No. 09-20084

In the United States Court of Appeals for the Fifth Circuit

SPECTRUM STORES INC; MAJOR OIL COMPANY INC; WC RICE OIL COMPANY; FAST BREAK FOODS LLC,
Plaintiffs-Appellants,

v.

CITGO PETROLEUM CORPORATION; SAUDI ARABIAN OIL COMPANY, doing business as Saudi Aramco; SAUDI PETROLEUM INTERNATIONAL INC; ARAMCO SERVICES COMPANY; SAUDI REFINING INC; MOTIVA ENTERPRISES LLC; PETROLEOS DE VENEZUELA SA; PDV AMERICA INC; PDV MIDWEST REFINING LLC; PDV HOLDING INC; OPEN JOINT STOCK COMPANY, "Oil Company Lukoil", also known as Lukoil Holdings, also known as Lukoil OAO, also known as OAO Lukoil; LUKOIL AMERICAS CORPORATION; GETTY PETROLEUM MARKETING; LUKOIL INTERNATIONAL TRADING AND SUPPLY COMPANY; LUKOIL PAN AMERICAS LLC,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No. 06-3569, The Hon. Simeon T. Lake III, Judge Presiding

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
[Tel.] (202) 463-5337
[Fax] (202) 463-5346

Gregory S. Coleman
Edward C. Dawson
YETTER, WARDEN & COLEMAN, L.L.P.
221 West Sixth Street, Suite 750
Austin, Texas 78701
[Tel.] (512) 533-0150
[Fax] (512) 533-0120

ATTORNEYS FOR AMICUS THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES

SPECTRUM STORES INC; MAJOR OIL COMPANY INC;
WC RICE OIL COMPANY INC,
Plaintiffs-Appellants,

v.

CITGO PETROLEUM CORPORATION,
Defendant-Appellee.

FAST BREAK FOODS LLC, on behalf of itself and all others similarly situated,
Plaintiff-Appellant,

v.

SAUDI ARABIAN OIL COMPANY, doing business as Saudi Aramco;
SAUDI PETROLEUM INTERNATIONAL INC; ARAMCO SERVICES COMPANY;
SAUDI REFINING INC; MOTIVA ENTERPRISES LLC; PETROLEOS DE
VENEZUELA SA; PDV AMERICA INC; CITGO PETROLEUM
CORPORATION; PDV MIDWEST REFINING LLC; PDV HOLDING INC,
Defendants-Appellees.

GREEN OIL CO, on behalf of itself and all others similarly situated,
Plaintiff-Appellant,

v.

SAUDI ARABIAN OIL COMPANY, doing business as Saudi Aramco;
SAUDI PETROLEUM INTERNATIONAL INC; ARAMCO SERVICES COMPANY;
SAUDI REFINING INC; MOTIVA ENTERPRISES LLC; PETROLEOS DE
VENEZUELA SA; PDV AMERICA INC; CITGO PETROLEUM
CORPORATION; PDV HOLDING INC; PDV MIDWEST REFINING LLC;
OPEN JOINT STOCK COMPANY, "Oil Company Lukoil" also
known as Lukoil Holdings, also known as Lukoil OAO,
also known as OAO Lukoil; LUKOIL AMERICAS CORPORATION;
GETTY PETROLEUM MARKETING INC; LUKOIL PAN AMERICAS LLC,
Defendants-Appellees.

COUNTRYWIDE PETROLEUM CO; FAST BREAK FOODS, LLC,
Plaintiffs-Appellants,

v.

PETROLEOS DE VENEZUELA SA; PDV AMERICA INC; CITGO PETROLEUM CORPORATION; PDV HOLDING INC; PDV MIDWEST REFINING LLC,
Defendants-Appellees.

FAST BREAK FOODS LLC,
Plaintiff-Appellant,

v.

CENTRAL OHIO ENERGY INC, on behalf of itself and all others similarly situated; FAST BREAK FOODS LLC,
Plaintiffs-Appellants,

v.

SAUDI ARABIAN OIL COMPANY, doing business as Saudi Aramco; SAUDI PETROLEUM INTERNATIONAL INC; ARAMCO SERVICES COMPANY; SAUDI REFINING INC; MOTIVA ENTERPRISES LLC; PETROLEOS DE VENEZUELA SA; PDV AMERICA INC; CITGO PETROLEUM CORPORATION; PDV HOLDING INC; PDV MIDWEST REFINING LLC; OPEN JOINT STOCK COMPANY, "OIL Company Lukoil", also known as Lukoil Holdings, also known as Lukoil OAO, also known as OAO Lukoil; LUKOIL AMERICAS CORPORATION; LUKOIL PAN AMERICAS LLC; GETTY PETROLEUM MARKETING INC,
Defendants-Appellees.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER

INTRODUCTION

The federal courts are neither well-equipped nor constitutionally permitted to disrupt the politics, diplomacy, and economy of the United States by pronouncing on the legitimacy of the actions of corporate subsidiaries of foreign state-owned companies taken in furtherance of foreign sovereigns' decisions about how much state-owned oil to produce. Recognizing this, the district court correctly dismissed these lawsuits because they are barred by the political-question and act-of-state doctrines. The Court should resist the appellants' invitation to revive these lawsuits, because letting them proceed would frustrate the constitutional principle of separation of powers underpinning the political-question and act-of-state doctrines and cause serious practical harms to the American businesses that are the Chamber's constituents.

