No. 24-

IN THE

Supreme Court of the United States

ROSEMARY D'AUGUSTA, *et al.*,

Petitioners,

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSEPH M. ALIOTO
Counsel of Record
TATIANA V. WALLACE
ALIOTO LAW FIRM
One Sansome Street,
35th Floor
San Francisco, CA 94104
(415) 434-8900
jmalioto@aliotolaw.com

ROBERT J. BONSIGNORE
BONSIGNORE TRIAL LAWYERS, PLLC
23 Forest Street
Medford, MA 02155

LAWRENCE G. PAPALE
LAW OFFICES OF LAWRENCE G. PAPALE
The Cornerstone Building
1308 Main Street, Suite 117
St. Helena, CA 94574

CHRISTOPHER A. NEDEAU
NEDEAU LAW PC
154 Baker Street
San Francisco, CA 94117

JOSEPHINE L. ALIOTO
VEEN FIRM, PC
20 Haight Street
San Francisco, CA 94102

Counsel for Petitioners

335864

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

This is a private antitrust suit brought under Sections 4 and 16 of the Clayton Antitrust Act (15 U.S.C. §§ 15, 26) for violations of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 2), and for violation of the Section 7 of the Clayton Antitrust Act (15 U.S.C. § 18).

The questions presented are:

Whether, contrary to this Court's seminal decision in *United States v. Socony Vacuum Oil Co.,* 310 U.S. 150 (1940), the Court below erred in ignoring the *Socony* case and affirming the District Court's Rule 12(b)(6) dismissal notwithstanding the "plausibility" of the allegations that the Respondent American oil companies, without Congressional sanction, accepted the invitation by the Russian and Saudi Arabian oil companies in April 2020 to reduce production and increase the price of oil as a "quid pro quo" condition to stop the price war between the oil companies of Russia and Saudi Arabia in *per se* violation of Sections 1 and 2 of the Sherman Antitrust Act.

Whether, contrary to this Court's seminal decisions in *Socony*, *supra*, and *Interstate Circuit Inc v. United States*, 306 U.S. 208 (1939), the Court below erred by affirming the District Court's Rule 12(b)(6) dismissal and Petitioners' motion to set aside the dismissal of Petitioners' suit charging that the Respondent American oil companies, without Congressional sanction, accepted the invitation of the oil companies of Saudi Arabia and Russia to

participate in a plan to reduce production and increase prices of oil and gasoline in the United States in a *per se* price-fixing violation of Sections 1 and 2 of the Sherman Antitrust Act.

Whether Respondent oil companies' acceptance of the invitation from the oil companies of Russia and Saudi Arabia to reduce production and raise the price of oil and gasoline as a "quid pro quo" deal to stop the price war was immunized by the Act of State Doctrine, even though the Petitioners insisted that the laws of Russia and Saudia Arabia were irrelevant.

Whether the Respondent oil companies' agreement with the oil companies of Russia and Saudi Arabia to reduce production and increase the price of oil and gasoline are immunized on the ground that their agreement was a non-justiciable political question because of the involvement of the President to act as "facilitator" with this "friends" Vladimir Putin of Russia and Prince MBS of Saudia Arabia, even though the agreement was strictly commercial, without Congressional sanction, and contrary to this Court's decision in *Socony*, *supra*, that the judiciary was competent to rule and enforce the Sherman Act.

Whether the Court below erred by affirming the decision by the District Court not to allow the Petitioners to amend their Complaint to include newly discovered evidence of admissions made by the President's son-in-law and principal advisor Jared Kushner that he was instructed to "call the Saudis and Russians and make a deal to raise the price of oil;" and later wrote in his memoirs that he "led the

negotiations on the historic OPEC + oil agreement in April 2020 among the United States (sic)[1], Saudi Arabia and Russia, which led to the largest oil production reductions in history."

Whether the decision by the Court of Appeals finding certain Respondents beyond the reach of personal jurisdiction is contrary to Section 12 of the Clayton Act allowing jurisdiction over Respondents who were found or did business in the United States or had an effect on the commerce of the United States. *See Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962).

Whether the American oil companies, without Congressional approval, can enter into price-fixing agreements which have the effect of raising prices in the United States.

---

[1] The reference must be to the American oil companies because the United States does not have an oil company.

