No. 10-1393

In the Supreme Court of the United States

FAST BREAK FOODS LLC, *et al.*,
Petitioners,

v.

SAUDI ARABIAN OIL COMPANY,
d/b/a Saudi Aramco, *et al.*,
Respondents.

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 the Fifth Circuit's decision that petitioners' private antitrust complaint presents a nonjusticiable political question is consistent with the jurisprudence of this Court and other circuit courts, where petitioners' complaint requires a court to pass judgment on foreign sovereigns' decisions concerning the exploitation of their natural resources and where the Executive Branch of the U.S. government has explained that adjudication of such claims would improperly interfere with the United States' national security and its conduct of foreign affairs?

2. Whether the Fifth Circuit's alternative holding—that the act of state doctrine required dismissal of the complaint because the complaint would require adjudicating the legality of foreign sovereigns' decisions to exploit sovereign-owned natural resources—is consistent with the jurisprudence of this Court and other circuit courts?

PARTIES TO THE PROCEEDING

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

Respondents are Saudi Petroleum International, Inc., Aramco Services Company, Saudi Refining, Inc., PDV America, Inc., CITGO Petroleum Corporation, PDV Holding, Inc., PDV Midwest Refining, LLC, Lukoil Americas Corporation, Lukoil Pan Americas LLC, Getty Petroleum Marketing, Inc., and Motiva Enterprises, LLC.[1]

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[1] Petitioners list the Saudi Arabian Oil Company (Saudi Aramco) as the lead respondent in their case caption. The Fifth Circuit noted that the Saudi Arabian Oil Company (Saudi Aramco), Petróleos de Venezuela, S.A., OAO Lukoil and Lukoil International Trading and Supply Company were named but not served with process in the district court proceeding, and therefore not parties to the appeal. *See* Pet. App. 7a n.6. These unserved entities, which have reserved all immunities, rights and defenses, thus are not parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Saudi Petroleum International, Inc., Aramco Services Company, and Saudi Refining, Inc. are wholly-owned subsidiaries of the Saudi Arabian Oil Company (Saudi Aramco), which is wholly owned by the Government of the Kingdom of Saudi Arabia.

PDV Holding, Inc. is a wholly owned subsidiary of Petróleos de Venezuela, S.A., a corporation wholly owned by the government of Venezuela. PDV America, Inc. is a wholly owned subsidiary of PDV Holding, Inc. CITGO Petroleum Corporation and PDV Midwest Refining, LLC are wholly owned subsidiaries of PDV America, Inc.

Lukoil Americas Corporation and Lukoil Pan Americas LLC are indirect, wholly owned subsidiaries of OAO Lukoil, a publicly held company that trades on the London Stock Exchange. Getty Petroleum Marketing Inc. is wholly owned by Cambridge Petroleum Holding, Inc., a privately held Delaware corporation.

Motiva Enterprises, LLC is owned fifty percent by Saudi Refining, Inc. and fifty percent by Shell Oil Company, Inc.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case arises from a consolidated complaint in which petitioners charged the defendants with participating in a conspiracy to fix the price of crude oil and refined petroleum products sold in the United States. Specifically, as both lower courts found, petitioners' consolidated complaint alleges a price-fixing conspiracy implemented through agreements between the defendants and foreign sovereign governments to restrain the output of crude oil

production within those foreign states.[2] Although petitioners chose not to name the sovereign nations as defendants, at bottom their complaint rests on actions taken by those nations to regulate the exploitation of their natural resources.

A. District Court Proceedings

Defendants jointly moved to dismiss the consolidated complaint on several grounds, including the act of state and political question doctrines.[3]

Fifteen foreign governments appeared as *amici curiae* in district court to explain the governmental and sovereign nature of their decisions regarding natural resource (crude oil) development and the profound foreign relations implications of adjudicating the claims in this case.[4]

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[2] Both the district court and Fifth Circuit considered petitioners' complaint together with a separate complaint, which is the subject of the petition in *Spectrum Stores, Inc. v. CITGO Petroleum Corp., petition for cert. filed,* 79 U.S.L.W. 3662 (U.S. May 5, 2011) (No. 10-1371).

