No. 07-81

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

RESPONDENTS' BRIEF IN OPPOSITION

TERRENCE P. COLLINGSWORTH
INTERNATIONAL RIGHTS ADVOCATES
218 D Street, SE, 3rd Floor
Washington, DC 20003
(202) 470-2515

BONNIE I. ROBIN-VERGEER
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

MICHAEL D. HAUSFELD
AGNIESZKA M. FRYSZMAN*
BRENT W. LANDAU
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
1100 New York Avenue, NW
West Tower - Suite 500
Washington, DC 20005
(202) 408-4600

* *Counsel of Record*

Counsel for Respondents

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QUESTION PRESENTED

Whether the collateral order doctrine should be expanded to allow a private U.S. corporation sued in a federal district court for its tortious actions to appeal from an order that, in response to Statements of Interest by the Executive Branch notifying the court of potential U.S. foreign policy concerns, grants in part and denies in part the corporation's motion to dismiss the plaintiffs' claims under the political question doctrine.

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RESPONDENTS' BRIEF IN OPPOSITION

The petition for certiorari filed by Exxon Mobil Corporation and its affiliates (collectively "Exxon") seeks to expand the collateral order doctrine to require the court of appeals to consider whether the district court's October 14, 2005 order properly denied in part Exxon's motion to dismiss respondents' claims on political question grounds.

There is no basis for review of the D.C. Circuit's dismissal of Exxon's political-question appeal. Not only is there no circuit split on the question presented, but there is not a single case in which a circuit court has found the denial of a motion to dismiss on political question grounds immediately appealable under the collateral order doctrine. Unsurprisingly, the court of appeals' opinion was unanimous on this issue.[1]

Exxon did not request certification for immediate review under 28 U.S.C. § 1292(b). Instead, it sought (and seeks from this Court) a novel expansion of the collateral order doctrine to obtain fact-bound review of the correctness of the district court's order dismissing some (but not all) of the claims against it—an order that the court issued in deference to a communication from the U.S. State Department. Although Exxon argued on appeal that immediate appellate review was necessary because continued litigation of the case would conflict with U.S. foreign policy interests, the United States did not appear in the court of appeals. Indeed, the State Department expressed no further concerns in the district court regarding the litigation after the district court dismissed respondents' claim under the Alien Tort Statute in its October 14, 2005 order, in accordance with the United States' request.

Therefore, the petition should be denied.

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[1] Judge Kavanaugh dissented only from the court of appeals' ruling that a writ of mandamus was unavailable. Pet. App. 24a, 41a, 45a. Exxon does not seek review of the court's denial of mandamus relief. *See* Pet. i.

STATEMENT OF THE CASE

1. Exxon operates a large natural gas facility in the Aceh province of Indonesia. Respondents are eleven Indonesian villagers from Aceh (or their survivors) who suffered murder, torture, sexual assault, battery, false imprisonment, and other wrongs at the hands of Exxon's security forces. Those security forces were members of the Indonesian military hired by Exxon for the "sole and specific purpose" of providing security for Exxon. First Amended Complaint ¶ 47.[2] As Exxon has said, its security personnel acted only to defend its natural gas operations, "not for maintaining general law and order." *Id.* ¶ 48 & n.19. Exxon paid a regular monthly fee for these security services, *id.* ¶¶ 51-53; provided its security personnel with military equipment and other support, *id.* ¶¶ 54, 78; and had the ability to, and did, supervise, control, and direct its security personnel at all times. *Id.* ¶¶ 49, 54, 57, 134. Relevant decisions were made in the United States by the U.S.-based defendants. *Id.* ¶¶ 25-33.

In June 2001, respondents sued Exxon and PT Arun LNG Company, an entity 55 percent owned by the Indonesian government, in the U.S. District Court for the District of Columbia. Respondents sought relief under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note. They also brought common-law tort claims for wrongful death, assault, battery, arbitrary arrest, and detention, among others. Pet. App. 4a-5a. In October 2001, Exxon moved to dismiss the federal claims for failure to state a claim and to dismiss the entire case on the grounds, among others, of forum non conveniens and the act of state and political question doctrines. R. 13.

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[2] Petitioners appended to their petition the original complaint, Pet. App. 91a-130a, but the narrower First Amended Complaint filed by respondents after the district court dismissed their federal claims now governs the lawsuit. *See* D.C. Cir. Deferred Appendix ("DA") 353-95 (R. 129).

