 U.S. at 309; *Underhill*, 168 U.S. at 252. The Fifth Circuit's decision is consistent with the Ninth Circuit's decision in a similar suit alleging an OPEC antitrust conspiracy. *Int'l Ass'n of Machinists*, 649 F.2d at 1355, 1360-61; Pet. App. 31a-33a.

2. Petitioners' argument is again premised on the idea that the judges below all misread the complaint. Pet. 29. They insist that a court could find that they were injured by Venezuela's alleged implementation of an unlawful conspiracy to limit oil production without suggesting that Venezuela's decision to limit its oil production was improper. Pet. 29. That argument was rejected by both courts below based on a straightforward reading of the complaint and the application of settled act of state law to that complaint.

To begin with, Petitioners are incorrect in arguing that they evaded the act of state doctrine by suing only CITGO and not any foreign sovereigns. Many of this Court's foundational act of state decisions involved disputes between private litigants. *E.g.*, *Shapleigh* v. *Mier*, 299 U.S. 468 (1937); *Ricaud*, 246 U.S. at 306; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918). Indeed, the doctrine's role in preserving

the separation of powers, *see Sabbatino*, 376 U.S. at 423, assumes heightened importance in facially "private" disputes, since private litigants have no recourse to the immunities that traditionally limit judicial involvement in direct suits against foreign sovereigns and their officials.

In addition, CITGO's conduct could not be separated from the Member Countries' sovereign acts because it is the conspiracy as a whole—not CITGO's independent behavior—that Petitioners allege violates the antitrust laws. As the Fifth Circuit explained, it would not be possible to decide that CITGO entered into an unlawful agreement with OPEC Member Countries without also deciding that the OPEC Members were part of that unlawful agreement. This Court has emphasized the same point: "The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (internal quotation marks and citation omitted). Because CITGO's allegedly anticompetitive behavior is part and parcel of the purported overarching conspiracy among sovereign nations, the claims against CITGO could not be resolved without also passing judgment on the legality of the Members Countries' sovereign acts.

3. Petitioners also make much ado about whether the act of state doctrine applies to a nation's extraterritorial acts. That argument is not presented on the facts of this case. As the Fifth Circuit emphasized, because the complaints "challenge[ ] the crude-oil production decisions of foreign sovereigns, the relevant acts are *necessarily intraterritorial*"—

not extraterritorial. Pet. App. 34a n.18 (emphasis added). The decision below simply provides no basis for considering an "extraterritoriality" exception to the act of state doctrine.

Again arguing error, Petitioners complain that the Fifth Circuit was wrong to read their complaint as involving intraterritorial acts because some conspiratorial activities—like OPEC meetings—occurred abroad. Pet. 29. That argument ignores that any alleged injury to Petitioners came from domestic implementation of oil production levels, which is an intraterritorial act as the Fifth Circuit explained. The petition erroneously relies on a misapplication of *criminal* antitrust law, which does not require an overt act to further a conspiracy. Pet. 29. Private antitrust plaintiffs, in contrast, must prove both an unlawful agreement and "antitrust injury." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (citation omitted). Petitioners' *civil* antitrust claim would therefore require showing that they were injured by the Member Countries implementation of an unlawful agreement. *See id.* at 339.

Implementing a production level for a nation's natural resources is plainly a sovereign act executed within each Member Country's territory—and must be presumed valid and legal.[14] Petitioners allege no

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[14] Courts must also presume valid a country's decision to enter OPEC. Executing treaties and other international instruments is a quintessentially sovereign function. *E.g., Wolf* v. *Federal Republic of Germany*, 95 F.3d 536, 543-44 (7th Cir. 1996) (Wood, J.). This Court has long refused to probe the validity or legal effect of a nation's decision to enter into international agreements, *e.g., Doe* v. *Braden*, 57 U.S. 635, 657 (1853) (treaty presumed valid despite questions about King of Spain's

independent collusive activity beyond the foreign sovereign decisions to restrict oil production, which they assert affects the price of downstream petroleum products. *E.g.*, Compl. ¶ 27 (Venezuela acquired CITGO to "materially assis[t] Venezuela by removing the threat of buyers exercising downward pressure on the price of Venezuelan oil").

4. Petitioners next suggest that this Court has held the act of state doctrine inapplicable to conspiracies between foreign sovereigns and private parties. Pet. 33. They cite two cases holding no such thing. *Sisal Sales Corp.*, 274 U.S. at 271-73, held that private corporate defendants illegally manipulated the sisal market and lobbied Mexico to pass laws in their favor; it did not require adjudicating whether Mexico was a co-conspirator in an alleged cartel. And *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), did not involve allegations of unlawful acts by Canada; there was no suggestion that Canada had "approved or would have approved of joint efforts to monopolize the production and sale of vanadium." *Id.* at 706.