[3] "Defendants" in this brief refers to the served defendants: Aramco Services Company, Saudi Petroleum International, Inc., Saudi Refining, Inc., Motiva Enterprises LLC, PDV America, Inc., CITGO Petroleum Corporation, PDV Holding, Inc., PDV Midwest Refining, LLC, Lukoil Americas Corporation, Lukoil Pan Americas LLC, and Getty Petroleum Marketing, Inc. *See* Pet. App. 7a n.6.

[4] The following foreign sovereign nations submitted *amicus curiae* briefs in the district court: Algeria; Angola; Ecuador; Indonesia; Iraq; Kuwait; Libya; Mexico; Nigeria; Norway; Qatar; the Russian Federation; Saudi Arabia; the United Arab Emirates; and Venezuela. In addition, the U.S. Chamber of Commerce submitted an *amicus curiae* brief warning of the

The district court dismissed the complaints, holding that they were barred by the act of state and political question doctrines. The court read the complaints—which concede that crude oil is the primary component of the price of refined petroleum products—as plainly challenging the crude oil production decisions of foreign sovereign nations because those production decisions were essential aspects of the conspiracy alleged in the complaints: "[W]here the Consolidated Complaint alleges specific facts, those facts show that the antitrust conspiracy for which the plaintiffs seek redress is an antitrust conspiracy * * * that consists of agreements entered by foreign sovereign states to limit their production of crude oil." Pet. App. 64a. The court found "no factual allegations from which the court could plausibly conclude that collusive activity by the named defendants alone fixed the price of [refined petroleum products] sold in the United States." *Id.* at 75a

Applying this Court's decisions in *Underhill v. Hernandez*, 168 U.S. 250 (1897), and *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990), the district court first held that the act of state doctrine barred the litigation. Pet. App. 86a, 92a. Citing the specific language of the complaint, the court found that, although it was "artfully worded to limit reference to actions performed by sovereign members of the conspiracy," the "allegations in the * * * Complaint

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adverse effects to U.S. economic interests abroad and foreign investment in the United States that could result if the cases were allowed to proceed.

show that the price-fixing with respect to [refined petroleum products] sold in the United States of which [petitioners] complain is, in fact, caused by the production decisions of the conspiracy's sovereign members." *Id.* at 62a-63a.

As an alternative ground, the court, applying the test set out in *Baker v. Carr*, 369 U.S. 186 (1962), held that petitioners' claims are nonjusticiable under the political question doctrine. The court stressed that adjudication of the claims 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." Pet. App. 89a.

Petitioners did not seek reconsideration of the trial court's construction of their complaint, nor did they seek leave to amend it. Instead, they appealed the decision to the Fifth Circuit.

B. Proceedings In The Court Of Appeals

Eleven foreign nations filed briefs *amici curiae* with the Fifth Circuit supporting affirmance and underscoring that adjudication of this case on the merits would undermine a long history of diplomatic and foreign relations efforts relating to international energy policies. Pet. App. 14a n.11.[5] After oral argument, the court requested a "Statement of

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[5] The Fifth Circuit granted the following foreign nations leave to file as *amici curiae*: Algeria; Indonesia; Iraq; Kuwait; Mexico; Nigeria; Qatar; the Russian Federation; Saudi Arabia; the United Arab Emirates; and Venezuela.

Interest" from the United States pursuant to 28 U.S.C. § 517 (2006). The government responded with an *amicus curiae* brief filed on behalf of the Departments of State, Treasury, Energy, and Justice. *See* Brief of the United States as Amicus Curiae Supporting Affirmance, *Spectrum Stores, Inc. v. CITGO Petroleum Corp.*, 632 F.3d 938 (5th Cir. 2011) (No. 09-20084), *available at* PACER.[6] The United States agreed with the district court that the complaints were properly read as challenging the decisions of foreign sovereign nations to limit production of crude oil within their territories, and that the legality of these decisions could not be adjudicated under the antitrust laws consistent with the act of state doctrine. *Id.* at 26. The government also agreed that the claims set forth in the complaints presented nonjusticiable political questions, because adjudication would directly interfere with the constitutional authority of the Executive Branch to manage this country's complex relations with oil-producing nations through negotiation and diplomacy. *Id.* at 56-57. The United States warned that granting the relief requested in the complaints could lead to serious adverse consequences for national security and foreign affairs. *Id.* at 3.[7]

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[6] https://ecf.ca5.uscourts.gov/cmecf/servlet/TransportRoom?servlet=ShowDocMulti&d=6605599&pacer=i&caseId=112949&incPdfFooter=&outputType=doc&outputForm=view.

