IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, ET AL.,
Petitioners,

v.

JOHN DOE I, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a lawsuit challenges the activities of a foreign government, and the Executive warns that the litigation itself, and not just the effects of a final judgment, would risk a potentially serious adverse impact on significant foreign policy interests of the United States, does the collateral order doctrine permit immediate appeal of a district court's denial of a motion to dismiss under the political question doctrine?

PARTIES TO THE PROCEEDING

Petitioners are Exxon Mobil Corporation, Mobil Corporation, Mobil Oil Corporation, and ExxonMobil Oil Indonesia Inc. Petitioners are the defendants-appellants below. PT Arun LNG Co. was named as a defendant in the trial court, but was dismissed from the case and is not a party on appeal.

Respondents are Indonesian citizens, John Does I through VII and Jane Does I through VI.

PETITIONERS' CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners hereby identify any parent corporation and any publicly-held corporation owning 10% or more of its stock:

Exxon Mobil Corporation: Exxon Mobil Corporation has no parent corporation and no publicly-held corporation owning 10% or more of its stock.

Mobil Corporation: Exxon Mobil Corporation is the parent of Mobil Corporation and owns 100% of the stock of Mobil Corporation.

Mobil Oil Corporation (now known as ExxonMobil Oil Corporation): Mobil Corporation is the parent of ExxonMobil Oil Corporation and owns 100% of the stock of ExxonMobil Oil Corporation. Exxon Mobil Corporation is the parent of Mobil Corporation and owns 100% of the stock of Mobil Corporation.

ExxonMobil Oil Indonesia Inc.: Mobil Exploration and Producing North America Inc. is the parent of ExxonMobil Oil Indonesia Inc. and owns 100% of the stock of ExxonMobil Oil Indonesia Inc. Mobil Corporation is the parent of Mobil Exploration and Producing North America Inc. and owns 100% of the stock of Mobil Exploration and Producing North America Inc. Exxon Mobil Corporation is the parent of Mobil Corporation and owns 100% of the stock of Mobil Corporation.

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OPINIONS AND ORDERS BELOW

The Court of Appeals' opinion below is reported at *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007). The opinion and accompanying order are reprinted in the Appendix to the Petition ("Appx.") at 1a to 45a.

The District Court's opinion below is reported at *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005). The opinion and accompanying order are reprinted at Appx. 46a to 63a.

STATEMENT OF JURISDICTION

The order sought to be reviewed was entered by the United States Court of Appeals for the District of Columbia Circuit on January 12, 2007. An order denying panel rehearing was entered by the same court on February 21, 2007.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

APPLICABLE STATUTES

The following statutes are pertinent to this petition:

28 U.S.C. § 1291

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1332(a)(2)

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs and is between—(2) citizens of a State and citizens or subjects of a foreign state.

28 U.S.C. § 1350

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1651(a)

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

In June 2001, Respondents filed a complaint alleging that they had "been subjected to serious human rights abuses, including genocide, murder, torture, crimes against humanity, sexual violence, and kidnapping in violation of the Alien Tort [Statute] ("ATS"), 28 U.S.C. § 1350, the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 (note), international human rights law, and statutory and common tort law of the District of Columbia" at the hands of "members of the Indonesian military hired to perform 'security' services on behalf of Defendants" in the province of Aceh, Indonesia. (Appx. at 92a.)

Petitioners moved to dismiss the complaint in October 2001, asserting, among other things, that Respondents' claims involved a nonjusticiable political question challenging the conduct of the Indonesian military during the Aceh civil war. The District Court sought the "opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States, and, if so, the nature and significance of that impact." (*Id.* at 64a-65a.)

In response, the United States submitted a letter dated July 29, 2002, from the Legal Adviser of the United States Department of State ("Statement of Interest"), together with a July 15, 2002 letter from the Indonesian Ambassador to the United States. The Indonesian Ambassador's letter stated that the Indonesian government "cannot accept the extra-territorial jurisdiction of a United States Court over an allegation against an Indonesian government institution [that is] the Indonesian military, for operations taking place in Indonesia." (*Id.* at 139a.) It also warned that "adjudication" of the case "will definitely compromise the serious efforts of the Indonesian government to guarantee the safety of foreign investments," and would "have an adverse impact on the process to find a peaceful and satisfactory solution on the problem of Aceh." (*Id.* at 139a-140a.)

The United States' Statement of Interest affirmed that the lawsuit would be "perceived in Indonesia as a U.S. court trying the GOI [Government of Indonesia] for its conduct [in] Aceh," and that this perceived affront to Indonesian sovereignty could translate into adverse consequences to important United States foreign policy interests. (*Id.* at 134a-135a.) In particular, "U.S. counterterrorism initiatives could be imperiled in numerous ways if Indonesia and its officials curtailed cooperation in response to perceived disrespect for its sovereign interests." (*Id.* at 135a.) The Statement of Interest also confirmed that "[t]his litigation appears likely to further discourage foreign investment" which "could have decidedly negative consequences for the Indonesian economy" and could "prejudice the Government of Indonesia and Indonesian businesses against U.S. firms bidding on contracts in extractive and other industries." (*Id.* at 136a-138a.)

