No. 19-789

IN THE
Supreme Court of the United States

MAGHREB PETROLEUM EXPLORATION, S.A. AND MIDEAST FUND FOR MOROCCO, LIMITED,
Petitioners,

v.

JOHN PAUL DEJORIA,
Respondent.

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

BRIEF IN OPPOSITION

CRAIG T. ENOCH
GARY E. ZAUSMER
MELISSA A. LORBER
SHELBY O'BRIEN
ENOCH KEVER PLLC
5918 Courtyard Drive
Suite 500
Austin, Texas 78730
(512) 615-1200

AARON M. STREETT
Counsel of Record
J. MARK LITTLE
TRAVIS L. GRAY
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
(713) 229-1234
aaron.streett@bakerbotts.com

Counsel for Respondent John Paul DeJoria

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

1. Whether the court of appeals erred by (a) rejecting petitioners' Texas constitutional challenge to the Texas judgment-recognition statute and (b) failing to invalidate that statute under the U.S. Constitution—a ground never urged by petitioners below.

2. Whether the court of appeals erred by applying clear-error review to the district court's factual findings.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 2

I. Background 2

II. Proceedings Below 4

A. The 2013 district court proceedings 4

B. The 2015 appeal to the Fifth Circuit in *DeJoria I* 5

C. The proceedings on remand and the Texas Legislature's enactment of the updated Texas Recognition Act 6

D. The 2019 appeal to the Fifth Circuit in *DeJoria II* 7

REASONS FOR DENYING THE PETITION 10

I. Petitioners Do Not Assert, Much Less Demonstrate, A Circuit Split 10

II. Petitioners' Retroactivity Issue Does Not Warrant Review 11

A. Petitioners failed to raise their baseless federal retroactivity argument below 11

B. Petitioners' only preserved retroactivity argument presents a pure question of state law that was correctly decided by the court below 15

III. Petitioners' Complaint About The Standard Of Review Does Not Affect The Outcome Of The Case And Alleges Only A Split Within The Fifth Circuit 18

IV. The International Context Of This Case Does Not Justify Exercising This Court's Supervisory Authority 21

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Bank Markazi v. *Peterson*,
136 S. Ct. 1310 (2016) 12

Bowen v. *Georgetown Univ. Hosp.*,
488 U.S. 204 (1988) 14

Collins v. *Youngblood*,
497 U.S. 37 (1990) 13

Ex parte Abell,
613 S.W.2d 255 (Tex. 1981) 18

Gasperini v. *Ctr. for Humanities, Inc.*,
518 U.S. 415 (1996) 20

Goodner v. *Hyundai Motor Co., Ltd.*,
650 F.3d 1034 (5th Cir. 2011) 20

In re I.I.G.T.,
412 S.W.3d 803 (Tex. App.—Dallas 2013, no pet.) 20

INS v. *St. Cyr*,
533 U.S. 289 (2001) 14

Lambrix v. *Singletary*,
520 U.S. 518 (1997) 15

Landgraf v. *USI Film Prods.*,
511 U.S. 244 (1994) 14

TABLE OF AUTHORITIES—Continued

Page

Mariles v. *Hector*,
No. 05-16-00814-CV, 2018 WL 3723104 (Tex. App.—Dallas Aug. 6, 2018, pet. denied).....9, 20, 21

Nixon v. *Adm'r of Gen. Servs.*,
433 U.S. 425 (1977) 13

Pension Ben. Guar. Corp. v. *R.A. Gray & Co.*,
467 U.S. 717 (1984) 12

Robinson v. *Crown Cork & Seal Co.*,
335 S.W.3d 126 (Tex. 2010).....12, 15

Sweezy v. *N.H. by Wyman*,
354 U.S. 234 (1957) 14

United States v. *Ortiz*,
422 U.S. 891 (1975) 12

CONSTITUTIONAL PROVISIONS

Tex. Const. art. I, § 16.....8, 15, 16, 18

U.S. Const. art. I, § 10.....11, 12, 13, 14, 18

U.S. Const. amend. XIV 6, 8, 13, 17

STATUTES AND RULES

S. Ct. Rule 10(a)..... 11

Texas Acts 2017, 85th Leg., ch. 390 (S.B. 944),
eff. June 1, 2017. .....4, 6

TABLE OF AUTHORITIES—Continued

Page

Tex. Civ. Prac. & Rem. Code §§ 36.001-008 (2016).....4, 5

Tex. Civ. Prac. & Rem. Code §§ 36A.001-011.....*passim*

MISCELLANEOUS

Bill Analysis, Texas Acts 2017, 85th Leg., S.B. 944, R.S. 85 (March 21, 2017) 17

National Conference of Commissioners of Uniform State Law, Uniform Foreign Money-Judgments Recognition Act of 1962..... 4

National Conference of Commissioners of Uniform State Law, Uniform Foreign-Country Money Judgments Recognition Act of 2005.....6, 8, 16

Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 Berkeley J. Int'l L. 150 (2013)..... 22

IN THE

Supreme Court of the United States

MAGHREB PETROLEUM EXPLORATION, S.A. AND MIDEAST FUND FOR MOROCCO, LIMITED,
Petitioners,

v.