PARTIES TO THE PROCEEDING

Petitioners were appellants in the Court of Appeals. They are: Rosemary D'Augusta, Brenda Davis, Pamela Faust, Carolyn Fjord, Donald C. Freeland, Donald Frye, Gabriel Garavanian, Valarie Jolly, Michael Malaney, Lenard Marazzo, Lisa McCarthy, Timothy Nieboer, Deborah Pulfer, Bill Rubinsohn, Sondra K. Russell, June Stansbury [Deceased], Clyde D. Stensrud, Gary Talewsky, Pamela S. Ward, Christine M. Whalen, Mary Katherine Arcell, Jose M. Brito, Jan-Marie Brown, and Jocelyn Gardner [Deceased].

Respondents American Petroleum Institute, Exxon Mobil Corporation, Chevron Texaco Capital Corporation, Phillips 66 Company, Occidental Petroleum Corporation, Devon Energy Corporation, Energy Transfer LP, Hilcorp Energy, and Continental Resources Inc. were the appellees in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

Pursuant to the disclosure requirements of Supreme Court Rule 29.6, Petitioners Rosemary D'Augusta, Brenda Davis, Pamela Faust, Carolyn Fjord, Donald C. Freeland, Donald Frye, Gabriel Garavanian, Valarie Jolly, Michael Malaney, Lenard Marazzo, Lisa McCarthy, Timothy Nieboer, Deborah Pulfer, Bill Rubinsohn, Sondra K. Russell, June

Stansbury [Deceased], Clyde D. Stensrud, Gary Talewsky, Pamela S. Ward, Christine M. Whalen, Mary Katherine Arcell, Jose M. Brito, Jan-Marie Brown, and Jocelyn Gardner [Deceased] are individuals and as such have no parent corporation and there is no publicly held corporation that owns 10% or more of their stock.

RELATED PROCEEDINGS

The following proceedings are directly related within the meaning of Rule 14(b)(iii):

D'Augusta v. Am. Petroleum Inst., No. 22-cv-01979-JSW, 2023 WL 137474 (N.D. Cal. Jan. 9, 2023). Judgment entered January 9, 2024.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES, RULES AND OTHER AUTHORITIES

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is published at 117 F.4th 1094 (9th Cir. 2024) and is reprinted at App. A, p. 1a. The District Court's decisions are not published in the Federal Supplement but are reprinted at App. B, p. 20a and App. C, p. 23a.

JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit issued an order affirming the judgment of the District Court on September 17, 2024. App. A, p. 1a. The Court denied the petition for panel rehearing and rehearing *en banc* on October 25, 2024. App. E, p. 43a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony...

Section 2 of the Sherman Act, 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...

Section 4 of the Clayton Act, 15 U.S.C. § 15

> . . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 7 of the Clayton Act, 15 U.S.C. § 18

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital … where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

Section 12 of the Clayton Act, 15 U.S.C. § 22

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all processes in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Section 16 of the Clayton Act, 15 U.S.C. § 26

> **. . .** any person …shall be entitled to sue and have injunctive relief …against threatened loss or damage by a violation of the antitrust laws.

INTRODUCTION

Nearly a century ago, the predecessors of the American oil companies in this case, agreed among themselves to reduce production and to eliminate oil supplies from the market and sought the approval of executives of the federal government, including the Secretary of Interior, which was tacitly given, but that approval could not and did not immunize them from being held accountable for their price-fixing in the absence of Congressional sanction. *See United States v. Socony Vacuum Oil Co.,* 310 U.S. 150 (1940).

The Respondents in this case, faced with a demand by foreign oil entities to cut production and raise the price of oil as a condition "quid pro quo" to stop the

price war, knowing it to be contrary to American law, combined and conspired between and among themselves to cut production and withdraw the oil supply from the market, all with the intent, purpose, and effect of fixing and raising the price of oil and gasoline in the United States. In order to protect their price-fixing agreement and maximize profits, the Respondents sought the personal facilitation of President Trump to end the Russian/Saudi price war. Conspicuous in its absence is any mention of *Socony* by the lower courts.