The American constitutional design wisely commits to each of the three coordinate branches of government the functions most suited to their particular competencies, and the federal courts have developed specific legal doctrines to implement and secure that division. The political-question doctrine keeps courts out of decisions that are committed by the Constitution to a different political department or that require determinations the Judiciary is unequipped to make, in order to prevent disrupting the Executive's or the Legislature's action within their own competent spheres. The act-of-state doctrine is a second-order protection of

that same separation, preserving the stage for the Executive's conduct of diplomacy with foreign sovereigns by keeping the Judiciary out of the business of pronouncing on the validity of foreign sovereigns' acts. The appellants' suits violate both doctrines.

First, appellants' suits raise nonjusticiable political questions. American negotiations with OPEC sovereigns about their decisions about natural-resource production are subjects of intense and prolonged diplomacy because they are vital to the national security and economic health of the United States. Appellants' suits would disrupt, perhaps irreparably, that nuanced and delicate diplomacy, by threatening to impose liability on corporate subsidiaries of foreign state-owned companies for foreign sovereigns' decisions about how to manage, produce, and conserve their natural resources. The likely result would be diplomatic affront, economic retaliation, and the consequent frustration of decades of foreign policy. The political-question doctrine directs the courts to stay out of this arena, which lies far beyond the competencies of the judiciary, and the district court was correct to dismiss the complaints on that basis.

The district court was also correct to dismiss the complaints based on the act-of-state doctrine. As important as questions about oil production are to American national security and diplomacy, they are just as important to the oil-producing sovereign nations that make up OPEC, and decisions about oil

production are considered by those nations to be at the heart of those nations' sovereign authority. Despite appellants' attempts to plead artfully, it is inescapable that their complaints depend on finding that the acts of OPEC sovereigns, within their sovereign territory, violate American antitrust laws. The act-of-state doctrine forbids American courts from passing on the validity of those activities, because our courts' presuming to do so will insult and provoke those foreign sovereigns, and so greatly complicate the Executive's conduct of diplomacy with them.

The district court's decision was not only well-justified doctrinally, it was also prudent. If these lawsuits were revived, it would cause practical harms that exemplify the sound reasons for the political-question and act-of-state doctrines and the underlying constitutional balance they secure. Of particular interest to the Chamber, allowing these lawsuits to proceed would greatly harm American business and the American economy. It would threaten to disrupt the supply of oil to American businesses at a time when the American economy is struggling. It would create a strong incentive for OPEC members to divest their investments in the United States, harming American businesses and costing American jobs. It would put American businesses at a serious disadvantage in attempting to partner with OPEC sovereigns and the Russian Federation abroad, as those sovereigns will likely prefer to deal with foreign companies when dealing with American companies could subject the foreign sovereign to jurisdiction and liability based on

that sovereign's domestic decisions about its production of state-owned natural resources. And it would expose those American corporations that do operate ventures with sovereign members of OPEC to liability in copycat lawsuits following upon this one, on the theory that they are furthering the purported illegal conspiracy. To prevent these harms, the district court correctly employed the political-question and act-of-state doctrines to their intended use when it dismissed the complaints, and that dismissal should be affirmed.

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America is the world's largest federation of business, trade, and professional organizations in the United States. The Chamber represents an underlying membership of over three million businesses and organizations of every size, in every sector, and in every region of the United States. The Chamber serves as the principal voice of the American business community.

A primary function of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community. While ordinarily the Chamber's amicus activities are focused on cases in the Supreme Court and in the courts of appeals, this case involves issues that are of such great concern to the nation's business community that the Chamber weighed in at the district court level and at the motion-to-dismiss

stage of the litigation, and is renewing in this Court its strong opposition to allowing this lawsuit to proceed. The Chamber believes that this litigation, if not headed off at the earliest possible stage, will have major detrimental effects for American business, both at home and abroad.

ARGUMENT

I. THE ACT OF STATE AND POLITICAL QUESTION DOCTRINES SECURE THE CONSTITUTIONAL SEPARATION OF POWERS.

Both the act-of-state and political-question doctrines have "constitutional underpinnings" in the Constitution's separation of powers between the three branches of government. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S.Ct. 923, 938 (1964). The Constitution delegates to each branch its own sphere in which to act, not only to preserve liberty, but also to operate in its own area of particular competency. *Id.* (noting differences in the "competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations"). While there is not a complete separation of functions, *see*, *e.g.*, THE FEDERALIST NO. 47 (James Madison), and indeed even deliberate overlap to allow each branch to check the encroachments of the others, *id.* NO. 51 (James Madison), the Constitution still enforces and requires separation sufficient for the branches to not disrupt each other's performance of their proper constitutional roles. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 870 (1952) (Jackson, J., concurring) ("[T]he

Constitution . . . enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). To implement the constitutional design of separation with respect to the province of the Judiciary, federal courts have developed, among other tools, the act-of-state and political-question doctrines to secure necessary limitations on the judicial sphere of action and prevent damaging judicial encroachments into the executive and legislative roles in formulating and implementing policy.