JOHN PAUL DEJORIA,
Respondent.

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

---

BRIEF IN OPPOSITION

INTRODUCTION

This case is unsuitable for this Court's review. Petitioners do not allege a circuit split or even cite a single case from another circuit or state. Nor do they properly raise any significant issue of federal law. Petitioners below based their retroactivity argument entirely on the Texas Constitution, and their belatedly raised federal retroactivity argument is factbound and meritless. Petitioners' argument that state law controls the federal appellate standard of review in this judgment-recognition case is immaterial because the court of appeals held that both federal and Texas law mandate deferential review of a district court's factual findings. At bottom, therefore,

the petition implicates primarily issues of Texas law—whether the updated Texas Uniform Foreign-Country Money Judgments Recognition Act ("Texas Recognition Act") violates the Texas Constitution and whether Texas law mandates a *de novo* standard of review for a district court's factual findings in the judgment-recognition context. The answer to both of those questions is no for the reasons cogently described in the opinion below. More fundamentally, however, this Court should not grant certiorari in a case that presents at best splitless, meritless, and non-recurring issues, and at worst, only matters of state law. The Court should deny review.

STATEMENT

Petitioners present a vastly different version of the facts than those found by the district court and chronicled in the court of appeals' opinion below. Respondent will base its statement on those sources.

I. BACKGROUND

Respondent John Paul DeJoria, a successful Texas entrepreneur and philanthropist, and his business partner, Michael Gustin, pursued a new investment opportunity involving oil production in Morocco. Pet. App. 2a-3a. DeJoria invested in Skidmore Energy, Inc., which in turn formed a Moroccan company, Lone Star Energy Corporation, which is now known as Maghreb Petroleum Exploration, S.A., one of the petitioners here. *Ibid.*

Lone Star entered into an "Investment Agreement" with the Kingdom of Morocco to drill three exploration wells. *Id.* at 33a. King Mohammed VI promised to recruit investors. *Ibid.* Because Moroccan companies must have a "local" shareholder, Lone Star's investors included an entity owned by Prince Moulay Abdallah Alaoui, the first cousin of the King. *Id.* at 2a. That entity, which invested $13.5 million, was Armadillo Holdings—now known as petitioner Mideast Fund for Morocco, Limited.

Id. at 120a-121a.

The exploratory wells discovered seemingly large oil reserves. *Id.* at 2a-3a. The King and the Moroccan energy minister announced, with DeJoria present, the discovery on national television, claiming the discovery would provide "copious and high-quality oil" to secure Morocco's energy independence for 30 years. *Id.* at 3a. Morocco's stock market soared. *Ibid.*

After further exploration, however, the discovery appeared less productive than projected, and drilling was halted. *Ibid.* This revelation damaged the King's credibility, and he dismissed the Kingdom's energy minister. *Id.* at 34a; C.A. Rec. 1525-1526. Moroccan media began blaming Skidmore, DeJoria, and Gustin, reporting that "the king had egg on his face." C.A. Rec. 1510, 1558-1563, 2899-2900. One newspaper that questioned the King's version of events was unceremoniously shut down. Pet. App. 66a, 79a. After receiving a death threat, DeJoria and Gustin fled Morocco and never returned. *Id.* at 3a. In their absence, Lone Star's board ousted them. *Ibid.*

Petitioners' new management, in Moroccan commercial court, sued DeJoria, Gustin, Skidmore, and others for mismanagement and fraud. *Ibid.* Mohamed Naciri, an attorney "with close relations to the King," represented petitioners. C.A. Rec. 551. DeJoria and Gustin briefly engaged an attorney to represent Skidmore, but he quickly withdrew after petitioners sent his law partner confidential information, creating a conflict of interest. Pet. App. 75a-76a. DeJoria's other efforts to secure counsel—both Moroccan and foreign—were consistently rebuffed. *Id.* at 73a-79a. One attorney explained that it would be "unsafe and unwise for any lawyer/barrister from any country to go there and plead against his Highness Prince Moulay Abdallah Alaoui and his partners to

argue that anyone descending from the Prophet Mohammed did not keep his word." *Id.* at 75a. As a result, the Moroccan litigation proceeded against an absent and unrepresented DeJoria. *Id.* at 8a.

Despite petitioners' advantages, the Moroccan court had to cycle through four "independent" experts—handpicked and debriefed by petitioners—before landing on one who would "conclude that there were damages incurred." *Id.* at 80a-81a; see *id.* at 19a. At the conclusion of this one-sided proceeding, the Moroccan court rendered judgment against DeJoria and Gustin for 969,832,062.22 Moroccan dirhams, which was then equivalent to nearly $123 million. *Id.* at 3a & n.1.