These foreign policy considerations led the Statement of Interest to conclude that

> the Department of State believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism. It may also diminish our ability to work with the Government of Indonesia ("GOI") on a variety of important programs, including efforts to promote human rights in Indonesia.

(*Id.* at 133a.) A footnote in the Statement of Interest advised that much of the Department's "assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation," (*id.* at 134a), but the Statement of Interest repeated that "it is the Department's considered opinion that adjudication at this time could adversely affect United States interests," (*id.*).

On several occasions over the next five years, the United States and the Government of Indonesia reaffirmed their objections. In July 2003, the United States submitted a second statement of interest, stressing that "[i]t remains the United States' position that adjudication of this case would raise foreign policy and national security concerns for the reasons articulated in the State Department's [July 2002] letter." (*Id.* at 142a.) In May 2005, while the Petitioners' October 2001 motion to dismiss was still under advisement, the United States restated its position during a status conference, and reminded the District Court that "[t]he Indonesian ambassador . . . [i]ndicat[es] that any adjudication of this case, including the discovery process, which would air information on what the security forces did would not only be an affront to them, but also would possibly create instability in Indonesia." (*Id.* at 166a, 173a.) Then, in a June 2005 diplomatic note, the government of Indonesia reiterated its concerns expressed in July 2002 and stressed in exasperated tones that "limited discovery as proposed by the plaintiffs is unacceptable to Indonesia. The Embassy . . . requests the esteemed [State] Department to help ensure that the judicial sovereignty of the Republic of Indonesia be fully and thoroughly respected." (*Id.* at 184a.) This was followed by a third statement of interest in July 2005, in which the United States advised that its previously stated concerns were still current. (*Id.* at 183a.) The Indonesian government sent another diplomatic note to the State Department in February 2007, "reaffirm[ing] its position as contained in the previous correspondences." (*Id.* at 185a.)

On October 14, 2005, the District Court dismissed Respondents' federal statutory claims under the ATS and TVPA for failure to state a claim and lack of subject matter jurisdiction. (*Id.* at 46a.) In its decision, the District Court noted among other things that "determining whether defendants engaged in joint action with the Indonesian military necessarily would require . . . an inquiry [that] cuts too close to

adjudicating the actions of the Indonesian government." (*Id.* at 58a.) The District Court further stated that "assessing whether Exxon is liable for these international law violations [genocide and crimes against humanity] would be an impermissible intrusion in Indonesia's internal affairs." (*Id.* at 55a.)

Specifically, the District Court held that

- Petitioners could not be held liable for violations of international law on an aiding and abetting theory (*id.* at 53a);
- Respondents' claims of "sexual violence" did not meet this Court's test in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) for a "specific, universal, and obligatory" international norm actionable under the ATS (*id.* at 54a);
- Respondents' claims of genocide and crimes against humanity would impermissibly "require adjudication on whether the Indonesian military was engaged in a plan allegedly to eliminate segments of the population" (*id.* at 55a);
- Respondents' claims of torture, arbitrary detention, and extrajudicial killing under the ATS could only be brought against states. Attempting to bring such claims against individuals on a "color of law" theory would "dramatically expand the extraterritorial reach" of the ATS (*id.* at 56a);[1]
- Respondents' TVPA claims could not be brought against corporations, only human beings (*id.* at 60a);

[1] The District Court further concluded that even if a "color of law" theory could be applied to Respondents' ATS claims, Respondents had failed to allege adequately either joint action or proximate cause, the two potential bases upon which "color of law" might be premised. (Appx. at 57a.)

- Respondents' "violence against women" claims were redundant of the defective ATS and TVPA claims (*id.*).

The District Court also dismissed all claims against original defendant PT Arun, on the grounds that PT Arun was 55% owned by an agency of the Indonesian government and that litigation against PT Arun "would create a significant risk of interfering in Indonesian affairs and thus U.S. foreign policy concerns." (*Id.* at 61a.)

At this point, all that remained of Respondents' initial claims were state law tort claims resting on the identical factual predicate with respect to the alleged behavior of the Indonesian military as did the dismissed federal claims, and thus also requiring an adjudication of the actions of the Indonesian military in Indonesia during a civil war. Nonetheless, the District Court allowed the state law claims to proceed. (*Id.*) It based its holding, in part, on the mistaken belief that discovery and litigation could be focused in the United States in a manner that would not be offensive to Indonesian sovereignty and would mitigate the other concerns expressed by the State Department and the Government of Indonesia. (*Id.*) The District Court subsequently entered two orders limiting discovery to documents located outside of Indonesia relating to the issues of personal jurisdiction over Petitioner ExxonMobil Oil Indonesia, Inc. ("EMOI")[2] and the knowledge and participation of the U.S. Defendants in any of the allegedly tortious conduct. (*Id.* at 81a, 84a.) Discovery on those issues is to conclude by July 31, 2007, and the Court's scheduling order provides that Petitioners may file a motion to dismiss EMOI for lack of personal jurisdiction in October 2007, and that Petitioners may file a summary judg-

[2] EMOI alleges it has no contacts with the District of Columbia, and the District Court is permitting discovery on the issue of whether EMOI is the alter-ego of the other Petitioners such that their contacts with the District of Columbia may be attributed to EMOI.

ment motion to dismiss the remaining U.S.-based Petitioners in January 2008. The District Court has also set a trial date for June 27, 2008.