Thus, the political-question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 2866 (1986); *accord Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petrol. Laden Aboard Tanker Dauntless Colocotronis*, 577 F.2d 1196, 1203 (5th Cir. 1978). It reflects a judicial recognition that there are, under the Constitution, questions that are neither committed to the courts nor within their competency to resolve. The area of foreign relations, which is textually committed expressly to the President and Congress, and to which the competencies of the Executive are particularly well-suited, has been noted as particularly likely to raise nonjusticiable political questions. *See, e.g., id.* at 1203.

Similarly, the act-of-state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers," *Sabbatino*, 376 U.S. at 423, 84 S.Ct. at 938, operating to prevent "judicial interference with the role of the executive branch in international affairs." *Airline Pilots Ass'n, Int'l AFL-CIO v. TACA Int'l Airlines, S.A.*, 748 F.2d 965, 969 (5th Cir. 1984); *accord Occidental of Umm al Qawayn*, 577 F.2d at 1201 n.4. Recognizing that judicial "engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere," the act-of-state doctrine forbids the courts from denying the validity of the acts of foreign sovereigns and reserves to the political branches the right of doing so. *Sabbatino*, 376 U.S at 423, 84 S.Ct. at 938.

In short, both the political-question and act-of-state doctrines are rooted in the Judiciary's proper recognition of its own limited, though coequally important, role in the constitutional design. The Constitution recognizes, wisely, that judges should not be formulating United States policy, especially foreign policy, nor directing the United States' response with regard to foreign sovereign acts. Statecraft is for the State, not judges. The animating constitutional principle behind the legal doctrines at issue here provides an instructive background when

considering the narrower legal issues in this lawsuit, as well as the serious practical harms that would flow from allowing these complaints to proceed.

II. APPELLANTS' LAWSUITS RAISE NONJUSTICIABLE POLITICAL QUESTIONS AND SEEK TO IMPOSE LIABILITY FOR UNREVIEWABLE ACTS OF STATE.

A. United States Policy Toward Foreign Sovereigns' Implementation of Their Oil-Production Decisions Through Their Corporate Subsidiaries Is a Nonjusticiable Political Question.

Appellants' complaints seek to impose liability on the corporate subsidiaries of foreign sovereigns, as well as one private foreign company, for those corporations' alleged participation in the sovereigns' activities and decisions about domestic production of state-owned oil. But the United States' response to, and negotiations with, those foreign sovereigns over their decisions about how much oil to produce is an inextricable and crucial subject of the United States' foreign policy, which is exclusively committed to the political branches. Appellants' claims therefore raise nonjusticiable political questions, and the district court rightly dismissed the complaints.

The political-question doctrine prohibits the courts from hearing cases requiring them to decide issues the Constitution commits exclusively to the political branches. *See, e.g.*, *Bancoult v. McNamara*, 445 F.3d 427, 432-33 (D.C. Cir. 2006). A case presents a nonjusticiable political question when any one of the following six factors is "inextricable from the case":

1) "a textually demonstrable constitutional commitment of the

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

Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710 (1962).

The Constitution textually commits the formulation of foreign policy to the President and Congress, and to the President alone the conduct of that policy through diplomacy: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . ." U.S. CONST. art. II §2, cl. 2; *see also id.* art. I §8, cl. 3. Because the Constitution expressly commits foreign policy to the political branches, courts have well and often recognized that claims implicating foreign relations are among the most common subjects of the political-question doctrine. *See, e.g., Chicago & S. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 436 (1948) ("[E]xecutive decisions as to foreign policy . . . are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the

domain of political power not subject to judicial intrusion or inquiry."); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 (D.C. Cir. 1984) (Bork, J., concurring) ("Questions touching on the foreign relations of the United States make up what is likely the largest class of questions to which the political-question doctrine has been applied.").

Appellants' complaints present nonjusticiable political questions inexctriably bound up in the conduct of United States foreign policy. Specifically, they present the thorny political question whether the United States should pursue a policy of confrontation and reprisal against foreign oil-producing sovereigns for their participation in agreements to reduce oil production, by exposing those sovereigns' corporate subsidiaries to massive liabilities in American courts.

The appellants are challenging the actions of corporate subsidiaries of foreign state-owned companies, and one foreign private company, in implementing and assisting foreign sovereigns' decisions about domestic oil production. Consol. Compl. ¶¶52-55, 60-63, R2. 535-43, 544-45; Spectrum Compl. ¶¶1, 52, 79, 82, 85, R3. 25, 41, 50, 51; *see also* R2. 631-33. Those actions and decisions are the subject of intense, extended American diplomacy, which is itself the product of deeply considered and hotly debated national policy. Indeed, because the United States depends on imported oil, our relations with oil-producing nations are singularly important to U.S. economic and foreign policy. Nor is appellants'

requested interference with those relations justiciable simply because appellants are seeking to interfere in foreign policy by attacking corporate subsidiaries, instead of foreign sovereigns themselves. *See, e.g.*, *El-Shifa Pharm. Indus. v. United States*, 559 F.3d 578, 585 n.2 (D.C. Cir. 2009) (Plaintiffs cannot "avoid the political question bar at the motion to dismiss stage by artful pleading that recasts the terms of a dispute to make it one properly reviewed by courts.").