[7] *See also id.* at 36 ("The possible consequences of judicial action in this sensitive area include oil embargoes, divestiture by certain foreign states of assets in the United States, retaliatory conduct by foreign states of assets in the United States, retaliatory conduct by foreign states against American oil

In a unanimous decision, the court of appeals affirmed. The court began by observing that the parties "vigorously contest whether the district court correctly portrayed the factual allegations of the complaint." Pet. App. 14a. After a careful review, the court of appeals agreed with the district court that "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. Moreover, the court held, the allegation of a conspiracy independent of those sovereign nations contained only "conclusory language" that failed to meet the standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Pet. App. 17a. The court accordingly concluded that the amended complaint "fails plausibly to allege a conspiracy based on refining agreements independent from the broader production-oriented conspiracy." *Id.*

Turning to the political question doctrine, the court of appeals carefully reviewed this Court's decisions from *Baker* to the present. Pet. App. 18a-21a. Applying this settled precedent, the court explained that adjudication would require an inquiry into whether respondents entered into a price fixing conspiracy with OPEC nations, and thus a pronouncement on the legality of foreign sovereign actions. Such a pronouncement, the court explained—"either way"—falls "within the realm of delicate foreign policy questions" that are textually

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producers, and reduction in cooperation on unrelated issues of immense public importance to the United States.").

committed under the Constitution to the political branches of government. *Id.* at 23a-24a.

The court further noted that petitioners' complaint seeks "nothing short of the dismantling of OPEC and the inception of a global market that operates in the absence of agreements between sovereigns as to the supply of a key natural resource." *Id.* at 26a-27a. The court held that the Sherman and Clayton Acts "are decidedly inadequate to provide judicially manageable standards for resolving such momentous foreign policy questions." *Id.* at 27a. The court's conclusion that litigation of the claims presented was foreclosed by the political question doctrine was reinforced by the United States' concerns, with which the court of appeals agreed, that adjudication would conflict with the Executive Branch's longstanding approach to managing relations with oil-producing nations through diplomacy rather than through private litigation. *Id.* at 28a.

With respect to the act of state doctrine, the court of appeals ruled that adjudication of the complaint would necessarily draw into question the legality of the actions of sovereign oil-producing states within their own territories. *Id.* at 32a-33a. Thus, it concluded, "[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." *Id.* at 33a. Accordingly, dismissal was required under the act of state doctrine as well.

REASONS FOR DENYING THE PETITION

Petitioners' entire argument is predicated on a reading of their complaint that four out of four judges have flatly rejected, not on any broad or important question of law for this Court to resolve. Although petitioners contend that their complaint alleges a conspiracy independent of decisions made by sovereign nations about the appropriate regulation of their natural resources, both lower courts disagreed and concluded that the complaint makes such sovereign decisions the heart of the alleged conspiracy. That case-specific question of whether the courts below were correct in their consistent reading of this complaint does not merit this Court's review.

The court of appeals' decision, moreover, does not conflict with any of this Court's decisions or with any other courts of appeals' decision. This Court's review is therefore not warranted.

A. The Lower Courts' Unanimous Construction Of The Complaint Does Not Warrant This Court's Review

Throughout their petition, petitioners advance characterizations of their amended complaint that are at odds with the plain language of their complaint's allegations and the straightforward reading of those allegations adopted by the district court and the unanimous Fifth Circuit. Those courts consistently concluded, after a "vigorous[ ] contest" among the parties about the proper construction of the complaint, that "the core of the alleged

conspiracy * * * consists of agreements entered into by foreign sovereign states to limit production of crude oil." Pet. App. 14a-15a.

Petitioners repeatedly characterize all four judges' conclusions as "erroneous." *See, e.g.*, Pet. 27, 33. Their Statement of the Case asserts as fact that their lawsuit questions only whether "captive corporations" of foreign sovereigns "can be sued when they engage in price fixing in the production and sale of their products in the private United States market," Pet. 13-14, and that the issues their lawsuit presents "relate only to commercial operations of oil companies acting in and directly affecting U.S. commerce," *id.* at 15. These assertions contradict the conclusions of the district court and the court of appeals about the allegations of the complaint. Pet. App. 64a, 15a-16a.