On November 10, 2005, Petitioners noticed an appeal of the District Court's October 14, 2005 order insofar as it denied the justiciability defense as to the state law tort claims. Petitioners asserted that jurisdiction in the Court of Appeals was appropriate under the collateral order doctrine, *see Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994), and alternatively petitioned for a writ of mandamus, *see* 28 U.S.C. § 1651(a). Respondents moved to dismiss the appeal for lack of appellate jurisdiction, and a decision on that motion was reserved for the merits panel.

On January 12, 2007, a divided panel of the D.C. Circuit Court of Appeals dismissed the appeal for lack of jurisdiction and denied the petition for a writ of mandamus. The majority determined that the justiciability issue was not effectively unreviewable upon an appeal from final judgment, rendering the issue inappropriate for immediate appeal under the collateral order doctrine. (Appx. at 12a.) In particular, the majority concluded that a separation of powers defense, unaccompanied by a claim of immunity, is not immediately appealable under the collateral order doctrine. (*Id.* at 13a.) The majority further reasoned that permitting a collateral order doctrine appeal in this matter would "substantially expand[]" the collateral order doctrine. (*Id.* at 15a.)

The majority also denied the petition for mandamus, finding that the District Court had not "'clearly and indisputabl[y]' exceeded its jurisdiction by refusing to dismiss this case under the political question doctrine." (*Id.* at 16a (alteration in original).) In searching for a "clear and indisputable" error, the majority noted specifically that the July 29, 2002 Statement of Interest was "not . . . an unqualified opinion that this suit must be dismissed," that the State Department "did not necessarily expect the district court to

immediately dismiss the case in its entirety," and that "the district court ha[d] taken several steps to limit the scope of the litigation," including the dismissal of PT Arun, dismissal of the federal claims and limitations on discovery. (*Id.* at 17a-18a.) Citing *Sosa*, the majority concluded:

> Thus, we need not decide what level of deference would be owed to a letter from the State Department that *unambiguously* requests that the district court dismiss a case as a non-justiciable political question. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (suggesting that when the State Department files a statement of interest "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"). . . . But given the letter before us in the record, we cannot say it is "indisputable" that the district court erroneously failed to dismiss plaintiffs' claims under the political question doctrine, no matter what level of deference is owed to the State Department's letter.

(*Id.* at 18a.)

In dissent, Judge Kavanaugh would have granted the petition for mandamus. Judge Kavanaugh believed that the majority opinion gave "unduly short shrift to the State Department's Statement of Interest." (*Id.* at 38a.) He concluded that the State Department's letter provided sufficient explanation of the potential adverse foreign policy consequences of the litigation to warrant dismissal, and that the steps taken by the District Court—to dismiss some claims but not others, to dismiss one defendant but not all defendants, and to limit the scope of discovery—were not consistent with the Executive's multiple cautionary statements. (*Id.* at 36a-37a, 43a-44a.) He further noted that the State Department's concerns were implicated not only by a potential judgment in this matter regarding the Indonesian soldiers' conduct, but by "*the litigation itself*." (*Id.* at 44a (emphasis in original).)

Judge Kavanaugh also noted that the remaining state law claims, to be adjudicated principally under District of Columbia law, posed the additional problem of federal foreign affairs preemption. (*Id.* at 37a.) During the pendency of the appeal, the District Court in March 2006 granted Respondents' leave to file an amended complaint, which reasserted most of the same facts as the original complaint and the state law tort claims, but asserted federal diversity jurisdiction, 28 U.S.C. § 1332(a)(2), as the basis for subject matter jurisdiction over the remaining claims. (*Id.* at 68a-69a.) At the same time, the District Court held that the state law claims would be governed by "United States" common and statutory law, rather than the law of Indonesia. (*Id.* at 71a.) In selecting among the laws of potential states,[3] the District Court concluded that the only conflict among the laws of the states related to the wrongful death claims.[4] (*Id.*) Concluding that Petitioner EMOI was the defendant whose actions were most relevant to the case, and observing that EMOI was incorporated in Delaware during the relevant period, the District Court resolved to apply Delaware law to Respondents' wrongful death claims. (*Id.*) For the remaining common law claims, the District Court noted no conflict among the laws of the states and simply selected District of Columbia law as the law of the forum. (*Id.*) In so holding, the District Court noted that Indonesian law does not provide for punitive damages, and concluded that exposing Petitioners to potential punitive damages would serve the United States'

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[3] The parties briefed the potential applicability of District of Columbia law (as the forum), Indonesian law (as the place of alleged injury and principal place of business of EMOI), as well as that of Delaware (state of incorporation of EMOI), New Jersey (state of incorporation of Exxon Mobil Corp.), and Texas (principal place of business of Exxon Mobil Corp.).

[4] The conflict with respect to the wrongful death claims arose because the District of Columbia wrongful death statute does not apply to deaths occurring outside of the District.

"overriding interest" in applying its own laws to Petitioners: "Ultimately, the United States, the leader of the free world, has an overarching, vital interest in the safety, prosperity, and consequences of the behavior of its citizens, particularly its super-corporations conducting business in one or more foreign countries." (*Id.* at 70a.)