The Executive and Legislature have decided to pursue a policy of conciliation, cooperation, and compromise with oil-producing foreign sovereigns. President Bush personally pursued that policy at the highest levels of diplomacy. *See Bush Prepares to Press Saudis on Skyrocketing Price of Oil*, AGENCE FRANCE PRESSE, May 12, 2008, http://afp.google.com/article/ALeqM5jtwX4mGpl4UIsb3EaRKMWSyLPdPA ("The White House has said Bush will stress US concerns about soaring oil prices when he meets King Abdullah in Saudi Arabia on May 16, and is expected to press the Saudis to boost their oil production as a way of curbing spiraling fuel prices.").

President Obama has picked up just where his predecessor left off, again raising the issue directly at the apex level. *See, e.g.*, *Obama, Saudi King to Discuss Oil Prices*, Reuters, May 27, 2009 http://uk.reuters.com/article/idUKTRE54Q4OK20090527 ("'Look, obviously, the president is concerned about

anything that raises the cost of living in a fragile economic time.'").[1] And Treasury Secretary Geithner has followed up with a trip to the Middle East designed to conciliate and reassure OPEC sovereigns, which are among the most prolific foreign direct investors in today's interconnected financial world. *Cf., e.g.*, Adam Schreck, *Treasury Boss Courts Mideast, Sees Gradual Rebound*, ASSOCIATED PRESS, July 14, 2009, http://www.google.com/hostednews/ap/article/ALeqM5hC-jHdi-JgIPFPAG4xCdL9jqQBUgD99EEBR00 ("[T]he stop in Saudi Arabia—the Arab world's largest economy and OPEC's de facto leader—is also a clear reflection of the growing financial clout of the six-nation Gulf Cooperation Council.").

The federal courts should not unilaterally shift the United States' policy from conciliation to confrontation.[2] But that is just what allowing appellants'

---

[1] Similarly, President Obama has engaged in such a dialogue with his Russian counterpart, Dmitri Medvedev. *See* Press Release, The White House-Press Office, Remarks by President Obama and President Medvedev of Russia Prior to Private Meeting (July 6, 2009), *available at* http://www.whitehouse.gov/the_press_office/remarks-by-President-Obama-and-President-Medvedev-of-Russia-prior-to-private-meeting (last visited on July 9, 2009) ("[O]n a whole host of issues, including . . . energy issues . . . the United States and Russia have more in common than they have differences, and [] if we work hard during these next few days, [] we can make extraordinary progress that will benefit the people of both countries.").

[2] If such a shift is to come, it should come from legislation passed by Congress and signed by the President. Legislation has been proposed seeking to impose liability for the same alleged conspiracy as the one in this case, but that legislation has as yet not been enacted. *See* No Oil Producing and Exporting Cartels Act of 2007 ("NOPEC"), H.R. 2264, 110th Cong. (2007) (passed by the House, not passed by

complaints to proceed would do, by attacking the corporate instrumentalities that carry out foreign sovereigns' decisions on crude oil production. Administration officials have explained how a decision by the federal government to sue OPEC under the United States antitrust laws only "ought to be made at the highest levels of the executive branch" because it "would raise significant diplomatic considerations" that "involve not only, and perhaps not even primarily, competition policy, but also defense policy, energy policy, foreign policy, and natural resource issues." Testimony of Richard G. Parker, Federal Trade Commission, March 29, 2000, www.ftc.gov/os/2000/03/opectestimony.htm ("Parker Testimony"). Appellants' attempt to invalidate foreign sovereigns' decisions about oil production by attacking their corporate subsidiaries, intermediaries, and partners operating in the United States raises all these concerns but is even more problematic from a political-question perspective, because it would put the courts in open confrontation with foreign sovereigns without any Executive decision to pursue such a course of action.

The complaints demonstrate the interconnection of appellants' claims with questions of international oil diplomacy, as the district court's opinion succinctly reviews. And the defendants demonstrated convincingly the extent to which their challenged acts are inextricably intertwined with American foreign relations. *See*

---

the Senate); No Oil Producing and Exporting Cartels Act of 2009, S. 204, 111th Cong. (2009) (pending in committee in the Senate).

R2. 637, 638-643. The numerous amicus briefs filed by foreign sovereigns in the district court, and expected to be filed in this Court, make clear that those foreign nations would indeed view allowing these lawsuits to proceed as a shift in American foreign policy, as well as an affront to their sovereignty. And, finally, the inextricably political and diplomatic aspects of the case are resonant to anyone who simply follows current events—oil prices, and the question of how to deal with oil-producing nations' actions taken to affect prices, are a topic of intense national attention and political debate. The federal courts lack the competency to make national foreign policy in this arena, and this Court should decline appellants' invitation to do so. *See, e.g.*, *Chicago & S. Airlines*, 333 U.S. at 111, 68 S.Ct. at 436 ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. . . .They are delicate, complex, and involve large elements of prophecy. . . .They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.").