Yet petitioners' assertions about the appropriate construction of their complaint are the essential predicate for their arguments for certiorari. The questions petitioners presented could not be resolved without this Court first overturning both lower courts' reading of the complaint.

Petitioners, however, have not set forth a challenge to the interpretation of their complaint as one of the Questions Presented. Pet. i.[8] Even if they had, such fact-bound questions about the proper

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[8] Petitioners also have not presented any basis for this Court to review the conclusions of both lower courts that the allegations of the complaint, if taken to *exclude* the production decisions of foreign sovereign nations, lack the necessary specificity to withstand a motion to dismiss under *Twombly*. Pet. App. 17a, 75a.

reading of pleadings would not be worthy of review by this Court.[9]

B. The Fifth Circuit's Political Question Ruling Is Consistent With Decisions Of This Court And Other Courts Of Appeals

1. The Decision Below Does Not Conflict With This Court's Precedents

Underscoring the petition's lack of certworthiness is petitioners' failure to identify any political question holding of this Court that conflicts with the Fifth Circuit's ruling. Unable to escape the complaint-specific nature of their arguments, petitioners argue that the Fifth Circuit's application of settled case law to the facts of this case was mistaken. That does not merit this Court's review either.

Petitioners make only passing reference to *Baker*, 369 U.S. 186; *Vieth v. Jubelirer*, 541 U.S. 267 (2004); and *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), and make no showing at all of a conflict between the decision below and those prior rulings. Indeed, there is no such conflict.

The Fifth Circuit faithfully applied this Court's political question precedents. The court closely

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[9] *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.").

followed the "seminal" six-factor test set forth in *Baker*, finding that all six factors were present and required dismissal. Pet. App. 20a-29a. The court also followed *Baker*'s observation that cases implicating foreign relations require a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling * * * , and of the possible consequences of judicial action." Pet. App. 20a-21a (quoting *Baker*, 369 U.S. at 211-12); Pet. App. 20a (further noting pronouncement in *Vieth* that *Baker* factors are "six independent tests for the existence of a political question" (quoting *Vieth*, 541 U.S. at 277)).

The court of appeals explained that *Japan Whaling* bears little resemblance to this case because petitioners' case does not "present 'a purely legal question of statutory interpretation,'" and seeks to subject the conduct of *foreign* sovereign nations to norms of U.S. law. Pet. App. at 22a-23a (quoting *Japan Whaling*, 478 U.S. at 230). By contrast, *Japan Whaling* involved a challenge to the manner in which *United States* officials had interpreted a United States statute compelling the Executive Branch to enforce certain treaty quotas against foreign nations.[10] Moreover, in the statute at issue in *Japan*

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[10] Similarly, this case bears no resemblance to *Zivotofsky v. Sec'y of State*, 571 F.3d 1227 (D.C. Cir. 2009), *reh'g denied*, 610 F.3d 84 (D.C. Cir. 2010), *cert. granted*, 79 U.S.L.W. 3344 (U.S. May 2, 2011) (No. 10-699), a political question case that involves a statute specifically directing Executive Branch action with respect to the endorsement of passports for Americans born in Jerusalem. Given these differences, along with the alternative and equally dispositive ground for dismissal here

Whaling, Congress had specifically required the Executive Branch, in certain defined circumstances, to certify foreign nations and then to impose sanctions for violations of quotas set forth in a treaty to which the President had agreed. Thus, both political branches—the Executive in agreeing to the treaty quotas, and Congress in enacting the statute—necessarily had considered the implications of treaty implementation and enforcement for foreign sovereign interests and sensitivities. The court's enforcement of the statute did not intrude on this prerogative of the political branches. Here, by contrast, no such considerations were weighed in connection with enactment of the Sherman Act, and indeed neither political branch has ever applied U.S. antitrust laws to foreign sovereign conduct in the way petitioners seek.