Shortly after the Court of Appeals' decision, on February 1, 2007, the Indonesian government "reaffirm[ed]" its earlier objections in a third written complaint about the litigation, noting in particular that the state law claims had not been dismissed. (*Id.* at 185a.)

On February 12, 2007, Petitioners moved the panel to reconsider its January 12, 2007 decision. The panel thereafter denied Petitioners' petition for rehearing on February 21, 2007, with Judge Kavanaugh again dissenting. (*Id.* at 90a.)

REASONS FOR GRANTING THE PETITION

In this proceeding, the Executive has given its "considered judgment" that the adjudication of Respondents' claims would risk a potentially serious adverse impact on significant foreign policy interests of the United States, and has restated that warning three separate times. Yet the District Court dismissed only Respondents' federal claims, permitting state common law and statutory claims to proceed on identical factual allegations over the objection that they should have been dismissed on political question grounds. The Court of Appeals refused to review the District Court's decision not to dismiss the remaining state claims under the collateral order doctrine, erroneously concluding that the potential harm resulting from the District Court's adjudication of the case could be remedied after final judgment. A majority of the panel also refused to order the state law claims dismissed via writ of mandamus, in reliance on a finding that the State Department had never explicitly requested dismissal of the litigation.

The Court should grant certiorari for three reasons. First, the majority opinion fails to recognize that the State Department warned that the litigation itself would likely cause serious harm to U.S. foreign policy interests; such harm is effectively unreviewable on appeal, because by the time of final judgment the damage has already been done. Second, in the absence of the right to appeal under the collateral order doctrine, relief through a petition for a writ of mandamus, at least as interpreted by the Court of Appeals below, suggests a standard of review that is incompatible with the standard of deference owed to Executive statements of interests concerning the potential foreign policy effects of cases challenging the actions of foreign governments abroad. Third, the recent surge of litigation filed in U.S. courts alleging harm caused by overseas conduct of foreign sovereigns highlights the necessity for immediate appellate review in the rare circumstance where a district court fails to dismiss after a cautionary Executive statement of interest.

I. THE COURT SHOULD DETERMINE THAT THE COLLATERAL ORDER DOCTRINE PERMITS AN IMMEDIATE APPEAL FROM A DISTRICT COURT'S FAILURE TO HEED THE EXECUTIVE'S WARNING THAT CONTINUED ADJUDICATION COULD HARM U.S. FOREIGN AFFAIRS.

The Court should grant certiorari to clarify that when the Executive opines that the continued prosecution of a lawsuit involving the conduct of a foreign government would risk an adverse effect on U.S. foreign policy, and the district court nevertheless declines to dismiss the action, the defendant has an immediate right of appeal under the collateral order doctrine.

The collateral order doctrine is an extension of the final judgment rule, 28 U.S.C. § 1291. The doctrine permits the

immediate appeal of a narrow category of orders that are conclusively decided, important and separate from the merits, and effectively unreviewable upon appeal from final judgment. *See Digital Equip. Corp.*, 511 U.S. at 868; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949).

Petitioners sought collateral order review of the District Court's determination that the state claims could proceed notwithstanding the political question doctrine. The political question doctrine has its roots in constitutional separation of powers, which, among other things, requires the Judiciary to yield in matters that would impermissibly interfere with the constitutional duties of the Executive, especially in the realm of foreign relations. *Baker v. Carr*, 369 U.S. 186, 211, 217 (1962). This Court has consistently recognized the primacy of the Executive in foreign policy matters. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (discussing the President's "vast share of responsibility for the conduct of our foreign relations"); *Christopher v. Harbury*, 536 U.S. 403, 417 (2002) ("[F]oreign policy [is] the province and responsibility of the Executive") (alternations in original) (*quoting Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988)); *Baker*, 369 U.S. at 211 (Many questions touching on foreign affairs "involve the exercise of a discretion demonstrably committed to the executive" or "uniquely demand single-voiced statement of the Government's views.").

The majority below agreed that the District Court's decision not to dismiss the case under the political question doctrine was final and important and separate from the merits, satisfying the first two elements of the collateral order doctrine. (Appx. at 9a-10a.) However, the majority held that the political question determination was not effectively unreviewable on appeal, and therefore dismissed the appeal for want of jurisdiction. (*Id.* at 16a.)

A. The Failure To Dismiss A Case Under The Political Question Doctrine Is Effectively Unreviewable On Appeal Where Continuation Of The Litigation Itself Will Cause Harm, Regardless Of The Result.

The majority opinion below thoroughly and accurately recounts that under this Court's precedents, a right that is "effectively unreviewable" is "'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" (Appx. at 10a (citation omitted).) It also correctly points out that not every claim of the right to avoid trial is sufficient to trigger the doctrine, but such interest must be "buttressed by 'some particular value of high order," such as "honoring the separation of powers . . . ." (*Id.* at 11a.) However, without any direct support, and ignoring the statements by the Executive in this case indicating that the conduct of the litigation itself would cause harm, the majority concluded that the only "separation of powers" issue that merits collateral review is a claim of immunity. (*Id.* at 13a.)