II. PROCEEDINGS BELOW

A. The 2013 district court proceedings

In 2013, DeJoria filed a motion for non-recognition in Texas state court under the then-existing version of the Texas Recognition Act, which was based on the 1962 Uniform Foreign Money-Judgments Recognition Act. *Id.* at 5a; see Tex. Civ. Prac. & Rem. Code §§ 36.001-008 (2016), repealed by Acts 2017, 85th Leg., ch. 390 (S.B. 944), § 2, eff. June 1, 2017. Petitioners removed the case to federal court and counterclaimed for recognition of the Moroccan judgment. Pet. App. 5a n.5.

DeJoria asserted numerous statutory bases that prevent recognition. The district court granted him relief on the ground that forecloses recognition if "the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." Tex. Civ. Prac. & Rem. § 36.005(a)(1); Pet. App. 6a.

The district court made subsidiary factual findings that led to its ultimate legal conclusion. It found that "the evidence plainly shows that members of the royal family had a political and economic interest in the out-

come of the underlying case." Pet. App. 56a, 140a-141a. The district court further found that "[DeJoria] could not have expected to obtain a fair hearing in Morocco" because he was adverse to the royal family's interests in a politically sensitive case; indeed, "[a]bsent an act of tremendous bravery by the judge, there is no conceivable set of facts or circumstances in which DeJoria could have prevailed in the underlying case." *Id.* at 56a, 142a. Those factual findings supported the district court's conclusion that "[s]uch a proceeding is not, was not, and can never be 'fundamentally fair.'" *Id.* at 142a.

B. The 2015 appeal to the Fifth Circuit in *DeJoria I*

The Fifth Circuit reversed on legal grounds, holding essentially that the district court had answered the wrong question. *Id.* at 90a-116a. Under the Fifth Circuit's interpretation of the Texas Recognition Act, the district court's findings and conclusions that Morocco denied DeJoria due process in *this case* were irrelevant. Instead, the Fifth Circuit explained, the Act's due-process ground for non-recognition required that "the *entire system* [be] fundamentally unfair and incompatible with due process," such that "*any judgment* rendered by a Moroccan court is to be disregarded as a matter of course." *Id.* at 102a, 105a (emphases added); see also *id.* at 98a ("The court's inquiry under Section 36.005(a)(1) focuses on the fairness of the foreign judicial system as a whole, and we do not parse the particular judgment challenged."). The court of appeals concluded that the Moroccan system, considered as a whole, comported with basic due process. *Id.* at 98a-105a. The Fifth Circuit thus reversed and remanded for further proceedings without resolving two of DeJoria's alternative grounds for non-recognition that the district court had not reached below. *Id.* at 105a & n.12.

C. The proceedings on remand and the Texas Legislature's enactment of the updated Texas Recognition Act

On remand, the district court rejected petitioners' contention that DeJoria had waived his remaining grounds for non-recognition by failing to raise them as alternative grounds for affirmance on appeal. *Id.* at 6a-7a & n.6. The district court also allowed DeJoria to amend his pleadings to add a defense to recognition under the U.S. Constitution's Due Process Clause. C.A. Rec. 4193; see Pet. App. 38a. Petitioners did not appeal these rulings.

Before the district court could rule on the remaining grounds for non-recognition, the Texas Legislature unanimously amended the Texas Recognition Act. The new version updated the statute to conform to the 2005 version of the Uniform Foreign Money-Judgments Recognition Act that had been adopted by twenty-three other states. Among numerous changes, the updated Texas Recognition Act added a ground for non-recognition based on a case-specific inquiry into whether "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law." Tex. Civ. Prac. & Rem. Code § 36A.004(c)(8). The legislature made the updated Texas Recognition Act applicable to pending cases. See Acts 2017, 85th Leg., ch. 390 (S.B. 944), § 3, eff. June 1, 2017.

After further briefing, the district court denied recognition of the Moroccan judgment under the updated Act's specific-proceeding due-process ground. Pet. App. 31a-86a. The district court first determined that *DeJoria I* did not prohibit it from relying on its previous case-specific findings of due-process violations. While the Fifth Circuit's interpretation of the old Act had rendered these case-specific findings legally immaterial, they were now plainly relevant under the updated Act's specific-

proceeding framework. *Id.* at 58a, 62a-65a. The district court thus readopted those findings. *Id.* at 65a.

Reviewing an extensive record—including witness affidavits, expert reports, and documentary evidence, see *id.* at 50a-53a—the court made three sets of "additional findings" that supported its conclusion that due process was violated. In summary:

- Due to the death threat against him, DeJoria was "unable to personally appear to defend himself and offer testimony to rebut the claims made against him in the Moroccan lawsuit." *Id.* at 73a.
- "DeJoria was in fact unable to retain counsel to represent him, and again, this was due to the fact that he was a defendant in a case of great political interest to the King of Morocco, and his interests were adverse to the King's." *Id.* at 74a.
- The Moroccan court's dismissal of four different experts before finding one who would recommend substantial damages indicated that the Moroccan court "was determined to award damages against DeJoria, even when the very experts the court retained advised otherwise." *Id.* at 80a.