While the motion to dismiss was pending, District Judge Oberdorfer solicited the U.S. State Department's opinion regarding whether adjudication of respondents' claims would adversely affect U.S. foreign policy interests. Pet App. 5a, 64a-65a. In response, the State Department submitted a letter dated July 29, 2002, *id.* at 131a-138a, conveying its view "that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States," *id.* at 133a, together with a July 15, 2002 letter from the Indonesian Ambassador objecting to adjudication of the case. *Id.* at 139a-140a. The State Department did not express a view in its letter that the case was nonjusticiable, and indeed, its Statement of Interest was qualified and appeared to assume that the litigation would continue:

> Much of this assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation. *E.g.*, the nature, extent, and intrusiveness of discovery; the degree to which the case might directly implicate matters of great sensitivity to the Government of Indonesia and call for judicial pronouncements on the official actions of the GOI with respect to the conduct of its military activities in Aceh; the effect that a decision in favor of plaintiffs might encourage secessionist activities in Aceh and elsewhere in Indonesia; whether the case were to go to a jury and, if so, whether a substantial monetary award were to be imposed on Exxon Mobil; how other large commercial interests might interpret such a judgment when making investment decisions in Indonesia.

Id. at 134a n.1.

The following year, while the motion to dismiss was still pending, the United States filed a Supplemental Statement of Interest. *Id.* at 141a-163a. This second statement, from the

U.S. Department of Justice, reiterated the concerns articulated in the 2002 letter and expressed the view that "[t]hose concerns can be avoided by holding, as the United States contends, that the ATS does not create an independent right of action." *Id.* at 142a. A legal argument followed that respondents' claims under the ATS should be rejected, *id.* at 143a-163a, along with a request that the Court grant Exxon's motion to dismiss the ATS claims. *Id.* at 163a. The United States did not urge the district court to dismiss the remainder of respondents' claims under the political question doctrine.

Finally, on July 15, 2005, the State Department submitted one last letter to the district court expressing continued concern in light of respondents' proposed discovery plan of May 16, 2005 (R. 86) and appended a letter from the Embassy of Indonesia also objecting to the proposed discovery. *Id.* at 183a-84a. The plan would have involved relatively broad discovery extending to documents and depositions in Indonesia. The scope of discovery respondents proposed was rejected by the district court. *See id.* at 84a-89a.

2. On October 14, 2005, the district court granted in part and denied in part Exxon's motion to dismiss. *Id.* at 46a-63a. Consistent with Judge Oberdorfer's declaration early in the case that he would "be very deferential to the State Department on this kind of a matter at this time in our history," DA 148 (Apr. 9, 2002 Hrg.), the court gave serious weight to the concerns expressed by the State Department, Pet. App. 50a-52a, and tailored its order to address those concerns.

First, the district court dismissed respondents' claims under the ATS, as the United States had requested. Apart from finding respondents' federal claims legally insufficient in part, the district court dismissed respondents' ATS claims because aspects of them—such as genocide and crimes against humanity, and allegations that Exxon engaged in joint action with the Indonesian military to engage in torture, arbitrary

detention, and extrajudicial killing—would require the court "to evaluate the policy or practice of the foreign state." *Id.* at 55a; *see also id.* at 58a. Second, the court refused to adjudicate respondents' TVPA claim, in part because it also would "impermissibly require[] adjudication of another country's actions." *Id.* at 60a. Third, Judge Oberdorfer agreed that "[p]roper concern for Indonesia's sovereignty" required dismissal of PT Arun LNG Co. from the case because adjudicating the liability of an entity largely owned by the Indonesian government "would create a significant risk of interfering in Indonesian affairs and thus U.S. foreign policy concerns." *Id.* at 61a. However, the court rejected Exxon's forum non conveniens argument and its motion to dismiss the entire case on political questions grounds. *Id.* at 61a-62a. With PT Arun dismissed as a party, the district court determined that "the resolution of this case would not turn on any 'official action' of the Indonesian government." *Id.* at 61a n.7.

The court allowed respondents' tort claims to proceed, however, "with the proviso that the parties are to tread cautiously. Discovery should be conducted in such a manner so as to avoid intrusion into Indonesian sovereignty." *Id.* at 61a. "Litigation and discovery . . . , if conducted with care, should alleviate the State Department's concerns about interfering with Indonesia's sovereign prerogatives while providing a means for plaintiffs to obtain relief." *Id.* at 63a. "It should be feasible," the court continued, for "plaintiffs to perpetuate testimony and satisfy document discovery requirements outside Indonesia." *Id.* To avoid intrusion into Indonesian sovereignty, the court would exercise "firm control over any discovery conducted by plaintiffs." *Id.* at 61a.[3]