Petitioners' recitation of decisions relating generally to Congress's commerce powers and the scope of the Sherman Act—none involving the political question doctrine (Pet. 22-25)—does nothing to help their cause. As the court of appeals explained, the political-question concerns raised by petitioners' complaint have nothing to do with the scope of Congress's power to delimit the reach of the Sherman Act, but rather with petitioners' attempt to "couch the conduct of foreign relations and national security policy in antitrust terms." Pet. App. 27a. The Fifth Circuit's conclusion that adjudication of petitioners' claims would inevitably involve the judiciary in critical matters of foreign policy,

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under the act of state doctrine, there is no reason to hold this petition for the *Zivotofsky* case.

international energy policy, national security, and military affairs exclusively committed to the political branches remains entirely consistent with this Court's political question precedents.

This is only underscored by the *amicus* submissions in the court of appeals of eleven foreign sovereigns and the United States. As the United States explained, seven different administrations—from President Nixon to President Obama—have concluded that assuring an adequate supply of crude oil from the member states of OPEC and other foreign nations requires the exercise of diplomacy, not litigation. U.S. Brief at 4-5. Adjudication would "seriously complicate relations with those foreign states that control most of the world's proven oil reserves and that supply the United States with a substantial fraction of the oil critical to our energy needs, our national security, and our domestic economy." *Id.* at 36. The Fifth Circuit gave "serious weight" to this Statement of Interest, Pet. App. 24a n.14 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004)), and recognized that these concerns required dismissal, since a pronouncement on the merits "either way" would intrude on the diplomatic efforts of the Executive. Pet. App. 23a-24a.

Petitioners' suggestion that the position of the Executive Branch must be counterbalanced against that of Congress, which has purportedly spoken through the enactment of the Sherman Act, has no purchase here. The Sherman Act has never been applied, in either a case brought by the United States or in private litigation, to cover decisions of foreign sovereign nations regarding the proper rate of extraction of their natural resources. And although

legislation has been introduced in Congress in recent years to extend the antitrust laws in such a manner, that legislation has not been enacted.[11]

In fact, the Fifth Circuit found that official Executive statements opposing such legislation, along with the United States' *amicus* brief, both reflected the Executive Branch's longstanding position against litigating such critical and sensitive matters. Pet. App. 24a. Further, the court ruled that Congress's exclusion of any private right of action from the proposed legislation indicated "an apparent political consensus that private litigation is to be avoided," thus reinforcing the court's adherence to the "political decision" that "[r]elations with OPEC nations regarding U.S. oil supplies are not to be conducted through private litigation." *Id.* at 29a n.15.

Ultimately, petitioners' argument is not that the Fifth Circuit departed from the analysis required by this Court's political question decisions, but that "*Baker* and its progeny should be revisited by the Court and either clarified or reexamined" in order to facilitate private treble damages actions involving foreign sovereign resource decisions. Pet. 20. But petitioners point to nothing to suggest that the political question doctrine requires such wholesale reexamination. And petitioners' complaint, which would thrust the courts directly into sensitive

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[11] *See, e.g.*, No Oil Producing and Exporting Cartels Act (NOPEC), S. 394, 112th Cong. (2011); NOPEC, H.R. 1346, 112th Cong. (2011); NOPEC, S. 204, 111th Cong. (2009); NOPEC, S. 879, 110th Cong. (2007); NOPEC, H.R. 2264, 110th Cong. (2007).

diplomatic matters, provides no occasion for this Court to do so.

2. There Is No Conflict With Other Circuits

Further underscoring the petition's lack of certworthiness is the absence of even a pretense of a circuit split on the political question doctrine.

Petitioners cite two decisions in the antitrust context that purportedly touch on the political question doctrine. Petitioners concede, however, that those cases involved fundamentally different circumstances. *Id.* at 21-22. Neither involved claims challenging the conduct of foreign nations or sensitive foreign relations concerns inextricably intertwined with such sovereign conduct. Rather, *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48, 49 (5th Cir. 1979)—which was decided solely on act of state, not political question, grounds—specifically held that "neither the validity of [Indonesian] regulations nor the legality of the behavior of the Indonesian government is in question here." Likewise, *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1047 (9th Cir. 1983), involved a commercial dispute between two American defense contractors which did "not challenge the wisdom or legality of any governmental act or decision." Neither case had the potential to embroil the United States in political conflict with foreign nations that this case has. And in neither case did the Court have before it *amicus* briefs filed by the United States and foreign sovereigns, all strongly voicing the sensitive foreign relations and

national security interests at stake. Pet. App. 14a n.11.