Based on these findings, the district court held that "the specific proceedings in the Moroccan court leading to the judgment against DeJoria were not compatible with due process" and granted DeJoria's motion for non-recognition under the updated Texas Recognition Act's case-specific due-process ground. *Id.* at 82a-83a. The district court also rejected petitioners' argument that applying the updated Act to pending cases violated the Texas Constitution. *Id.* at 42a-48a.

D. The 2019 appeal to the Fifth Circuit in *DeJoria II*

The Fifth Circuit affirmed. *Id.* at 1a-27a.

1. The court first held that the updated Texas Recognition Act's application to pending cases did not violate the Texas Constitution's prohibition on retroactive laws. *Id.* at 9a-12a (citing Tex. Const. art. I, § 16). Reviewing Texas Supreme Court decisions interpreting the Texas Constitution, the court balanced the State's interest in enforcing the law against the nature and extent of the prior right impaired by the statute. *Id.* at 10a.

The court of appeals reasoned that the State had a strong interest in protecting its citizens from foreign judgments obtained in violation of fundamental due-process protections. "[I]t cannot be said that a state's desire to provide immediate protection to the due process rights of its citizens is not compelling." *Id.* at 12a. Indeed, "the absurdity of lending a court's power to the vindication of fundamentally unfair proceedings is why the 2005 Uniform Act recognizes an absence of due process as one of the rare situations when an American court may not recognize a foreign judgment." *Id.* at 11a.

Petitioners had no legitimate claim to any right to enforce the Moroccan judgment. It was not "certain that the law as it stood before the adoption of the updated act would have led to recognition of the Moroccan judgment," given that DeJoria retained a Due Process Clause challenge and additional unresolved statutory defenses under the old Act. *Id.* at 10a.

More crucially, "the only right that has been impinged is the right to automatic recognition of a judgment obtained in proceedings that denied the judgment debtor fundamental fairness." *Id.* at 11a. "To state that 'right' is to show why we cannot recognize it, let alone allow its protection to sink a state statute." *Ibid.* The Fifth Circuit further observed that the updated Texas Recognition Act "does not abrogate [petitioner's] claim" or "strip [petitioner] of the ability to seek recognition of the Moroc-

can judgment." *Id.* at 11a. Instead, "[i]t just gives a district court the ability to deny recognition if it finds the judgment was obtained in proceedings that were incompatible with the requirements of due process." *Ibid.*

In the end, the Fifth Circuit held that this was not "a close call" under Texas law. *Id.* at 9a n.9. "When balanced against the slight imposition on a right of dubious provenance, retroactive application of the updated [Texas] Recognition Act does not violate the Texas Constitution." *Id.* at 12a.

2. The court of appeals next affirmed the district court's conclusion that the Moroccan proceedings violated due process under the updated Act. Petitioners did not dispute that the district court's factual findings, if accepted, met the requirements for non-recognition under the updated Texas Recognition Act's specific-proceeding due-process ground. *Id.* at 26a ("Maghreb does not dispute the nonrecognition conclusion if we uphold the findings that DeJoria could neither appear personally nor find a lawyer to appear for him."). They challenged only the validity of those findings and the governing standard of review.

While the court of appeals held that "the standard of review is a federal issue," it also "look[ed] to Texas law governing recognition to see if anything counsels in a different direction." *Id.* at 16a. Texas and federal law provided identical answers. See *id.* at 15a ("[I]t is a venerable principle [of federal law] that a district court's factual findings are reversed only if clearly erroneous."); *id.* at 17a ("When a trial court is presented with conflicting evidence in recognition proceedings, Texas courts 'defer to the trial court's * * * resolution of those conflicts.'") (quoting *Mariles* v. *Hector*, No. 05-16-00814-CV, 2018 WL 3723104, at *6 (Tex. App.—Dallas Aug. 6, 2018, pet. denied))). The Fifth Circuit thus declined petitioners'

invitation to apply a *de novo* standard of review to the district court's factual findings. *Id.* at 18a.

Reviewing the record, the Fifth Circuit concluded that "the district court did not clearly err in its factfinding" and thus "properly determined that DeJoria was denied due process in Morocco." *Id.* at 26a-27a. The court of appeals deemed it noteworthy that "the three trial judges who handled aspects of this case all generally found DeJoria's evidence about what happened in Morocco more persuasive than Maghreb's." *Id.* at 23a n.16.