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[3] Given the dismissal of the federal claims, the court ordered respondents to show cause why the complaint should not be dismissed for lack of subject-matter jurisdiction over the remaining claims. Pet. App. 47a. Respondents asserted diversity jurisdiction over these claims and filed a

3. Exxon appealed the district court's October 2005 order, challenging the court's refusal to dismiss respondents' tort claims. Exxon did not ask the district court to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b), but argued in the court of appeals that the interlocutory order was immediately appealable under the collateral order doctrine and asked, in the alternative, for a writ of mandamus. Exxon moved in the district court for a stay of proceedings pending the disposition of its appeal, which the court denied. DA 276-80 (R. 109). The court rejected, among other things, Exxon's assertions that discovery would inevitably violate Indonesian sovereignty and that the State Department wholly opposed discovery and litigation of this case. *Id.* at 277-78. The court also reiterated that, in contrast to genocide and crimes against humanity, "whether Defendants committed various torts . . . in securing their pipeline [would] not require the court to reach any conclusions regarding Indonesia's policies." *Id.* at 277.

Exxon likewise sought a stay from the D.C. Circuit, which the court denied, and then a motion for reconsideration of that denial, which the court also denied.

The State Department expressed no further concerns regarding the litigation, despite queries by the district court. During a December 15, 2005 hearing to discuss how the parties would "proceed with discovery and litigation on the state court claims without interfering with U.S. foreign policy and Indonesia sovereignty," DA 285, Judge Oberdorfer asked the Assistant U.S. Attorney who attended the conference whether the United States had anything it wished to add. The Assistant U.S. Attorney responded that he had nothing to say "[o]ther than that the State Department very much appreciates the

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proposed amended complaint. *See supra* note 2. The district court granted respondents' motion to amend. Pet. App. 68a-77a.

sensitivity that you've shown to its foreign policy concerns." *Id.* at 311.

True to its word that it would keep "firm control" over discovery, Pet. App. 61a, to avoid "trampling on the sovereign and other prerogatives of Indonesia," DA 220 (May 4, 2005 Hrg.), the district court, in a May 3, 2006 order, restricted discovery to specified subject matters and excluded from discovery altogether documents located in Indonesia, although Exxon was permitted to produce documents it anticipated using in its defense (after "any necessary authorization" by two Indonesian government-controlled entities). Pet. App. 84a-85a. Not only did Exxon agree to these discovery provisions in the May 1, 2006 conference preceding the court's issuance of its discovery order, *see, e.g.*, DA 420-23, 436-38, but its counsel represented that he understood both the Indonesian government and the State Department to be "comfortable" with the discovery contemplated by the court. *Id.* at 425-26; *see also* Pet. App. 87a. No discovery of documents in Indonesia ever occurred, and the cut-off date for the production of documents has now passed without incident.

The United States, which is on the case service list, DA 311, advanced no further objections to the continued litigation of respondents' tort claims or to the scope of discovery the district court permitted.[4] Furthermore, the United States entered no appearance in Exxon's appeal to the D.C. Circuit.

4. Exxon argued on appeal that the district court should have dismissed respondents' tort claims as presenting nonjusticiable political questions. The D.C. Circuit did not

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[4] Petitioners append to their petition a February 1, 2007 letter from the Embassy of Indonesia. Pet. App. 185a-86a. Although Exxon alluded to the letter in its petition for rehearing in the D.C. Circuit, that letter was not transmitted by the State Department to the district court or to the court of appeals and is not part of the record below.

reach the merits of Exxon's arguments, however, because it found, in an opinion written by Judge Sentelle, that it had no jurisdiction over the appeal. Pet. App. 4a.

a. First, the court of appeals explained that its jurisdiction under 28 U.S.C. § 1291 was limited to appeals of "final decisions" of the district court. *Id.* at 7a. Acknowledging that "final decisions" also encompass a "small class" of orders that do not necessarily conclude the litigation, but which finally determine a "claim[] of right" separable from, and collateral to, rights asserted in the action, *id.* at 8a (citation omitted), the court held that Exxon's appeal did not fall within the collateral order doctrine's narrow ambit. *Id.* at 7a. For an order to be immediately appealable, it must (1) "conclusively determine the disputed question"; (2) "resolve an important issue completely separate from the merits of the action"; and (3) "be effectively unreviewable on appeal from a final judgment." *Id.* at 8a (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The court of appeals believed that the third requirement—whether the order would be "effectively unreviewable on appeal from final judgment"—was not satisfied. The cases in which courts have found this requirement satisfied, the D.C. Circuit reasoned, have generally involved a denial of a claim of immunity or double jeopardy because such denials entail "the rejection of a defense that would have allowed the defendant to *avoid trial altogether*." *Id.* at 10a. The court found that Exxon had established no such right not to stand trial here. *Id.* at 12a.