Petitioners respectfully assert that the majority erred. The Executive clearly stated that it was not simply concerned about whether the impugned Indonesian military ultimately would be condemned or vindicated; it was independently concerned about the offense that would be taken by the Indonesian government to the litigation process and the intrusion of that process on Indonesian sovereignty:

> We anticipate that adjudication of this case will be perceived in Indonesia as a U.S. court trying the GOI for its conduct of a civil war in Aceh . . . . In the letter [Indonesian] Ambassador Soemadi expresses his government's objections to the *continued* adjudication of this case. He states that Indonesia views this litigation as an unacceptable extraterritorial act . . . .

(*Id.* at 134a, 138a (emphasis added).) To underscore the point, the Executive in May 2005 and July 2005 reaffirmed

the July 2002 letter and joined in the Indonesian government's objection to discovery as initially proposed by Respondents. (*Id.* at 183a, 173a ("[t]he Indonesian ambassador . . . indicat[es] that *any* adjudication of this case, *including the discovery process*, which would air information on what the security forces did would not only be an affront to them, but also would possibly create instability in Indonesia.") (emphasis added).)

The majority misinterpreted Petitioners' argument as advocating application of the collateral order doctrine whenever the "district court order den[ies] a motion to dismiss based on the separation of powers." (*Id.* at 13a-14a.) Petitioners' interpretation of the collateral order doctrine is, however, much narrower. The political question doctrine determination in this case is effectively unreviewable on appeal, not simply because it presents separation of powers issues, but rather because the discovery and litigation itself is an affront to Indonesian sovereignty. This is confirmed by the repeated objections by the United States and Government of Indonesia over a five-year period. (*Id.* at 133a, 139a, 142a, 166a, 183a, 184a, 185a.) Thus, in dissent, Judge Kavanaugh correctly recognized that "the U.S. foreign policy interest here is not simply avoiding the effects of a final judgment, [it] is in avoiding the repercussions of *the litigation itself.*" (*Id.* at 44a (emphasis in original).)

Because the conduct of the litigation is itself an independent source of grievance, in the analogous context of litigation under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.* ("FSIA"), the denial of a motion to dismiss is immediately appealable under the collateral order doctrine. *See, e.g., Simpson ex rel. Estate of Mostafa Karim v. Socialist People's Libyan Arab Jamahiriya*, 470 F.3d 356, 359 (D.C. Cir. 2006); *FG Hemisphere Assocs., LLC v. Republique du Congo*, 455 F.3d 575, 584 (5th Cir. 2006). To Petitioners' knowledge, every Court of Appeals to consider

this question of appellate jurisdiction has held that the collateral order doctrine applies to the FSIA. This is because courts recognize that exposing a foreign sovereign to the indignity of litigation in the United States is a harm that cannot be remedied upon later appeal. Because foreign sovereigns may legitimately take offense to litigations in the United States even if they are not named as defendants—*see Garamendi*, 539 U.S. at 416 ("[T]he distinction [between corporations and foreign governments] does not matter. Historically, wartime claims against even nominally private entities have become issues in international diplomacy."); *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (the political question "doctrine is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government; the identity of the *litigant* is immaterial to the presence of these concerns in a particular case") (emphasis in original)—the same prudential reasons creating an immediate avenue for appeal in FSIA cases should also apply to political question justiciability issues where the State Department has offered a letter expressing concern about the effect of prosecution of a lawsuit, (*see* Appx. at 44a (analogizing concerns in instant litigation to doctrine of foreign sovereign immunity).)

At least one other Circuit has held that the denial of a motion to dismiss on political question grounds based on an Executive statement of interest should be appealable under the collateral order doctrine. *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugo.*, 218 F.3d 152 (2d Cir. 2000). *767 Third Avenue* was a landlord-tenant dispute involving a building occupied by the former government of Yugoslavia. *Id.* at 152-53. The Department of State submitted a statement of interest opining that apportionment of state liability among potential successor states constituted a political policy decision reserved to the Executive Branch. The district court agreed to stay the case, but refused to dismiss it on political question grounds. *Id.* at 158-59. The

Second Circuit accepted an immediate appeal from the district court's failure to dismiss the case for two independent reasons, one of which was that the lower court's ruling under the political question doctrine was appealable under the collateral order doctrine. *Id.*

This matter presents an even more compelling case for application of the collateral order doctrine. Whereas in *767 Third Avenue* the district court was called upon merely to identify a successor state and award contract damages, here the District Court is impermissibly tasked with examining the allegedly tortious conduct of a sovereign military acting within its own borders and against its own citizens, after expressly finding in part that adjudicating identical allegations arising under federal statutes would impermissibly affect U.S. foreign relations.

With a trial on that issue potentially to occur in less than a year, immediate appellate review of the constitutional ability of the District Court to entertain the matter under the political question doctrine is necessary.

B. The Court of Appeals' Failure To Review The Justiciability Issue Under The Collateral Order Doctrine Resulted In An Anomalous Ruling That An Executive Statement of Interest Must Explicitly Request Dismissal To Warrant Deference.