3. In addition to those core holdings, the Fifth Circuit held that *DeJoria I* "did not preclude the findings the district court made on remand" because the enactment of the updated Texas Recognition Act meant that the district court was not "operating in the same legal landscape [and] nothing in the prior panel's opinion foreclose[d] the district court's findings." *Id.* at 24a-25a. The court of appeals accordingly affirmed the district court's judgment of non-recognition. *Id.* at 27a.

4. Petitioners sought rehearing *en banc*, arguing that the opinion created a direct conflict with the *DeJoria I* opinion. The Fifth Circuit denied the petition without calling for a response.

REASONS FOR DENYING THE PETITION

I. PETITIONERS DO NOT ASSERT, MUCH LESS DEMONSTRATE, A CIRCUIT SPLIT

Petitioners seek this Court's review without asserting, much less demonstrating, a disagreement among federal courts of appeals or with a state's highest court on an important issue of federal law. In fact, petitioners do not even cite a single case from another circuit or state. They instead present this case as a matter of pure error correction, seeking refuge in this Court's "supervisory power." Pet. 16, 28. As discussed below, the Fifth Circuit's opinion is sound in its reasoning and result. See

infra Parts II-III. The court of appeals' decision turns largely on state law and a review of a factual record, not on disputed questions of federal law or how to apply a decision of this Court. While it involves colorful and somewhat high-profile facts, nothing about the court of appeals' measured judgment "so far depart[s] from the accepted and usual course of judicial proceedings * * * as to call for an exercise of the Court's supervisory power." See this Court's Rule 10(a). The petition satisfies none of the Court's traditional criteria for certiorari and should be denied for that reason alone.

II. PETITIONERS' RETROACTIVITY ISSUE DOES NOT WARRANT REVIEW

Petitioners' retroactivity issue does not deserve plenary review because it presents no preserved federal issue. Although they now frame their first question presented as whether the updated Texas Recognition Act's application to pending cases "violates the anti-retroactivity provisions of the Federal and the Texas Constitutions," Pet. i, petitioners based their retroactivity argument below entirely on Texas law. Their filings are bereft of any mention of a federal retroactivity issue, and it is far too late for them to raise that point now. Nor do the merits justify the extraordinary step of overlooking that waiver. The Fifth Circuit correctly held that this case did not involve "a close call" on retroactivity under Texas law. Pet. App. 9a n.9. That result would be even clearer under federal constitutional principles. The Court should deny review of this naked request for error correction on an issue neither pressed nor addressed below.

A. Petitioners failed to raise their baseless federal retroactivity argument below

Petitioners spill much ink building a retroactivity argument under the federal Constitution. Pet. 15-25. But they never raised that argument below. Petitioners in-

stead argued that applying the updated Texas Recognition Act to pending cases "[v]iolates the *Texas Constitution*." Pet. App. 40a (emphasis added). The briefing below focused entirely on Texas law and revolved around the Texas Supreme Court's seminal retroactivity case, *Robinson* v. *Crown Cork & Seal Co.*, 335 S.W.3d 126 (Tex. 2010). The Fifth Circuit accordingly based its retroactivity holding exclusively on *Robinson* and the Texas Constitution. Pet. App. 9a-12a. The Court should "decline to consider [petitioners' federal claim], which was raised for the first time in the petition for certiorari." *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975).

Nor does the substance of petitioners' federal retroactivity argument compensate for its procedural shortcomings. The question presented is framed tightly around the facts of this case, Pet. i, rather than reflecting a significant, recurring issue on which lower courts need guidance. And, indeed, petitioners identify no other court that has addressed a similar federal retroactivity challenge to a state law, much less resolved it in their favor. Nothing commends this unpreserved issue for the Court's review.

What is more, the U.S. Constitution broadly allows retroactive provisions of the sort at issue here, absent some direct conflict with a specific constitutional provision. See *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1325 (2016) ("[W]e have affirmed [that] Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases."). A form of rational-basis review applies. See *Pension Ben. Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) ("Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legis-

lative and executive branches * * * ."). Petitioners make little attempt to engage in this analysis, preferring instead a scattershot citation of cases and constitutional provisions.

Before briefly examining the constitutional provisions that petitioners identify, it is instructive to recall precisely what the updated Texas Recognition Act does. As petitioners conceded below, it "'simply align[s] the statute with the Constitution's requirements' and 'aim[s] to incorporate this individualized due-process protection into the impartial-tribunal/due process ground.'" C.A. Rec. 4568. Petitioners never attempt to explain how a statute that merely incorporates into state law the Constitution's due-process protections for judgment debtors could possibly be unconstitutionally retroactive in any scenario, much less one where its "retroactive" application is limited to pending cases.

Beyond that fundamental disconnect in petitioners' argument, the various constitutional provisions petitioners cite are inapplicable on their face. The updated Texas Recognition Act plainly is not a bill of attainder. See *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977) (defining a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial"). It comports with the Contracts Clause because it does not invalidate any contracts. See Pet. 16. Nor could it possibly violate the Ex Post Facto Clause because that "applies only to *penal* statutes." *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990) (emphasis added); see Pet. 16. And it would defy all logic and reason to conclude that the updated Texas Recognition Act—which petitioners conceded below is coextensive with the Due Process Clause, C.A. Rec. 4568—somehow violated that very provision, which petitioners invoke only in passing.