For the Court courts to shift American foreign policy on its own, by reviving appellants' complaints, would require "an initial policy determination" about foreign oil policy "of a kind clearly for nonjudicial discretion," would express a "lack of the respect" for the political branches' primacy in diplomatic matters, and would create "multifarious pronouncements" on the question whether the United States will pursue a strategy of retaliation, reprisal, and retribution for foreign

sovereigns' domestic decisions about oil production. *Baker*, 369 U.S. at 217, 82 S.Ct. at 710; *accord Doe I v. State of Israel*, 400 F.Supp.2d 86, 112 (D.D.C. 2005) ("A ruling on any of these issues would draw the Court into the foreign affairs of the United States, thereby interfering with the sole province of the Executive Branch."); *see also* Parker Testimony at III B(1)(b) ("[A]ny decision to undertake such a challenge ought to be made at the highest levels of the executive branch."). Under the political-question doctrine, these are things the Court lacks jurisdiction to do, as the district court recognized correctly.

B. Appellants' Lawsuits Are Barred by the Act-of-State Doctrine Because They Depend on Illegalizing Foreign Nations' Domestic Decisions About Oil Production.

OPEC sovereigns' decisions about how much state-owned oil to produce are acts of state that cannot be second-guessed by United States courts. Since appellants' claims depend on holding that those acts violate American antitrust laws, the complaints must be dismissed.

The act-of-state doctrine recognizes that foreign governments are sovereign within their own borders and that United States courts have no right to judge the exercise of that sovereignty. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 404, 110 S.Ct. 701, 704 (1990); *see also Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84 (1897) ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of

one country will not sit in judgment on the acts of the government of another, done within its own territory."). "[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 . . . must be accepted by our courts as a rule for their decision." *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309 38 S.Ct. 312, 314 (1918). Thus, when allegations in a case require a court to review or judge a foreign sovereign's acts, even if only indirectly, the case must be dismissed. *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165-66 (D.C. Cir. 2002).

The district court was correct to dismiss these lawsuits because the allegations require the Court to review and judge foreign sovereigns' oil-production decisions. Courts have rejected prior attempts to directly hold OPEC members liable for their oil-production decisions. *See, e.g.*, *Int'l Ass'n of Machinists & Aerospace Workers (IAM) v. OPEC*, 477 F.Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981); *see also Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F.Supp. 343, 346 (S.D. Tex. 1989) ("A sovereign's conduct with respect to its natural resources is presumptively a governmental function."). This case is not substantively different, because appellants' claims all require the Court to hold unlawful the domestic decisions of OPEC nations about oil production. The fact that defendants are corporations

(primarily state-owned corporations) does not matter because the lawsuit requires the Court to judge the validity of foreign sovereign decisions about oil production. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1113 (5th Cir. 1985) ("In the act of state context, even if the defendant is a private party, not an instrumentality of a foreign state, and even if the suit is not based specifically on a sovereign act, we nevertheless decline to decide the merits of the case if in doing so we would need to judge the validity of the public acts of a sovereign state performed within its own territory.").

The counts of both complaints require a finding that foreign sovereigns are engaged in an unlawful price-fixing conspiracy. *See, e.g.*, Consol Compl. ¶52, R2. 535. While the complaints allege on their face conspiracies to fix prices for refined products, the mechanism of fixing alleged is, in fact, crude-oil production and pricing decisions. Consol. Compl. ¶¶52-53, R2. 535-36; Spectrum Comp. ¶¶1, 52, 79, 82, R3. 25, 41, 50; *see also*, R2. 631-33. The district court engaged in a careful analysis of both complaints that correctly concluded that both ultimately were seeking to reach "agreements made between foreign sovereign states to limit their production of crude oil." R3. 1375; *see also id.* R3. 1369-75 (analyzing the complaints in detail). The court further correctly concluded "the defendants are alleged merely to have helped the foreign sovereign members of the conspiracy" by acts that are not themselves independently subject to liability. R.1 1377, 1385;

see also Br. of Appellees Saudi Petroleum International, Inc., *et al.* 14-15. Thus, for the district court to find that defendants have engaged in the illegal anticompetitive conspiracy pleaded by the appellants, it would have to hold illegal and invalid OPEC sovereigns' determinations as to levels of crude oil production and exports, determinations that are recognized as sovereign acts by the law of those nations, international law, and the decisions of United States courts. *See World Wide Minerals*, 296 F.3d at 1165; *IAM*, 477 F.Supp. at 568; U.N. Resolution on Perm. Sovereignty over Natural Res., G.A. Res. 1803 (XVII), ¶I(1), (7), U.N. Doc. A/C/2/5 R 850 (Dec. 14, 1962); R2. 651 (collecting citations to foreign laws reserving to the state control over oil resources).

One clear way to see that appellants' claims require the Court to pass upon foreign sovereigns' domestic acts of state is to consider their claims absent any allegations about the domestic acts of foreign sovereigns. Without condemning as illegal the conduct and decisions of foreign sovereigns, there is no conspiracy that defendants could have joined. There is no mechanism by which the remaining acts, alleged to have been committed by the named corporate defendants alone, could have affected prices for refined petroleum products. *See* R1. 1377, 1380. The complaints thus hinge on domestic acts of foreign sovereigns, and the claims against the named defendants therefore must be dismissed. *See Callejo*, 764 F.2d

at 1122 (applying act of state doctrine to dismiss claims against a nonsovereign defendant).[3]

The correctness of the dismissal of the complaints under the act-of-state doctrine is confirmed by the presence of two factors the Fifth Circuit has noted should guide the doctrine's application. *TACA*, 748 F.2d at 970. The "degree of involvement of the foreign state[s]" is high, in a number of ways. *Id.* Foreign sovereigns ultimately own almost all the defendants; the lawsuits threaten to intrude upon decisions that those foreign sovereigns consider to be at the heart of their domestic sovereignty, policy, and economy; and those foreign sovereigns have expressed an intense opposition to the case through their energetic amicus participation.