Petitioners resort to decisions that do not involve the political question doctrine at all, but rather general propositions like Congress's broad authority to regulate commerce, *see Vanity Fair Mills, Inc. v. T. Eaton Co., Ltd.*, 234 F.2d 633, 641 (2d Cir. 1956); Congress's constitutionally assigned power to regulate commerce with foreign nations, *see Int'l Bancorp, L.L.C. v. Société des Bains de Mer*, 329 F.3d 359, 367-68 (4th Cir. 2003); *U.S. v. Guy W. Capps, Inc.*, 204 F.2d 655, 658-60 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955); the Executive's duty not to subvert the policy established by Congress, *see Miss. Poultry Ass'n v. Madigan*, 992 F.2d 1359, 1365 (5th Cir. 1993); and Congress's intent to extend the prohibitions of the Sherman Act to the farthest reaches of the Commerce Clause, *see U.S. v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 679 (5th Cir. 1981); *Chatham Condo. Ass'ns v. Century Village, Inc.*, 597 F.2d 1002, 1006-07 (5th Cir. 1979); *Gough v. Rossmoor Corp.*, 487 F.2d 373, 376 (9th Cir. 1973); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 34 (5th Cir. 1972).

None of those cases remotely suggests a conflict in the circuits. Nor does the Fifth Circuit's decision depart from any of those general principles in any respect. The opinion below in no way questions Congress's constitutional authority to regulate foreign commerce, and as the Fifth Circuit noted, there is no conflict between the Executive and Legislative branches with respect to the adjudication of this particular case. Pet. App. 29a n.15.

C. The Fifth Circuit's Decision Regarding The Act of State Doctrine Is Consistent With Decisions Of This Court And Other Courts Of Appeals

1. The Decision Below Does Not Conflict With This Court's Precedents

The Fifth Circuit's alternative ground for affirmance based on the act of state doctrine fully comports with this Court's precedents. Petitioners argue that the Fifth Circuit ignored this Court's exposition of the act of state doctrine in *Kirkpatrick*, 493 U.S. at 404-10, and claim that it reverted instead to a pre-*Kirkpatrick* analysis that asks whether adjudication of the dispute would "impugn[ ] the motivations of a foreign state." Pet. 27-30 (internal quotation omitted).

Petitioners are mistaken: the decision below is fully consistent with *Kirkpatrick*. The Fifth Circuit concluded that because petitioners "allege a conspiracy that is orchestrated by the sovereign member nations of OPEC," Pet. App. 34a, adjudication of the case necessarily would require a determination whether the crude oil production decisions of OPEC nations violate the Sherman Act. *Id.* at 33a-34a. It held that granting any relief to petitioners "would effectively order foreign governments to dismantle their chosen means of exploiting the valuable natural resources within their sovereign territories." *Id.* at 33a. Thus the court of appeals applied the threshold act of state inquiry that *Kirkpatrick* reaffirmed: "In every case in which

we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." 493 U.S. at 405.

To be sure, the Fifth Circuit did not cite *Kirkpatrick*, but that is irrelevant. "This Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)). Moreover, the court of appeals quoted and relied upon *Underhill*, 168 U.S. 250; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); and *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972)—foundational decisions that *Kirkpatrick* in turn cited and relied upon. 493 U.S. 404-06. And the district court's decision, which the court of appeals affirmed, quoted extensively from *Kirkpatrick* and concluded that *Kirkpatrick* required dismissal of the action here. Pet. App. 51a-57a, 68a, 71a, 74a, 86a. There can be no serious contention that the court of appeals disregarded the act of state principles articulated in *Kirkpatrick*.

Moreover, at no point did the Fifth Circuit suggest that it was concerned merely about "impugning" the motivations of OPEC nations or "embarrassing" foreign governments—which *Kirkpatrick* indicated were inappropriate grounds to trigger the act of state doctrine. 493 U.S. at 409. Rather, the Fifth Circuit noted the separation of powers foundation for the act of state doctrine, *i.e.*, that "'juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of government.'"