The court of appeals emphasized that Exxon had not cited—and the court had not found—"a single case in which a federal appeals court held that denial of a motion to dismiss on political question grounds is an immediately appealable collateral order." *Id.* at 14a. It concluded that if it allowed defendants to appeal every time a district court denied a motion to dismiss based upon political question grounds, it "would be substantially expanding the scope of the collateral order

doctrine," contrary to this Court's admonition "that the doctrine is 'narrow and selective' and 'should never be allowed to swallow the general rule . . . that a party is entitled to a single appeal to be deferred until final judgment.'" *Id.* at 15a-16a (citation omitted).

b. A majority of the court of appeals also rejected Exxon's alternative petition for a writ of mandamus. To grant the petition, the court "would have to hold that the district court 'clearly and indisputabl[y]' exceeded its jurisdiction by refusing to dismiss the case under the political question doctrine." *Id.* at 16a. The D.C. Circuit was unable to so hold.

The court of appeals "disagree[d] with Exxon's contention that there is a conflict between the views of the State Department and those of the district court." *Id.* at 17a. Like the district court, the appellate court viewed the State Department's July 2002 letter "not as an unqualified opinion that this suit must be dismissed, but rather as a word of caution to the district court alerting it to the State Department's concerns." *Id.* Indeed, the court continued, "the fact that the letter refers to 'how the case might unfold in the course of the litigation' shows that the State Department did not necessarily expect the district court to immediately dismiss the case in its entirety." *Id.* at 17a-18a. Accordingly, the court found that it could not say that it was "indisputable" that the district erroneously failed to dismiss respondents' claims, "no matter what level of deference is owed to the State Department's letter." *Id.* at 18a.

The court of appeals recognized that the district court had taken several steps to limit the scope of the litigation in response to the State Department's concerns. *Id.* at 17a. In addition, the absence of case law from other circuits holding in similar circumstances that the complaint must be dismissed underscored, in the majority's view, that Exxon was not entitled to mandamus: "Exxon cites no cases in which a federal

court has held that, in a matter involving like issues and comparable circumstances (*i.e.*, claims by a private party against a private United States corporation), the complaint *must* be dismissed under the political question doctrine. And we are aware of no such authority." *Id.* at 19a.

The court of appeals emphasized, however, that if it had misinterpreted the letter or if the State Department had additional concerns about the litigation, the State Department was "free to file further letters or briefs with the district court expressing its views." *Id.* at 18a.

c. Judge Kavanaugh dissented on the mandamus issue. In his view, "federal courts should dismiss the complaint on justiciability grounds if the Executive Branch has reasonably explained that the suit would harm U.S. foreign policy interests." *Id.* at 34a. He believed that the Executive Branch had provided such an explanation here. *Id.* at 34a-35a. Like the majority, Judge Kavanaugh emphasized that the State Department again would have an opportunity to express its views in the district court. *Id.* at 44a. He assumed that the majority would agree that the district court should dismiss the case if the State Department "reasonably and unambiguously states that litigation of the state-law claims would affect U.S. foreign policy interests." *Id.* at 45a.

5. Exxon's petition for panel rehearing was denied. *Id.* at 90a.

The State Department has expressed no further views to the district court since the dismissal of Exxon's appeal.

REASONS FOR DENYING THE WRIT

The only question presented in the petition is whether the district court's October 2005 order denying Exxon's motion to dismiss respondents' tort claims on political question grounds is immediately appealable under the collateral order doctrine. For the reasons that follow, that question does not merit review.

I. There Is No Circuit Split.

Exxon contends that this Court should grant review to expand the collateral order doctrine to allow a private U.S. corporation to take an immediate appeal from a district court order that, in response to Statements of Interest by the Executive Branch, grants in part and denies in part the corporation's motion to dismiss the plaintiffs' claims on political question grounds. Pet. i, 26. There is no split in the Circuits on this appellate jurisdiction question, and indeed, as the court of appeals noted, not a single case supports Exxon's position. *See* Pet. App. 14a.

In the one other case to raise a similar appellate jurisdiction question, the Fourth Circuit found that it had no appellate jurisdiction. In *Eckert International, Inc. v. Government of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77 (4th Cir. 1994), the Government of Fiji moved to dismiss a breach of contract action in federal court on the basis of sovereign immunity, the act of state doctrine, and the political question doctrine. *Id.* at 78-79. The district court denied the motion, and Fiji appealed. The Fourth Circuit reviewed only Fiji's assertion that the district court erred in denying it sovereign immunity because denials of sovereign immunity are immediately appealable collateral orders. It refused to reach the other issues raised by Fiji. *Id.* at 79.