Petitioners also lodge a novel "separation of powers" argument, arguing that the Texas Legislature somehow interfered with the powers of federal courts. See Pet. 17, 23. But the separation-of-powers doctrine regulates the balance of power among the three branches of the federal government. Cf. *Sweezy* v. *N.H. by Wyman*, 354 U.S. 234, 255 (1957) ("[T]his Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments."). Federal separation-of-powers doctrine is not a ground to invalidate state statutes. In any event, the court of appeals correctly explained that the updated Act did not prescribe the outcome in a pending lawsuit, Pet. App. 10a-11a, so petitioners would have no separation-of-powers claim even if those principles applied here.

Petitioners' statutory-interpretation cases—*INS* v. *St. Cyr*, 533 U.S. 289 (2001), and *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994)—are equally off-base. In those cases, the Court imposed a clear-statement rule regarding the retroactive effect of federal statutes. See *St. Cyr*, 533 U.S. at 315-316 (2001) ("[C]ongressional enactments * * * will not be construed to have retroactive effect unless their language requires this result." (quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988))); *Landgraf*, 511 U.S. at 280 ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."). But the Court did not condemn retroactive statutes as unconstitutional. To the contrary, the Court recognized that "[r]etroactivity provisions often serve entirely benign and legitimate purposes," including "to give comprehensive effect to a new law Congress considers salutary." *Landgraf*, 511 U.S. at 267-268. That was the situation here: The updated Texas Recognition Act's application to pending cases ensured that no one would be allowed to enforce a judgment that

was obtained without basic due process.

Petitioners' newfound federal retroactivity argument is both waived and meritless. It is a particularly poor candidate for this Court's review.

B. Petitioners' only preserved retroactivity argument presents a pure question of state law that was correctly decided by the court below

The retroactivity argument that petitioners presented below sounds entirely in state law. The Fifth Circuit found this to be a straightforward case under the Texas Constitution: "[W]e do not think application of the Supreme Court of Texas's many retroactivity precedents to this statute leaves us with a close call." Pet. App. 9a n.9. While this Court does not resolve pure issues of state law, *Lambrix* v. *Singletary*, 520 U.S. 518, 522-523 (1997), a brief examination of Texas law on this issue validates the Fifth Circuit's assessment. And because petitioners correctly admit that Texas law contains "even more arden[t]" protections against retroactivity than federal law, Pet. 16, the court of appeals' conclusion decisively forecloses any possibility of a federal constitutional violation.

The Texas Supreme Court applies a balancing test to retroactive statutes, which considers "[1] the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; [2] the nature of the prior right impaired by the statute; and [3] the extent of the impairment." *Robinson*, 335 S.W.3d at 145. Here, the court of appeals rightly concluded that each of these factors supports the updated Act's constitutionality:

- **Nature and strength of the public interest served by the statute:** Strong. "[I]t cannot be said that a state's desire to provide immediate protection to the

due process rights of its citizens is not compelling." Pet. App. 12a. Indeed, "the absurdity of lending a court's power to the vindication of fundamentally unfair proceedings is why the 2005 Uniform Act recognizes an absence of due process as one of the rare situations when an American court may not recognize a foreign judgment." *Id.* at 11a.

- **Nature of the prior right impaired by the statute:** Illegitimate. "[T]he only right that has been impinged is the right to automatic recognition of a judgment obtained in proceedings that denied the judgment debtor fundamental fairness." *Ibid.* "To state that 'right' is to show why we cannot recognize it, let alone allow its protection to sink a state statute." *Ibid.*
- **Extent of the impairment:** Minimal. The updated Texas Recognition Act "does not abrogate [petitioners'] claim" or "strip [petitioners] of the ability to seek recognition of the Moroccan judgment." *Ibid.* Instead, "[i]t just gives a district court the ability to deny recognition if it finds the judgment was obtained in proceedings that were incompatible with the requirements of due process." *Ibid.*

That is why this case was not "a close call": "When balanced against the slight imposition on a right of dubious provenance, retroactive application of the updated [Texas] Recognition Act does not violate the Texas Constitution." *Id.* at 12a.