Pet. App. 30a (quoting *First Nat'l City Bank*, 406 U.S. at 765). *Kirkpatrick* relies upon that same jurisprudential foundation. 493 U.S. 404.

Petitioners also contend that the decision below conflicts with *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976), because it failed to recognize a "commercial activity" exception to the act of state doctrine. Pet. 30-33. That is wrong for two reasons.

First, as both the district court and the court of appeals made clear, petitioners' complaint requires adjudication of the legality of inherently sovereign state acts, and so this case involves sovereign—not commercial—activity. Pet. App. 31a, 86a. These acts have been recognized to be inherently sovereign under international law as well.[12] Thus this case does not even raise the question whether a commercial activity exception to the act of state doctrine should be recognized. The cases petitioners cite, by contrast, involve the exercise of jurisdiction by federal courts over domestic or foreign state entities that were acting in a commercial capacity. *See Bank of the U.S. v. Planters' Bank of Ga.*, 22 U.S. 904, 907 (1824) (bank was not exempt from suit in federal court because the state of Georgia held an ownership interest); *N.Y. v. U.S.*, 326 U.S. 572 (1946) (federal government could assess taxes on New York's sale of mineral waters); *Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (foreign state's issuance of

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[12] *See, e.g.*, United Nations General Assembly Res. 1803, 17 U.N. GAOR, 2d Comm. 327, U.N. Doc. A/C 2/5 R 850 (Dec. 14, 1962) (recognizing the permanent sovereignty of nations over their natural resources); *see also generally* Restatement (Third) of the Foreign Relations Law of the United States § 206 (1986).

bonds is commercial activity under the Foreign Sovereign Immunities Act because sovereign is acting not as a regulator but in the manner of a private player in the market).

Also irrelevant are authorities that address issues of sovereign immunity law rather than the act of state doctrine. *See Verlinden, B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983) (in granting federal courts subject matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns, Congress did not exceed the scope of Art. III); *Austria v. Altmann*, 541 U.S. 677 (2004) (permitting suit to proceed against Austria under the expropriation exception of the Foreign Sovereign Immunities Act). As this Court has made clear, the act of state doctrine is distinct from sovereign immunity, for it serves different purposes, and courts should not simply transpose concepts from one doctrine to the other. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2290 (2010) ("[T]he act of state doctrine is distinct from immunity * * * *"); *Altmann*, 541 U.S. at 701 ("[T]he FSIA in no way affects application of the act of state doctrine * * * *").

Second, and in any event, the Fifth Circuit correctly observed that "[n]either the Supreme Court nor any circuit have adopted a commercial activity exception to the act of state doctrine * * * *" Pet. App. 31a n.16. The exception that was supported by a plurality in *Dunhill*, *see* 425 U.S. at 698-99, has never been accepted by a majority opinion of this Court. Nor has any court of appeals adopted a commercial activity exception to the act of state

doctrine.[13] Thus there is no conflict for this Court to resolve, and, even if there were, this case does not present the question.

2. There Is No Conflict With Other Circuits

Not only is there no conflict in the circuits, but the Fifth Circuit's act of state decision mirrors the ruling in the only other act of state circuit precedent on point. In *IAM v. OPEC*, the Ninth Circuit held that a private action under the Sherman Act against OPEC and its member nations for fixing crude oil prices was barred by the act of state doctrine. 649 F.2d at 1361. The Ninth Circuit observed that "[w]hile the case is formulated as an anti-trust action, the granting of any relief would in effect

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[13] *See Glen v. Club Méditerranée, S.A.*, 450 F.3d 1251, 1254 n.2 (11th Cir. 2006) ("[W]e have unequivocally stated that there is no commercial exception to the act of state doctrine.") (internal quotations omitted); *World-Wide Minerals, Ltd. v. Kazakhstan*, 296 F.3d 1154, 1166 (D.C. Cir. 2002) ("The existence of such an exception is an unsettled question that this court has never addressed."); *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) ("We do not read the dicta in [*Dunhill* and other Second Circuit cases] as an adoption of the suggested [commercial activity] exception."); *Kalamazoo Spice Extraction v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422, 425 n.3 (6th Cir. 1984) ("[T]he commercial act exception * * * was recognized by only a plurality of the [*Dunhill*] Court [and thus] seems to be of doubtful precedential value."); *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 302 n.2 (3d Cir. 1982) ("We note that [the commercial] exception has [n]ever been accepted by a majority of the Supreme Court."); *Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981) [hereinafter *IAM*] ("The act of state doctrine is not diluted by the commercial activity exception.").

amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources." *Id.* That is exactly the same as the Fifth Circuit's decision here.