Having concluded that the collateral order doctrine does not apply to review of Petitioners' claims, the majority reviewed the justiciability question under the mandamus standard of "clear and indisputable" error. From that narrow perspective, the majority focused heavily on the State Department's failure to explicitly demand dismissal of the litigation, concluding that deference to the State Department is not required when such a demand is absent. This unprecedented approach was sharply inconsistent with this

Court's decisions in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) and *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004), and illustrates the inadequacy of confining appellate review solely to the extraordinary writ of mandamus procedure in circumstances where a district court does not dismiss a case after receipt of a cautionary Executive statement of interest.

In *Sosa* and *Altmann*, this Court stated that in a case alleging torts committed abroad against non-U.S. citizens involving allegedly wrongful conduct by a foreign government, the courts should give "serious weight to the Executive Branch's view of the case's impact on foreign policy," *Sosa*, 542 U.S. at 733 n.21, as the Executive's "considered judgment," *Altmann*, 541 U.S. at 702.

In *Sosa*, the Court provided guidance in defining the boundaries of the jurisdictional reach of claims by non-U.S. residents under the Alien Tort Statute, 28 U.S.C. § 1350. *Sosa*, 542 U.S. at 712-33. One of the applicable jurisdictional boundaries, the Court concluded, is that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historic paradigms familiar when § 1350 was enacted." *Id.* at 732. Although that requirement was sufficient to dispose of the *Sosa* case, the Court noted that "case-specific deference to the political branches [that] give[s] serious weight to the Executive Branch's views of the case's impact on foreign policy" might also limit the jurisdictional reach of federal courts over claims under the ATS. *Id.* at 733 n.21.

In *Altmann*, the Court considered whether the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.* ("FSIA"), applied to conduct that pre-dated the enactment of the statute. *Altmann*, 541 U.S. at 677, 692-702. The Court declined to agree with the Executive that the FSIA should not apply to pre-enactment conduct, noting that this question was

a "pure question of statutory construction . . . well within the province of the Judiciary" that did not merit special deference. *Id.* at 701 (*citing INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987)). However, the Court also noted that "should the State Department choose to express its opinions on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Id.* at 701-02 (emphasis in original).

Reviewing under the mandamus standard, the court below declined to give appropriate weight to the State Department's Statement of Interest concerning the foreign policy effects of this action on U.S.-Indonesian relations, because, in the majority's view, the State Department did not "unambiguously" request dismissal. (Appx. at 18a.) But nothing in *Sosa* or *Altmann* suggests that the Executive's "considered judgment" must be accompanied by an explicit demand for dismissal. Nevertheless, the majority placed such great weight on the absence of an explicit dismissal request from the State Department that it largely ignored the balance of the State Department's letter, which repeatedly warned of "significant" U.S. foreign policy interests imperiled by the litigation—it also ignored the repeated reiterations of objections by the Indonesian government and the endorsement of those objections by the United States—and it completely failed to conduct a justiciability analysis under *Baker*. (*See generally id.* at 17a-22a.)[5]

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[5] Despite the Executive's clearly expressed judgment that continuation of the litigation would be considered an affront to the sovereignty of Indonesia and would risk adverse effects on important U.S. foreign policy objectives—including counterterrorism efforts, the ability of U.S. firms to compete fairly for oil extraction and production contracts, and maintaining the stability of Indonesia's economy and of the Aceh region—the majority below found ambiguity in the Statement of Interest by relying on

The error in the majority's analysis becomes more apparent when examined against the State Department's statement of interest in *In re South African Apartheid Litigation.* (*See id.* 193a-196a.) Like the Statement of Interest in this case, the statement of interest in *Apartheid Litigation* does not explicitly demand dismissal of the case and notes the adverse foreign policy effects of the litigation as potential consequences, rather than certain ones. (*Id.*) But this Court in *Sosa* cited the statement of interest in *Apartheid Litigation* as a model for those entitled to deference. 542 U.S. at 733 n.21.

The majority's mistaken and narrow emphasis on the State Department's failure to explicitly demand dismissal is all the more striking and inappropriate because the District Court (appropriately) did not ask for the State Department's opinion on whether the complaint should be dismissed. Instead, the District Court asked for an "opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States, and, if so, the nature and significance of that impact." (*Id.* at 65a.) The Executive Branch's response was completely in keeping with the question it had been asked: "Because the Court had requested only policy input from the State Department, the State Department's letter specifically did not address the legal issues before the Court." (*Id.* at 142a.)

Contrary to the clear implication of the majority's holding, the ultimate resolution of justiciability is within the province

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a footnote in the document that noted, unsurprisingly, that assessing the future foreign policy implications of a complex litigation in the context of a then-on-going civil war was "necessarily predictive." (Appx. at 134a.) The majority found particular meaning in this footnote, written in 2002, notwithstanding that the United States thereafter had reaffirmed its conclusion (in the body of the letter) that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States" three times over the ensuing three years. (*Id.* at 142a, 166a, 183a.)

of the Judiciary. In this regard, the history of the FSIA is instructive. Before enactment of the FSIA, courts routinely relied upon the Executive to decide whether a particular state ought to be immune from a particular claim. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983) ("[I]nitial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by 'suggestions of immunity' from the State Department.").[6] This regime proved uncomfortable, because it appeared to be a judicial abdication of its role to address justiciability. *See id.* at 488; *Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981) ("The principal purpose of the FSIA was to codify contemporary concepts concerning the scope of sovereign immunity *and withdraw from the President the authority to make binding determinations* of the sovereign immunity to be accorded foreign states.") (emphasis added).[7] The FSIA was enacted to return such decisions to courts. 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."); *Altmann*, 541 U.S. at 691 ("The Act . . . transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch."). The majority's emphasis on the existence or non-existence of an explicit demand for dismissal in the political question doctrine context is directly contrary to this history of FSIA jurisprudence.