The petition also dramatically proclaims that the Fifth Circuit erred because 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." Pet. 31. That may be good rhetoric, but it is wrong on the law. The act of

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authority to enter into it), and lower courts have followed suit, *e.g.*, *Oceanic Exploration Co.* v. *ConocoPhillips, Inc.*, 2006 WL 2711527, at *7 (D.D.C. Sept. 21, 2006) (act of state doctrine barred passing judgment on the sovereign acts of Australia and East Timor resulting in ratification of the Timor Sea Treaty).

state doctrine is neither sword nor shield; it provides a " 'rule of decision,' " *Kirkpatrick*, 493 U.S. at 406 (quoting *Ricaud*, 246 U.S. at 310), under which the courts "presum[e]" that acts undertaken by a sovereign are "valid," *Sabbatino*, 376 U.S. at 438.[15]

B. There Is No Split Of Authority Regarding A Commercial Activity Exception To The Act Of State Doctrine.

The Fifth Circuit's observation in a footnote that it declined to read a commercial activity exception into the act of state doctrine does not create a split of authority. Petitioners assert, without elaborating, that the Fifth Circuit's decision "directly contradicts" *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, 72-73 (2d Cir. 1977). Pet. 35. They do not elaborate for good reason: The *Hunt* court did not rule on the existence of a commercial activity exception because the appellants in that case had conceded at oral argument that Libya's nationalization of their properties was *not* a commercial activity. 550 F.2d at 73. The Second Circuit itself has since confirmed that it did not adopt a commercial activity exception in *Hunt*. *See Braka* v. *Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985).

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[15] In *Sabbatino*, for example, the Court had no difficulty applying the act of state doctrine to a claim that would have required passing judgment on the legality of Cuba's expropriation of American property, even though the National Bank of Cuba had filed an action for conversion in a U.S. federal district court after a commodities broker refused to tender payment for certain goods. *Id.* at 406. By filing that action, the bank had plainly "penetrated the territorial boundaries of the United States," Pet. 31, but the Court rejected the notion that Cuba was barred from invoking the doctrine because it had sought redress in a U.S. court. 376 U.S. 437-38.

Three additional circuits have explicitly rejected a commercial activity exception to the act of state doctrine, and a fourth has expressed serious doubt about such an exception. *See Glen* v. *Club Mediterranee, S.A.*, 450 F.3d 1251, 1254 n.2 (11th Cir. 2006) ("'[T]here is no commercial exception to the act of state doctrine.' ") (citation omitted); *Int'l Ass'n of Machinists*, 649 F.2d at 1360; Pet. App. 32a n.16; *Kalamazoo Spice Extracting Co.* v. *Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422, 424 n.3 (6th Cir. 1984). [16]

Nor has this Court adopted a commercial activity exception. While four Justices in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba* advocated such an exception, the cornerstone of the plurality's reasoning—that the act of state doctrine should mirror the restrictive theory of sovereign immunity, *see* 425 U.S. 682, 704-05 (1976) (opinion of White, J.)—has been undercut by subsequent decisions of this Court. *See Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2290 (2010) ("the act of state doctrine is distinct from immunity"); *Republic of Austria* v. *Altmann*, 541 U.S. 677, 701 (2004) ("the FSIA in no way affects application of the act of state doctrine"). In any event, this case does not even present the question because regulation of natural resources is a sovereign function, not commercial activity. *See World Wide Minerals, Ltd.* v. *Republic of*

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[16] Petitioners mistakenly contend that the Executive has "concluded" there is a commercial activity exception. Pet. 37. In fact, the Government's *amicus* brief below pointedly declined to endorse an act-of-state commercial activity exception and noted that the issue was irrelevant because a country's policy concerning natural resource development is "quintessentially governmental," not commercial. U.S. *Amicus* Br. 33-35.

Kazakhstan, 296 F.3d 1154, 1165 (D.C. Cir. 2002). So is becoming a signatory to the OPEC Statute, *see Wolf*, 95 F.3d at 543-44; *Oceanic Exploration Co.*, 2006 WL 2711527, at *7. *See also Int'l Ass'n of Machinists*, 649 F.2d at 1360 ("OPEC's 'price-fixing' activity has a significant sovereign component.").

CONCLUSION

For the foregoing reasons, the petition should be denied.

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