Petitioners claim that the application of the updated Texas Recognition Act infringed on its "strong and settled right to recognition after remand" because the case was "all-but-over after *DeJoria-I*." Pet. 18. But, as the Fifth Circuit pointed out, that claimed "right to automatic recognition of a judgment obtained in proceedings that denied the judgment debtor fundamental fairness" is il-

legitimate. Pet. App. 11a. Moreover, no such post-remand "right" existed here anyway. On remand, the district court still had to address DeJoria's remaining grounds for non-recognition under the prior version of the Texas Recognition Act. See *id.* at 38a-39a.[1] And there was also DeJoria's argument that, irrespective of the Texas Recognition Act, the Due Process Clause prevented recognition of the Moroccan judgment. *Id.* at 8a n.8, 38a-39a. Accordingly, "it [was] not even certain that the law as it stood before the adoption of the updated act would have led to recognition of the Moroccan judgment." *Id.* at 10a.

Lacking valid arguments under Texas (or federal) law, petitioners attempt to cloud the issue by insinuating that DeJoria engaged in inappropriate lobbying efforts. Pet. 22-24. But the record on the updated Texas Recognition Act's passage is clear: The bill was debated in public, C.A. Rec. 5099-5100, 5120; representatives of both petitioners and DeJoria testified during committee hearings, *id.* at 5120; and the legislature ultimately enacted the updated Act to "ensure that Texans' individual due process rights continue to be recognized by foreign judicial systems before those foreign judgments are enforced by Texas courts." Pet. App. 45a (quoting Bill Analysis, S.B. 944, R.S. 85 (March 21, 2017)).

It is far from extraordinary for a state legislature to respond to a judicial decision narrowly interpreting a state statute designed to protect citizens' rights by amending the statute to more fully protect those rights. And no legal principle requires the legislature to turn a blind eye to pending cases affected by the narrow inter-

---

[1] The district court interpreted *DeJoria I* to permit DeJoria to raise those unaddressed grounds on remand. Pet. App. 38a-39a. Although petitioners now complain about that ruling, petitioners waived that point by not challenging the ruling on appeal.

pretation—especially when doing so would countenance a due-process violation. In short, nothing about the legislative process provides a basis for invalidating the updated Act—much less to do so on the odd ground that the statute applies its due-process protections too generously.

The Fifth Circuit carefully and cogently applied Texas law to uphold the statute under Texas's stricter constitutional prohibition on retroactive laws. See *Ex parte Abell*, 613 S.W.2d 255, 260 (Tex. 1981) ("[T]he Texas Constitution, by prohibiting the enactment of retroactive laws, affords greater protection to rights than the protection of the Constitution of the United States * * * ."). The same result would follow *a fortiori* under federal principles. Consequently, nothing in petitioners' amalgam of state-law claims and unpreserved federal arguments remotely merits this Court's review.

III. Petitioners' Complaint About The Standard Of Review Does Not Affect The Outcome Of The Case And Alleges Only A Split Within The Fifth Circuit

Petitioners' second question presented is equally flawed. Petitioners fault the Fifth Circuit for applying the traditional federal clear-error standard of review to the district court's factual findings. They would have the Fifth Circuit instead find facts itself under a *de novo* standard of review. Pet. 25. That argument would turn appellate review on its head.

A. Petitioners identify no other court of appeals that applies *de novo* review of factual findings, in judgment-recognition cases or otherwise. They claim only an *intra*-circuit conflict, alleging that the opinion below conflicts with *DeJoria I* and another Fifth Circuit case, which purportedly looked to state law for a *de novo* standard of review. *Ibid.* But the Fifth Circuit perceived no such

conflict, summarily denying petitioners' plea for *en banc* rehearing without comment.

As the opinion below explains, there is no intra-circuit conflict and nothing that warrants this Court's attention. Analyzing system-wide issues under the prior version of the Texas Recognition Act, *DeJoria I* held that "[w]hether the judgment debtor established that [a] non-recognition provision[] applies is a question of law reviewed *de novo*." Pet. App. 14a (quoting *id.* at 95a). But "the issues in that appeal—whether the Moroccan system provides procedures compatible with due process, whether Moroccan law provides a mechanism to reciprocate recognition of Texas judgments, and whether the Moroccan court had personal jurisdiction over DeJoria—were all legal determinations." *Ibid.* The *DeJoria I* court thus "had no cause to determine the proper standard of review for the factual findings that underpin the district court's legal decision." *Ibid.*

The opinion below, in contrast, had to review the district court's factual findings regarding the case-specific non-recognition grounds under the updated Texas Recognition Act. The district court was tasked with determining whether "the *specific proceeding* in the foreign court leading to the judgment was * * * compatible with the requirements of due process of law." Tex. Civ. Prac. & Rem. Code § 36A.004(c)(8) (emphasis added). Unlike the old Act's system-wide approach, this case-specific standard required factual findings about what occurred in this Moroccan proceeding. Only then could the district court answer the ultimate legal question of whether that proceeding was "compatible with the requirements of due process of law." *Ibid.* In reviewing the district court's ruling, therefore, the Fifth Circuit "answer[ed] a different question [than it did in *DeJoria I*]—what level of scrutiny should we apply to the findings of fact subsidi-

ary to that ultimate legal conclusion?" Pet. App. 17a n.14. It held that "[t]hat question, at least, is controlled by federal law." *Ibid.*

The court of appeals' conclusion finds ample support in this Court's precedents, which establish that a federal court's "appellate standard of review is governed by federal law, even in this diversity case." *Id.* at 14a (citing *Goodner* v. *Hyundai Motor Co., Ltd.*, 650 F.3d 1034, 1040 (5th Cir. 2011); see also *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 437-438 (1996) (applying federal "abuse of discretion" standard of review instead of "de novo" review under state law). Thus, the opinion below properly reviewed the district court's underlying factual findings for clear error.