To date, at least one court has concluded, based on the decision below, that "the level of deference due a Statement

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[6] *See also Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 705 (9th Cir. 1992) ("[T]he courts continued to defer to the Executive Branch. When the State Department issued a suggestion of immunity in a particular case, the court followed it . . . .").

[7] *See also* H.R. No. 94-1487, at 7-8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06 (discussing purpose of FSIA).

of Interest turns on whether the Executive Branch merely voices foreign-policy concerns or instead directly requests that a suit be dismissed as nonjusticiable." *Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60, 82 (D.D.C. 2007) (*citing Doe*, 473 F.3d at 354).

Because the decision below reviewed the political question justiciability issue under the wrong appellate standard, with an aberrational result, the Court should step in now to prevent additional courts from following its path.[8]

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[8] The Court of Appeals decision to permit the common law and statutory claims to proceed even after the federal claims were dismissed is problematic for an additional doctrinal reason. While federal statutes such as the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victims Protection Act, 28 U.S.C. § 1350 (note), are specifically designed by Congress—a branch of the federal government constitutionally entrusted with foreign affairs issues—to apply to certain extraterritorial claims, the statutory and common law of the states was not developed for that purpose and lacks similar constitutional justification. Thus, as Judge Kavanaugh correctly observed, (Appx. at 37a), the application of state law here threatens significant foreign policy interests without advancing any federal law or legislative mandate, suggesting that state law may be preempted by the contrary federal foreign policy interests. Where the application of state law claims so directly interferes with issues of foreign affairs, a clear standard of deference to the views of the Executive is all the more important. *See Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1185-88 (C.D. Cal. 2005) (foreign affairs preemption doctrine barred Colombian plaintiffs' California state tort claims arising from air raids by Colombian air force; federal foreign policy interests outweighed California's interest in adjudicating the tort claims) (*citing Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) and *Zschernig v. Miller*, 389 U.S. 429 (1968)). A clear standard of deference applicable to U.S. statements of interest is particularly important given the possibility, as exemplified by this case, that the common law of the 50 different states could govern claims principally relating to the overseas conduct of foreign sovereigns.

C. The Growing Number Of Cases Brought By Non-U.S. Plaintiffs Alleging Harm Caused Abroad By Foreign Governments Strongly Suggests The Need For Direct Appellate Review Under The Collateral Order Doctrine.

The number of cases brought in United States courts alleging wrongdoing by foreign governments is rising rapidly. This Court's guidance therefore is urgently needed to address the availability of immediate appellate review in the rare instance where a district court permits such litigation to proceed despite a statement of interest from the Executive suggesting serious potential adverse consequences.

In dissent, Judge Kavanaugh observed that since *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 883-84 (C.D. Cal. 1997), "foreign citizens have begun bringing human rights lawsuits against multinational corporations in U.S. courts," often "directly or indirectly target[ing] actions of foreign government officials." (Appx. at 23a.) Examples of such cases in recently reported decisions are abundant. *See, e.g.*, *Sarei v. Rio Tinto LLC*, 487 F.3d 1193 (9th Cir. 2007) (Papua New Guinean plaintiffs alleging corporate liability for human rights abuses by Papua New Guinea military); *Bigio v. Coca-Cola Co.*, 448 F.3d 176 (2d Cir. 2006) (Egyptian plaintiff alleging subsequent acquisition by corporation of property wrongfully nationalized by Egyptian government), *cert. denied*, 127 S. Ct. 1842 (2007); *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192 (D.C. Cir. 2004) (Namibian tribe alleging corporate liability for late 19th and early 20th century torture, slavery, and genocide by Germany in Namibia); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (Burmese plaintiffs alleging corporate liability for human rights abuses by Burmese military); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (Nigerian plaintiffs alleging corporate liability for human rights abuses by Nigerian government); *Carmichael v. United Techs. Corp.*, 835 F.2d 109 (5th Cir. 1988) (British plaintiff alleging

corporate liability for imprisonment and torture by Saudi Arabian government); *Xiaoning v. Yahoo*, No. 07-2151 (N.D. Cal. filed Apr. 18, 2007) (Chinese plaintiffs alleging corporate liability for human rights abuses by Chinese government); *Bauman v. DaimlerChrysler AG*, No. 04-00194, 2007 U.S. Dist. LEXIS 13116 (N.D. Cal. Feb. 12, 2007) (Argentinean and Chilean plaintiffs alleging corporate liability for kidnappings, killing, and torture of union activists by Argentinean military); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (Sudanese plaintiffs alleging corporate complicity in genocide by Sudanese military); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005) (Palestinian plaintiffs alleging corporate liability for human rights abuses by Israeli military); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (Colombian plaintiffs alleging corporate liability for injuries resulting from bombing by Colombian air force); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (South African plaintiffs alleging corporate liability for human rights abuses committed by South African government); *Bowoto v. ChevronTexaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (Nigerian plaintiffs alleging corporate liability for human rights abuses by Nigerian military and police); *see also* Patti Waldmeir, FIN. TIMES, Mar. 13, 2003 (discussing "a rash of recent lawsuits that seek to punish human rights abuses abroad by targeting US corporations at home").