Petitioners suggest that *IAM* is not an "instructive precedent" because it was decided before *Kirkpatrick* and involved different facts. Pet. 15. But the *material* facts in the two cases are the same—the same type of factual allegation implicates the same types of foreign sovereign acts. More importantly, petitioners fail to identify any inconsistency between *IAM* and *Kirkpatrick* regarding the appropriate legal standard, and in fact there is none. *Compare IAM*, 649 F.2d at 1359 ("The act of state doctrine is apposite whenever the federal courts must question the legality of the sovereign acts of foreign states."), *with Kirkpatrick*, 493 U.S. at 406 ("Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign.").

Petitioners cite numerous circuit court decisions rejecting act of state defenses, but the cases cited are not remotely like the present one, in which petitioners' complaint seeks relief that would require a court to police the authority foreign sovereigns exercise over natural resource exploitation. Several of these cases involved tort claims or commercial disputes that implicated no question of the lawfulness of a foreign state's sovereign act.[14] Others

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[14] *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 366 (3d Cir. 2006) (action for recovery of interest on fund established by German businesses to compensate victims of Nazi persecution did not require court to rule on validity of any

hold that the act of state did not extend to a res located in the United States.[15] That other courts of appeals declined to apply the act of state doctrine when confronted with legal claims and factual circumstances readily distinguishable from the present case presents no basis for review of the Fifth Circuit's decision.[16]

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act of state); *Walter Fuller Aircraft Sales, Inc. v. Philippines*, 965 F.2d 1375, 1377 (5th Cir. 1992) (action by American corporation against Philippine government commission for failing to defend title as agreed in sale of seized airplane); *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1025 (6th Cir. 1990) (claim that American corporations made large donations to foreign charity of interest to president's spouse in order to induce foreign government to impose price controls on raw materials); *Williams*, 694 F.2d at 301-02 (action against American corporation for inducing foreign governments not to deal with plaintiff in purchasing used aircraft engines); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1373 (5th Cir. 1980) (actions for breach of contract and negligence against a foreign air carrier); *see also Sharon v. Time, Inc.*, 599 F. Supp. 538, 542-43 (S.D.N.Y. 1984) (action for libel by former Israeli defense minister).

[15] *Allied Bank Int'l v. Banco Credito Agricola*, 757 F.2d 516, 518-19 (2d Cir. 1985) (action by American banks to enforce debts of Costa Rican banks having situs in the United States after default caused by government decree); *Airline Pilots Ass'n v. TACA Int'l Airlines, S.A.*, 748 F.2d 965, 967 (5th Cir. 1984) (order prohibiting national airline from relocating pilot base in United States to El Salvador pending collective bargaining under Railway Labor Act).

[16] Petitioners also quote isolated passages from decisions addressing legal issues of sovereign immunity, rather than the act of state doctrine. *See, e.g., Guevara v. Peru*, 468 F.3d 1289, 1292 (11th Cir. 2006) (whether action to recover reward from foreign state for information about fugitive's whereabouts could be brought under the commercial activity exception to the

CONCLUSION

The Fifth Circuit's application of the political question and act of state doctrines is consistent with the jurisprudence of this Court and other circuit courts. The petition for a writ of certiorari should be denied.

Foreign Sovereign Immunities Act); *Globe Nuclear Serv. v. AO Techsnabexport*, 376 F.3d 282, 285 (4th Cir. 2004) (whether breach of contract action could be brought against Russian corporation consistent with the commercial activity exception to the Foreign Sovereign Immunities Act); *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 346-47 (S.D. Tex. 1989), *aff'd*, 954 F.2d 1061 (5th Cir. 1992) (sovereign's grant of mineral drilling concession does not support jurisdiction under commercial activity exception to the Foreign Sovereign Immunities Act). As previously noted, because the doctrines of sovereign immunity and act of state are distinct and serve different purposes, these decisions provide no basis for identifying a conflict warranting this Court's review.

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