B. Even if petitioners were correct that Texas law governs the standard of review, it would make no difference because the Fifth Circuit "look[ed] to Texas law governing recognition to see if anything counsels in a different direction" from federal law. Pet. App. 16a. And the court of appeals discovered that Texas applies the same deferential standard of review to factual findings. *Id.* at 17a-18a ("Consistent with the standard practice, Texas courts also generally defer to trial court factfinding." (citing *In re I.I.G.T.*, 412 S.W.3d 803, 806 (Tex. App.—Dallas 2013, no pet.))). Indeed, Texas courts have specifically done so in judgment-recognition proceedings: "When a trial court is presented with conflicting evidence in recognition proceedings, Texas courts 'defer to the trial court's * * * resolution of those conflicts.'" *Id.* at 17a (quoting *Mariles* v. *Hector*, No. 05-16-00814-CV, 2018 WL 3723104, at *6 (Tex. App.—Dallas Aug. 6, 2018, pet. denied)). *Mariles* explained that although Texas courts review the ultimate "ruling on a motion for nonrecognition * * * de novo," they nonetheless "defer to the trial court's credibility determinations and resolution of [evi-

dentiary] conflicts." 2018 WL 3723104, at *6. That is precisely the standard of review that the Fifth Circuit applied below.[2]

Petitioners are thus forced to ask this Court to review the Fifth Circuit's reading of Texas law. Besides the facial impropriety of that request, there is no reason to think that the Fifth Circuit got Texas law wrong. Petitioners cite a handful of Texas cases, Pet. 28, but those merely "explain what [the Fifth Circuit] acknowledged: that review of the district court's ultimate determination of the application of a nonrecognition factor should be de novo." Pet. App. 17a. None of them had occasion to address the standard of review that applies to a district court's underlying factual findings. *Mariles* is the only Texas case to do that in the judgment-recognition context, and the deferential standard it adopts is entirely consistent with the one applied in the opinion below.

In sum, petitioners' second question presented asks the Court to resolve an illusory intra-circuit conflict that ultimately devolves into a question of Texas law. It is unworthy of this Court's review.

IV. THE INTERNATIONAL CONTEXT OF THIS CASE DOES NOT JUSTIFY EXERCISING THIS COURT'S SUPERVISORY AUTHORITY

Petitioners' amici, two Moroccan businesspeople, argue that this Court must grant review because the opinion below will cause foreign companies to mistrust the American justice system, thus "undermin[ing] American interests." Amici Br. 5. That makes little sense. The opinion below stands for the proposition that courts applying Texas judgment-recognition law will not recognize foreign judgments obtained in contravention of funda-

[2] Because federal and Texas law is the same on this point, petitioners' concern about forum shopping is misplaced. See Pet. 30-31.

mental due process. If foreign businesses take anything from the Fifth Circuit's opinion, it will be that their governments must afford Texans basic due-process protections when litigating disputes in court. It is unclear how that could "undermine[] American interests." *Ibid.* Indeed, it is telling that the United States never submitted any filing at any stage of this case urging a ruling for petitioners in the name of American economic or foreign-policy interests.

Amici's concerns are also directed at the wrong branch of the federal government. Recognition of foreign judgments is presently governed by state law, and it is not the place of the federal judiciary to ignore state law based on free-floating geopolitical or economic considerations. Complaints that state judgment-recognition laws strike the wrong international balance should be addressed to Congress, which could enact a national judgment-recognition statute. See Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 Berkeley J. Int'l L. 150, 194 (2013) (urging Congress to "strongly consider adopting a federal statute setting a uniform procedure for the recognition and enforcement of foreign judgments"). In the meantime, twenty-three states have adopted the same specific-proceeding due-process provision contained in Texas law, with no evident harm to commerce or foreign relations. Nothing about the decision below warrants the extraordinary exercise of this Court's supervisory authority.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

CRAIG T. ENOCH
GARY E. ZAUSMER
MELISSA A. LORBER
SHELBY O'BRIEN
ENOCH KEVER PLLC
5918 Courtyard Drive
Suite 500
Austin, Texas 78730
(512) 615-1200

AARON M. STREETT
Counsel of Record
J. MARK LITTLE
TRAVIS L. GRAY
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
(713) 229-1234
aaron.streett@bakerbotts.com

Counsel for Respondent John Paul DeJoria

March 2020