The Court observed this trend with some concern in *Sosa*. 542 U.S. at 732 n.21 ("there are now pending in Federal District Court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa" and discussing related foreign policy concerns). These cases typically have minimal connection to the United States, and often "raise sensitive foreign policy issues." (Appx. at 23a) (Kavanaugh, J., dissenting); *see, e.g.,*

Sarei, 487 F.3d at 1198-99; *Corrie*, 403 F. Supp. 2d at 1032; *Mujica*, 381 F. Supp. 2d at 1188; *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 553-54.

Such cases are also part of a broader trend of filings by non-U.S. plaintiffs against foreign governments and government officials. *See, e.g., Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) (Salvadoran plaintiffs alleging torture by Salvadoran military); *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005) (Chinese, Taiwanese, South Korean, and Filipino plaintiffs alleging sexual slavery and torture in Asia by Japanese military during World War II), *cert. denied*, 546 U.S. 1208 (2006); *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) (Nigerian plaintiffs alleging human rights abuses by Nigerian military), *cert. denied*, 546 U.S. 1175 (2006); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (estate of Chilean decedent alleging extrajudicial killing by Chilean military officer); *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 389 F.3d 61 (2d Cir. 2004) (French plaintiffs alleging forced deportation of Jews during World War II by national French railroad company); *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) (Chinese plaintiffs alleging religious persecution by Chinese government); *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004) (Zimbabwean plaintiffs alleging human rights abuses by Zimbabwean government), *cert. denied*, 126 S. Ct. 2020 (2006); *Mohammad v. Bin Tarraf*, 114 Fed. Appx. 417 (2d Cir. 2004) (Canadian plaintiff alleging physical and mental abuse, and wrongful seizure of property, by United Arab Emirates); *Reyes v. Grijalba*, No. 02-22046 (S.D. Fla. 2006) (Honduran plaintiffs alleging torture, abduction, and extrajudicial killing by Honduran army colonel); *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005) (Salvadoran plaintiffs alleging human rights abuses by Salvadoran military); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (Bosnian plaintiffs alleging human rights abuses by Bosnian-Serb soldier). Numerous observers have identified

this trend. *See, e.g.*, *Old Law, New Questions*, WASH. POST, July 20, 2004, at A16 (noting a "flood of litigation . . . over conduct that, however horrible, is not obviously the province of America's courts to redress"); Arthur Fergenson & John Merigan, *There They Go Again*, BRIEFLY, Vol. 11, No. 1, at 28 (2007) (noting an "emerging effort by contingency fee lawyers to construct global ATS class actions with no nexus to the United States"); *Human Rights in Court*, WASH. POST, Apr. 6, 2004 (describing a "raft of litigation over wrongs [that] America's courts have no practical power to address"); Robert H. Bork, *Judicial Imperialism*, WALL ST. J., June 22, 2003; Curtis A. Bradley, *The Costs of Human Rights Litigation*, CHI. J. INT'L L. 457, 458 (Fall 2001) (Extra-territorial litigation in the United States is "undergoing significant expansion, both in terms of the number of cases filed as well as the scope of the claims raised.").

The volume and importance of these cases further suggest that it is time for this Court to announce that, if a district court fails to dismiss a case under the political question doctrine where the Executive has provided a statement of interest warning that the litigation may adversely affect significant U.S. foreign policy interests, an immediate right of appeal exists pursuant to the collateral order doctrine. Such a holding would not significantly expand the collateral order doctrine, as speculated by the majority below, because it is rare, if ever, that a district court has failed to dismiss a case under such circumstances. *See Sarei v. Rio Tinto plc*, 221 F. Supp. 2d at 1192 ("[P]laintiffs have not cited, and the court has not found, a single case in which a court permitted a lawsuit to proceed in the face of an expression of concern such as that communicated by the State Department here."), *rev'd on other grounds*, 487 F.3d 1193 (9th Cir. 2007).[9]

[9] The district court decision in *Sarei* was reversed by the Ninth Circuit Court of Appeals in part because the United States affirmatively declined to update its position and expressly declined to seek dismissal on political

CONCLUSION

For the foregoing reasons, Petitioners request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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question grounds. *Sarei*, 487 F.3d at 1199, 1207 n.14. The Ninth Circuit also noted that the forum country, Papua New Guinea, had appeared to reverse policy to *favor* the litigation in the United States. *Id.* at 1199, 1207 n.15. The *Sarei* district court's observation that few, if any, district courts have permitted cases to proceed in the fact of a cautionary State Department statement of interest remains accurate, and was not affected by the Ninth Circuit's reversal. *See also Doe I v. Qi*, 349 F. Supp. 2d 1258, 1298 (N.D. Cal. 2004) (endorsing observation by *Sarei* district court that few cases have been permitted to proceed in spite of a State Department warning).