Exxon asserts that the D.C. Circuit's decision here conflicts with the Second Circuit's decision in *767 Third Avenue Associates v. Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000). Pet. 16-17. The D.C. Circuit below correctly rejected the analogy. Pet. App. 14a-15a. In *767 Third Avenue*, the Second Circuit held that an "abstention-based stay order" was a "final decision" under 28 U.S.C. § 1291 and thus immediately appealable. *See* 218 F.3d at 159; *see* Pet. App. 15a.

Exxon claims that the Second Circuit accepted an immediate appeal for two "independent" reasons, one of which was that the lower court's ruling under the political question doctrine was immediately appealable, Pet. 17, but its reading of the opinion in *767 Third Avenue* is incorrect. As the D.C. Circuit observed, the Second Circuit's decision mentions the political question doctrine, but only to note that the district court's stay order was based upon political question concerns. Pet. App. 15a (citing *767 Third Avenue,* 218 F.3d at 159). The Second Circuit held that the stay order in *767 Third Avenue* was immediately appealable because it "put the litigants effectively out of court" and thus fell under the rule of *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996). That procedural posture is not present here. The Second Circuit's decision does not address, much less support, Exxon's contention that the denial of a motion to dismiss on political question grounds is appealable under the collateral order doctrine.

II. Dismissal of Exxon's Appeal for Lack of Appellate Jurisdiction Was Required by This Court's Precedents.

A review of this Court's precedents applying the collateral order doctrine—which are not discussed in the petition—reveals that the district court's October 14, 2005 decision is not a collateral order.

A. Exxon urges this Court to expand the collateral order doctrine to encompass orders in which a district court had failed 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." Pet. 26; *see also id.* at i. But this Court "has been asked many times to expand the 'small class' of collaterally appealable orders," and it has "instead kept it narrow and selective in its membership." *Will v. Hallock*, 546 U.S. 345, 350 (2006); *Digital Equip. Corp. v. Desktop Direct,*

Inc., 511 U.S. 863, 868 (1994) (describing the conditions for collateral order appeal as "stringent"). Apart from the Court's reluctance to expand the doctrine, allowing an immediate appeal here would run afoul of at least three precepts established in the Court's cases.

1. First, this Court has consistently warned that the issue of appealability under § 1291 "is to be determined for the *entire category* to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a 'particular injustic[e]' averted by a prompt appellate court decision." *Digital Equip.*, 511 U.S. at 868 (citation omitted) (emphasis added); *see also Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988); Pet. App. 9a. Thus, "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll v. United States*, 354 U.S. 394, 405 (1957); *accord United States v. MacDonald*, 435 U.S. 850, 857 (1978); *see also Richardson-Merrell v. Koller*, 472 U.S. 424, 439 (1985) (Court has rejected efforts to reduce finality requirement "to a case-by-case determination of whether a particular ruling should be subject to appeal").

Exxon's articulation of the purported "category" that it would add to this Court's small list of immediately appealable collateral orders shows that appealability would not, if Exxon were to prevail, be decided on a categorical basis. Exxon's new "category" is conditional and qualified. A district court order denying a motion to dismiss on political question grounds would become immediately appealable if the Executive has provided a statement of interest and if that statement warns "that the litigation may adversely affect significant U.S. foreign policy interests." Pet. 26; *see also id.* at i.

How clear and strong must the warning be to trigger immediate appealability rights? Here, respondents, the district court, and the court of appeals all disagreed with Exxon that the State Department had expressed the view that the litigation was

such an affront to U.S. foreign policy interests that the case should be dismissed in its entirety. As the court of appeals explained: "We interpret the State Department's letter not as an unqualified opinion that this suit must be dismissed, but rather as a word of caution to the district court alerting it to the State Department's concerns." Pet. App. 17a. Judge Oberdorfer interpreted the State Department's statements of interest in the same way and, to that end, dismissed those claims that he found potentially would have required adjudication of actions taken by the Indonesian government, *id.* at 55a-61a, and strictly managed discovery to focus on "the acts or omissions in the United States by the U.S. Exxon defendants," *id.* at 84a, and to permit no intrusion into Indonesian sovereignty.