"[T]he effect a judicial decision in [this] case will have on our foreign relations," is, similarly, huge. *Id.* Adjudicating appellants' claims on the merits will affect United States foreign relations by disrupting decades of careful Executive diplomacy in this area. *See supra* Part I. Letting the lawsuit proceed would provoke foreign sovereigns, by putting the federal courts into the business of reviewing their domestic oil-production decisions, as assisted and implemented

[3] Nor is the application defeated by the doctrinal exceptions for extraterritorial or commercial sovereign acts, as appellants' claim, for reasons that are well articulated by the district court and the appellees. R1. 1388-96; Br. of Appellees Lukoil Americas Corp. *et al.*, 23-34; Br. of Appellees Saudi Petroleum International, Inc. *et al.* 29-37; *see also Callejo*, 754 F.2d at 1115 n.17 (noting that the Fifth Circuit has not adopted the purported commercial exception).

by their corporate subsidiaries. This is exactly the kind of diplomatic dispute the act-of-state doctrine is designed to prevent. *See, e.g.*, *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304, 38 S.Ct. 309, 311 (1918) ("[P]ermit[ting] the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.").

Nor will the district court's decision have wide-ranging undesirable consequences, as the appellants suggest. The decision does not immunize activities of privately owned American companies in conjunction with OPEC sovereigns, Spectrum Appellants Br. 2, because the district court's opinion neither reaches nor implies an answer to that question. Non-Spectrum Appellants Br. 40-41. Nor would the district court's decision immunize from liability foreign sovereigns, or their corporate subsidiaries, that bought American oil fields and then reduced production from those fields. Spectrum Appellants Br. 2, 17. Such conduct would clearly be extraterritorial conduct involving the production of oil situated inside the United States, and thus fundamentally different from those sovereigns' decisions about how much of their own domestic oil to produce (and their implementation of those decisions through their control over sovereign-owned corporate subsidiaries). *Cf., e.g.*, *Tabacalera Severiano Jorge, S.A. v Standard Cigar Co.*, 392 F.2d 706, 715-16 (5th Cir. 1968). The district court

correctly applied the act-of-state doctrine to its intended use when it dismissed the complaints.

III. ALLOWING THESE LAWSUITS TO PROCEED WOULD SERIOUSLY DAMAGE AMERICAN BUSINESS BOTH AT HOME AND ABROAD.

The political-question and act-of-state doctrines, rooted in the constitutional separation of powers, required dismissing appellants' complaints, as the district court did. The grave practical consequences if those lawsuits were revived and allowed to proceed demonstrate the necessity for those doctrines and the wisdom of the constitutional plan. For this Court to accept appellants' invitation to disrupt American foreign policy by allowing this suit to proceed would cause predictable domestic evils that flow from the inappropriateness of conducting through the courts the underlying discussion by the United States with foreign sovereigns about their oil production, and from the federal courts' lack of the proper tools to evaluate and resolve that dispute. Of particular interest to the Chamber are the enormous practical harms and risks to American business from allowing these suits to proceed.

These suits could cause disruptions and price spikes in oil imports to the United States at a time when Americans and American businesses can ill afford them. The American economy is in crisis. Oil is critical to the American economy, and American dependence on OPEC oil, as a percentage of imported foreign oil, is actually increasing. *See, e.g.,* Energy Information Administration,

Annual Energy Review 2008, at 134 fig. 5.4, "Petroleum Imports by Country of Origin", http://www.eia.doe.gov/emeu/aer/pdf/pages/sec5_10.pdf. Allowing plaintiffs to sue the corporate subsidiaries of foreign sovereigns for money damages could well lead those sovereigns to restrict or delay shipments of oil to the United States in protest or retaliation. They may think this a more plausible response given that the American oil market, as a share of the global market, is becoming less important, although it is still the largest single market in the world. *See, e.g.*, Robin Pagnamenta, *Global Oil Demand to Rebound Sharply in 2010*, TIMES ONLINE, July 10, 2009, http://business.timesonline.co.uk/tol/business/industry_sectors/natural_resources/article6681708.ece ("Global demand for oil is poised to rebound sharply next year, led by booming consumption in developing countries including China, India and Indonesia."). Disruption of supply could lead to price rises or spikes that would operate as a drag on an already weak American economy. The resulting increase in energy costs would harm American businesses of every size and in every sector of the economy at a particularly inauspicious time.

Further, allowing these lawsuits to proceed would create a strong incentive for OPEC members to divest their investments in the United States. If OPEC sovereigns' having corporate subsidiaries that operate in the United States will expose those subsidiaries to liability in United States courts for the sovereigns'

decisions about the management and production of their most crucial natural resource, those sovereigns and corporations will surely have a strong incentive to reduce their United States corporate operations as much as they possibly can. This point was made convincingly by Administration officials who spoke in opposition to Congressional attempts to extend the antitrust laws to reach the conduct of OPEC sovereigns. *See* Letter from Henry M. Paulson, Jr., Sec'y of the Treasury, to Jeff Bingaman, U.S. Senator (Oct. 16, 2007) ("Paulson Letter") ("At a minimum, we believe that OPEC countries would reconsider their financial investment in the United States."). They will divest current investments, choose not to make new investments, and remove assets from the country.