If Exxon's proposed category of orders became immediately appealable, appellate courts would have to wrestle in every case with the question whether the Executive had with sufficient clarity warned that the litigation itself—no matter *how* it was conducted—would interfere with U.S. interests and should be dismissed. There would likely be an appeal in every case to decide appealability, undermining the efficiency interest in keeping the collateral order doctrine both narrow and genuinely categorical. *Cf. Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2418 (2007) ("Lengthy appellate disputes about whether an arguable jurisdictional ground invoked by the district court was properly such would frustrate the purpose of § 1447(d) quite as much as determining whether the factfinding underlying that invocation was correct.").

2. Second, as the court of appeals held, Exxon has failed to satisfy the third requirement of the collateral order doctrine—that the order involve a "claim of right," the denial of which would be "effectively unreviewable on appeal from final judgment." Pet. App. 8a, 10a (citations omitted). This Court has emphasized that in assessing whether an order is effectively unreviewable on appeal, "[t]he critical question" is

"whether 'the essence' of the claimed right is a right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524; *accord Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 500 (1989); *see also* Pet. App. 10a; *Will*, 546 U.S. at 350-52 (collaterally appealing party must be vindicating "a right to avoid trial," although even a right to avoid trial is not necessarily sufficient); *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (absolute and qualified immunity share the "essential attribute" that the claim is "an entitlement not to stand trial under certain circumstances"). The court of appeals correctly found here that "Exxon has not established that the political question doctrine confers a 'right not to stand trial' that can justify an immediate appeal." Pet. App. 12a.[5]

As this Court has emphasized, "[t]here is a 'crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.'" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989) (citation omitted). The political question doctrine cannot be characterized, at its core, as conferring a right not to stand trial. Exxon's political question doctrine defense is not premised on the notion that it is immune from suit altogether, but rather that respondents' claims against it are not justiciable in a U.S. court. In *Van Cauwenberghe*, the Court disallowed an immediate appeal from an order denying a motion to dismiss urged on the

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[5] Because sovereign immunity likewise "is an immunity from trial and the attendant burdens of litigation," *Rush-Presbyterian-St. Luke's Med. Center v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir. 1989), the courts of appeals, including the D.C. Circuit, agree that interlocutory orders denying sovereign immunity in litigation under the Foreign Sovereign Immunities Act are immediately appealable. *See, e.g.*, *id.*; *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1281-82 (3d Cir. 1993); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990). Exxon's attempted analogy to FSIA appeals as supporting an interlocutory appeal here is therefore inapt. *See* Pet. 15-16.

ground that an extradited person is immune from civil process. The Court believed that even if the petitioner were shielded from service of process while detained in the United States following extradition, "the right not to be burdened with a civil trial itself is not an essential aspect of this protection." 486 U.S. at 525. Likewise, in *Lauro Lines*, this Court rejected a collateral-order appeal because, in invoking a contractual forum selection clause as justification for an immediate appeal from the denial of a motion to dismiss, the defendant there was not entitled "to avoid suit altogether." 490 U.S. at 501. As the Court clarified, "an entitlement to avoid suit is different in kind from an entitlement to be sued only in a particular forum." *Id.*

The conditional nature of the appellate rights Exxon invokes underscores that Exxon does not seek to vindicate a right to avoid trial. According to Exxon's conception of appealability, its right to avoid litigation did not exist at the time the complaint was filed against it, but sprang into being only when the United States filed its Statement of Interest expressing concern about the litigation. This Court held that an order was not immediately appealable, however, when the defendants' alleged right to avoid litigation was similarly dependent on the occurrence of later events. *See Will*, 546 U.S. at 354 (contrasting an immediately appealable qualified immunity claim, which is timely from the moment an official is served with a complaint, with the not-immediately appealable judgment bar at issue in *Will*, which could be raised only after a case under the Federal Tort Claims Act had been resolved in the government's favor).

More fundamentally, even if some rights other than the right to avoid trial may be vindicated in an immediate appeal, Exxon's "claim" about potential harm to U.S. foreign relations is not a "claim of right" belonging to *Exxon*. *See Will*, 546 U.S. at 349 (the collateral order doctrine allows immediate appeals of rulings resolving "*claims of right* separable from, and collateral to, rights asserted in the action") (emphasis added)

(quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)); *see also* Pet. 14 (recognizing that "*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") (emphasis added) (quoting Pet. App. 10a (quoting *Midland Asphalt*, 489 U.S. at 798)). If any "right" is implicated here, it belongs to the United States, not to Exxon. But both the district court and the court of appeals disagreed with Exxon that the State Department had expressed the view that the litigation was such an affront to U.S. foreign policy interests that the case should be dismissed in its entirety, the United States did not intervene and move to dismiss the case as nonjusticiable, the United States did not seek to take an appeal to protect any asserted "right" to prevent the case from proceeding, and the State Department has expressed no further views to the district court since the dismissal of Exxon's appeal, even when invited to do so.