Indeed, the Spectrum appellants expressly suggested divestment in the district court as their purported solution to the obvious encroachments their lawsuit will cause upon the sovereignty of OPEC members with respect to their decisions about oil production. R3. 3983. ("OPEC's member nations can effectively immunize themselves from both injunctive and monetary relief by simply refraining from furthering their price-fixing agreement in the United States."). In this Court, they repeat the suggestion, Spectrum Appellants Br. at 48, and ratchet up the rhetoric by claiming that Venezuela "has trespassed on American soil, through CITGO." Spectrum Appellants Br. at 1.

Even a partial divestment of OPEC sovereigns' corporate subsidiaries from the United States would deprive domestic markets of valuable capital investment at a time when such investments are especially sought and needed, and foreign sovereign investment is of increasing importance. *Cf.*, *e.g.*, Adam Schreck, *Treasury Boss Courts Mideast, Sees Gradual Rebound*, ASSOCIATED PRESS, July 14, 2009 http://www.google.com/hostednews/ap/article/ALeqM5hC-jHdiJgIPFPAG4xCdL9jqQBUgD99EEBR00 ("What Geithner has to say in private to officials in the oil-rich region could help determine whether the Obama administration's efforts to right the U.S. economy succeed. The Arab Gulf states are major backers of U.S. companies and government bonds and, as a group, are the biggest U.S. creditor after China."). The result, again, would be serious harm to American business and the loss of many American jobs. Paulson Letter ("A loss of this foreign investment would unquestionably cost American jobs and damage the U.S. economy.").

Relatedly, foreign sovereigns' fear of exposure to liability of the sort sought to be imposed in this case will also put American businesses at a serious disadvantage in attempting to partner abroad with OPEC sovereigns and their corporate subsidiaries. Those sovereigns will likely prefer to deal with foreign companies if dealing with American companies subjects the foreign sovereigns, or their corporate subsidiaries, to American jurisdiction and liability based on that

sovereign's domestic decisions about its production of state-owned natural resources.

At the same time, allowing these suits to proceed will also pose great risks to American businesses that do successfully operate overseas in the global oil market. Domestic American corporations frequently work with OPEC sovereigns, or their corporate subsidiaries, on oil exploration and production ventures abroad. These American corporations that operate ventures with, or work in conjunction with, sovereign members of OPEC could be exposed to liability in copycat lawsuits following upon this one on the theory that they are furthering the OPEC principals' purported illegal conspiracy. Already, appellants have pleaded their case against one private company, Lukoil. Their theory of how the named defendants have participated in the purported illegal conspiracy through providing technical and price information, and through attending OPEC meetings, *see* Spectrum Compl. ¶¶21-22, R3. 31-32, could easily be applied to American oil companies that work with OPEC, and (for obvious reasons) monitor OPEC decisions about production with great interest. It is no great stretch to envision that domestic American corporations will be hit with similar complaints for assisting the purportedly illegal OPEC conspiracy. American companies would then be faced with the choice of either: (1) fighting these lawsuits and risking the massive liabilities they present (without the option, available to foreign sovereigns and corporations, of simply

picking up stakes and divesting from the United States), or (2) not doing business with OPEC sovereigns and their corporate subsidiaries—that is, removing themselves from the market for services for over 40% of the world's oil supply. Either alternative will unnecessarily cause those companies significant economic harm.

On the broader scene, allowing these lawsuits to go forward could lead to reprisal in other economic sectors from oil-producing sovereigns. Paulson Letter ("[T]he countries singled out for special treatment could retaliate against U.S. assets and block investments in their countries."). In particular, it could lead foreign courts to feel justified, in retaliation, to attempt to meddle extraterritorially with the domestic natural-resource decisions of the United States. (Imagine, for example, a lawsuit in Russian courts seeking to impose liability for the United States's failure to allow drilling in the Arctic Natural Wildlife Reserve). And, finally, it would enhance American courts' "reputation around the world as venues for abusive, lengthy, and excessively costly litigation." President's Export Council, "Civil Justice Reform Letter of Recommendation" to President George W. Bush, Aug. 23, 2007, *available at* http://www.ita.doc.gov/td/pec/Civil_Justice_Reform.pdf.

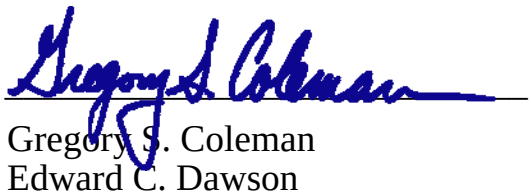
All of these harms and risks can and should be avoided. At the very least, if they are to be incurred, it should be only because of a well-considered, fully

debated decision by the politically accountable branches of government. The political-question and act-of state doctrines exist to prevent just the sort of interference with and disruption of international relations that these lawsuits will cause. The constitutional balance those doctrines secure wisely commits to the political branches, not the Judiciary, decisions about how to negotiate with foreign sovereigns over those sovereigns' decisions about what to do with their natural resources. The district court, respecting the wisdom of that constitutional design, applied the implementing legal doctrines as they are intended, and rejected appellants' invitation to interfere in global energy diplomacy. The Court should affirm the district court's well-reasoned decision.

CONCLUSION

For these reasons, the Court should affirm the decision of the district court.

Respectfully submitted,



Gregory S. Coleman
Edward C. Dawson
YETTER, WARDEN & COLEMAN, L.L.P.
221 West Sixth Street, Suite 750
Austin, Texas 78701
[Tel.] (512) 533-0150
[Fax] (512) 533-0120

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
[Tel.] (202) 463-5337
[Fax] (202) 463-5346

ATTORNEYS FOR AMICUS THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES

CERTIFICATE OF SERVICE

I certify that the Brief of The Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Appellees was filed with the Court by Federal Express, and in electronic format, on the 30th day of July, 2009, and two copies of the brief and an electronic copy of the brief were served on all counsel of record, as listed below, by Federal Express on the same date:

Geoffrey L. Harrison
Alexandra G. White
SUSMAN GODFREY, L.L.P.
1000 Louisiana Street, Suite 5100
Houston, TX 77002-5096

Charles J. Cooper
David H. Thompson
Howard C. Nielson
David Lehn
COOPER & KIRK PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036-0000

Arthur T. Susman
William T. Gotfryd
SUSMAN HEFFNER & HURST LLP
20 S. Clark Street, Suite 600
Chicago, IL 60603-0000

Lauren Blair
PEDERSEN & HOUPT P.C.
161 North Clark Street, Suite 3100
Chicago, IL 60601

Joseph R. Saveri
LIEFF, CABRASER, HEIMANN
& BERNSTEIN
275 Battery Street, Suite 3000
San Francisco, CA 94111-0000

Robert T. Cunningham
Steven L. Nicholas
R. Edwin Lamberth
CUNNINGHAM, BOUNDS L.L.C.
1601 Dauphin Street
Mobile, AL 36604

James B. Sloan
JAMES B. SLOAN LTD.
One Westminster Place
Lake Forest, IL 60045

Theodore T. Poulos
Terence Campbell
COTSIRILOS TIGHE & STREICKER, LTD.
33 N. Dearborn Street, Suite 600
Chicago, IL 60602

Richard N. Carrell
FULBRIGHT & JAWORSKI, L.L.P.
1301 McKinney Street, Suite 5100
Houston, TX 77010-3095

William A. Isaacson
Hamish P.M. Hume
BOIES SCHILLER & FLEXNER
5301 Wisconsin Avenue NW
Washington, DC 20015

M. Elaine Johnston
Robert A. Milne
Thomas J. O'Sullivan
Raj. S. Gandesha
WHITE & CASE, L.L.P.
1155 Avenue of the Americas
New York, NY 10036-2787

Caroline C. Pace
Carrin F. Patman
Warren H. Harris
BRACEWELL & GIULIANI, L.L.P.
711 Louisiana Street, Suite 2300
Houston, TX 77002-0000

Mark S. Bernstein
BARACK, FERRAZZANO, KIRSCHBAUM
& NAGELBERG L.L.P.
200 W Madison Street, Suite 3900
Chicago, IL 60606-0000

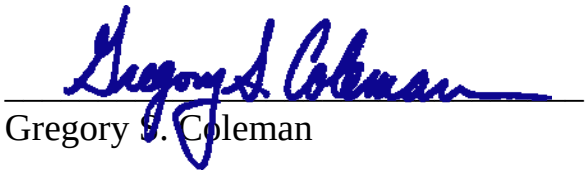
David L. Doyle
VEDDER PRICE KAUFMAN
& KAMMHOLZ, P.C.
222 N. LaSalle Street
Chicago, IL 60601

Nathan P. Eimer
Chad J. Doellinger
Andrew G. Klevorn
EIMER STAHL KLEVORN & SOLBERG
224 S Michigan Avenue, Suite 1100
Chicago, IL 60604-0000

Carolyn B. Lamm
Hansel Tuan Pham
Anne Davies Smith
Jonathan C. Ulrich
WHITE & CASE, L.L.P.
701 Thirteenth Street, NW
Washington, DC 20005-3807

Dale R. Harris
Tom McNamara
DAVIS GRAHAM & STUBBS
1550 Seventeenth Street, Suite 500
Denver, CO 80202-0000

James Patrick Tuite
Catherine F. Spillman
AKIN GUMP STRAUSS HAUER & FELD
1333 New Hampshire Avenue, NW
Washington, DC 20036-0000



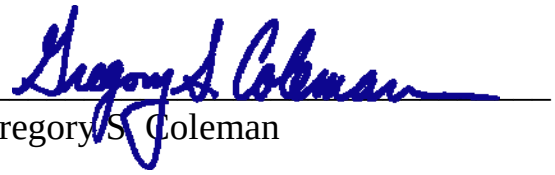
Gregory J. Coleman

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6108 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2 This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft© Office Word 2003 in 14-Point Times New Roman font.

Date: July 30, 2009



Gregory S. Coleman