In short, even if the district court erred in proceeding with this case (and we believe that it did not), the court's error—which would not infringe a right of Exxon to avoid trial or, indeed, any right of Exxon at all—can be addressed at the conclusion of the case. To ground a ruling here on whether the particular Statements of Interest submitted by the State Department "confer[] the prized 'right not to stand trial' . . . would flout [the Court's] own frequent admonitions that availability of collateral order appeal must be determined at a higher level of generality." *Digital Equip.*, 511 U.S. at 876-77 (citation omitted).

3. Finally, although the court of appeals held that the first two requirements of the collateral order doctrine were satisfied here, Pet. App. 9a-10a, the court was mistaken in ruling that the political question issue is completely separate from the merits of respondents' claims against Exxon. *Id.* at 10a.

As this Court has said, the political question doctrine "is one of 'political questions,' not one of 'political cases.'" *Baker v. Carr*, 369 U.S. 186, 217 (1962). Deciding whether a matter has been committed by the Constitution to another branch of government requires "case-by-case inquiry," *id.* at 210-11, and a "discriminating inquiry into the precise facts and posture of the particular case." *Id.* at 217. And even though the district court did not need to decide the truth or falsity of respondents' claims against Exxon, the court, in assessing which, if any, of the claims were justiciable, had to analyze the "precise facts and posture" of the case—that is, review the allegations and likely proof—to determine which claims implicated the concerns the State Department had raised and potentially intruded into Indonesian internal affairs. *See* Pet. App. 52a-63a. Thus, its order was not "completely separate from the merits of the action." *Coopers & Lybrand*, 437 U.S. at 468.[6]

Similarly, in *Van Cauwenberghe*, the Court held that a denial of a motion to dismiss on forum non conveniens grounds was not completely separate from the merits, 486 U.S. at 527-29, even though that issue could be decided without assessing the "correctness" of the plaintiff's version of the facts. There, factors relevant to a forum non conveniens determination—such as the relative ease of access to sources of proof, availability of witnesses, and local interest—required the court to "scrutinize the substance of the dispute between the parties" and to consider issues "enmeshed in the merits of the

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[6] Other circuits evaluating similar political question arguments have emphasized the case-by-case, merits-driven nature of the inquiry. *See, e.g.*, *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 377-78 (3d Cir. 2006) (political question doctrine requires "discriminating inquiry into the precise facts and posture of the particular case") (citation omitted); *Alperin v. Vatican Bank*, 410 F.3d 532, 547 (9th Cir. 2005) ("It is incumbent upon us to examine each of the claims with particularity."), *cert. denied*, 546 U.S. 1137 (2006); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (relevant considerations must be evaluated "on a case-by-case basis").

dispute." *Id.* at 528. Evaluating factors relevant to a political question determination (*e.g.*, "respect due coordinate branches of government" or the potential for "embarrassment from multifarious pronouncements by various departments," *Baker*, 369 U.S. at 217), likewise would "require significant inquiry into the facts and legal issues presented by [the] case." *Van Cauwenberghe*, 486 U.S. at 529. Even if in some particular instance, the political question determination would not require such an inquiry, this Court, again, decides appealability based on "categories of cases." *Id.* "[I]n the main," the issues that will arise in political question cases where the Executive has submitted a statement of interest "will substantially overlap factual and legal issues of the underlying dispute." *Id.*

B. Exxon obliquely criticizes the panel majority's analysis regarding the availability of mandamus relief, contending that it "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." Pet. 18; *see also id.* at 12. The petition presents no question, however, regarding whether the court of appeals' denial of Exxon's alternative petition for mandamus relief was correct. *Id.* at i; *see* Supreme Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").[7]

Exxon's contention that the court of appeals issued an "anomalous ruling" that an Executive statement of interest "must explicitly request dismissal to warrant deference," Pet.

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[7] Likewise, this case presents no question under the foreign affairs preemption doctrine. *See* Pet. 22 n.8. Exxon did not assert this ground for dismissal in its first motion to dismiss, which led to the district court's October 14, 2005 order, and the court did not address the issue in that order. The denial of a motion to dismiss on preemption grounds, in any case, would not constitute an immediately appealable collateral order.

17, misstates the D.C. Circuit's decision. The court of appeals did not require that the State Department request dismissal in order for its views to warrant deference. To the contrary, the court cited *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), which suggests that "federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." Pet. App. 18a. The panel majority emphasized, however, that it need not decide what level of deference would be owed to a letter that unambiguously requested the district court to dismiss a case as nonjusticiable because, given the letter in the record, "*no matter what level of deference is owed to the State Department's letter*," the district court did not indisputably err in dismissing some, but not all, of respondents' claims. *Id.* (emphasis added). Thus, Exxon's quarrel is not with the level of deference paid by the district court, but with the outcome of that deference—a fact-bound determination within the discretion of the district court.

This case is simply in the wrong procedural posture for this Court to consider the level of deference that a federal court must accord the Executive's statements of interest. Instead of deciding the level of deference a federal court owes a statement of interest from the Executive, the court of appeals held only that Exxon did not meet the standard for obtaining a writ of mandamus—a "drastic" remedy "to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Ct. for the N. Dist. of Calif.*, 426 U.S. 394, 402 (1976); *see* Pet. App. 16a (explaining that mandamus was available only if petitioners' right to relief is "clear and indisputable") (quoting *Mallard v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989)). The absence of any case law from other circuits holding that in like circumstances "the complaint *must* be dismissed under the political question doctrine," *id.* at 19a, buttressed the majority's conclusion that Exxon had failed to establish a "clear and indisputable right" to have respondents' claims dismissed as nonjusticiable. *Id.*; *see also id.* at 22a.

Furthermore, Exxon's argument that the limits on availability of mandamus are a reason to be more liberal in allowing collateral order appeals gets it exactly backward: Mandamus is available only in exceptional circumstances precisely so that it does not undermine the strict limits on collateral order appeals. *See Kerr*, 426 U.S. at 403 ("A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered" by Congress's judgment that appellate review generally be postponed until after final judgment).

The inapplicability of the collateral order doctrine does not mean, of course, that defendants are without appellate recourse in exceptional cases. Exxon has overlooked another important potential avenue for appellate review, a request for certification of an immediate appeal under 28 U.S.C. § 1292(b). *See, e.g.*, *Beaty v. Republic of Iraq*, No. 03-0215, 2007 WL 1169333 (D.D.C. Apr. 19, 2007) (certifying for appeal under § 1292(b) its earlier order denying a motion to dismiss that was based in part on political question grounds). In many cases in which this Court has found an appeal not to satisfy the rigorous standards of the collateral order doctrine, it has emphasized that a party may seek certification under § 1292(b). *See Digital Equip.*, 511 U.S. at 883 (§ 1292(b) serves as "safety valve" for cases not appealable under § 1291); *see also Van Cauwenberghe*, 486 U.S. at 529-30; *Richardson-Merrell*, 472 U.S. at 435; *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 n.13 (1981). Exxon did not seek certification of an immediate appeal under § 1292(b) from the district court.

C. Exxon concludes by arguing that "[t]he volume and importance of these [kind of] cases," 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." Pet. 26. In the same breath, however, Exxon negates any need for such a broad expansion of the collateral order, asserting that "it is rare, if ever, that a district court has failed to dismiss a case under such circumstances." *Id.* Thus, not only would allowing Exxon to take an immediate appeal from the district court's interlocutory order violate basic appealability principles, but such an expansion of the collateral order doctrine is, by Exxon's own admission, rarely necessary to protect the U.S. foreign policy interests that Exxon—and not the United States—urged upon the court of appeals.

* * *

Exxon has filed two motions to dismiss, an interlocutory appeal, multiple requests for a stay, and repeated motions for reconsideration from various orders. A recent Exxon motion provoked a stern warning from the district court on July 13, 2007 that "all non-dispositive motions hereinafter filed by either party shall be accompanied by a certificate signed by each counsel . . . that he or she has re-read Federal Rule of Civil Procedure 11 within 10 days before the filing." R. 220 at 6. This case has become a crowning illustration of a point this Court has often made: The conditions for an immediate appeal are "stringent, and unless they are kept so," *Will*, 546 U.S. at 349-50 (citations omitted), the collateral order doctrine will no longer advance § 1291's goals of "judicial efficiency," and "the 'sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise.'" *Id.* (internal quotation marks and citation omitted).

CONCLUSION

The petition should be denied.

Respectfully submitted,

MICHAEL D. HAUSFELD
AGNIESZKA M. FRYSZMAN*
BRENT W. LANDAU
COHEN, MILSTEIN, HAUSFELD &
TOLL, P.L.L.C.
1100 New York Avenue, NW
West Tower - Suite 500
Washington, DC 20005
(202) 408-4600

* *Counsel of Record*

TERRENCE P. COLLINGSWORTH
INTERNATIONAL RIGHTS ADVOCATES
218 D Street, SE, 3rd Floor
Washington, DC 20003
(202) 470-2515

BONNIE I. ROBIN-VERGEER
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Respondents

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