This case presents issues of exceptional importance to the private enforcement of the antitrust laws and to the nation's policy favoring competition over combination. In this case the lower courts declined to adhere to the binding and controlling authority of this Court in *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940), and suggested in error that "the political question and act of state doctrines" immunized the Respondents simply because of the participation of the President in the meeting with their executives to fix prices by reducing the production of oil. The courts below adopted the Respondents' misleading statements while asserting opinions as facts which have no resemblance to the allegations in the Complaint and the proposed Supplemental Complaint. The claimed immunity defenses do not apply to the Respondents. The Panel, like the Court below, erroneously concluded that Respondents "have not pled sufficient facts to establish a plausible antitrust conspiracy" yet failed to analyze the Rule 12 motions in accordance with the law that all facts alleged must be taken as

true, and all inferences to be drawn in favor of the non-moving party. *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962).

The Price War

Since November of 2016, OPEC and Russia (OPEC+) had an agreement to control the production and sale of oil and gasoline in order to stabilize prices, which was scheduled for renewal on March 6, 2020. At that meeting, the representative of Russia walked out, complaining that the high prices helped the shale oil companies to stay in business. One day later, Saudia Arabia retaliated by increasing its production to levels it had never done before, resulting in the plummeting of prices. The price war erupted on March 8. On March 9, oil prices plunged 24% in the largest drop in over three decades. At the time, President Trump publicly hailed the price war and welcomed the benefits of the free market system, stating: "the free enterprise system was (sic) a great thing …. So that's like giving a massive tax cut to the people of our country." (Compl. ¶ 20).

The Combination and Conspiracy

As the profits dropped, the Respondents determined that they would seek a facilitation by then President Trump based upon their understating of a friendship between the President and the head of the Russian oil company and the head of the Saudi Arabian oil company to attempt to stop the price war, and for no other reason. They approached President

Trump to cajole him against his business instincts to intercede and call his "friends" Putin and MBS asking them to end the price war. Both Russians and Saudis[2] agreed to stop the price war on the specific condition and a quid pro quo deal that the American oil companies would cut their production as well.

On April 3, then President Trump met with the Respondents' senior officers in the White House. Although the meeting was secret and private, it is now known as a matter of fact, confirming the Petitioners' allegations, that the President instructed his staff, including Jared Kusher, "to make a deal to raise the price of oil." The fact that Mr. Kushner did just that is evidenced by his boastful statement in his resume establishing his new company, in which he stated that he led "the negotiations on the historic OPEC+ oil agreement in April 2020 among the United States (sic), Saudi Arabia and Russia, which led to the largest oil production reductions in history…" The American oil companies followed with their agreement to cut production by 2 to 3 million barrels per day by the end of the year, just as the Russians and Saudis had demanded. More than 20 million barrels of American oil surplus could have been purchased for America's Strategic Petroleum Reserve, but instead, in furtherance of the combination, the Secretary of the Interior allowed the Respondents to

---

[2] Although the Petitioners did not name the Russian Oil Company or the Saudi Arabian oil company, there was legal authority that would have allowed Petitioners to do so. 28 U.S. Code § 1605(a)(2) (**General Exceptions to the Jurisdictional Immunity of a Foreign State**).

store their excess oil, allowing them to retrieve and sell it if they wanted to, which in fact Conoco did. Conoco sold its excess oil to India and China. Competition in the oil industry was eliminated, just like *Socony*. The oil and gasoline prices rose to historic levels, contributing to the crippling rate of inflation. The interests of regular consumers, farmers, and small businesses were ignored, while the oil companies reported in 2023 that their profits in 2022 were the largest in their history.

The Complaint charged that the American oil companies had an agreement among themselves to respond to the Russian/Saudi price war by agreeing among themselves to limit the production, investment, and exploration of oil, and made the announcement on March 24, 2020, after meetings at the Respondent API. However, that was not enough. Subsequently, Petitioners claimed that the oil companies from Russia and Saudi Arabia required them to cut production as a condition precedent to the Russian and Saudi cessation of the price war. The Respondents accepted that invitation to participate in that plan which they knew was a violation of our antitrust laws (the effect of the agreement was the substantial increase in price of oil and gasoline noted in the Complaint.) *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). ("Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.) (Cites Omitted).")

The Court has personal jurisdiction over all Respondents. Under the antitrust laws, Section 12 of the Clayton Act (15 U.S.C. § 22) controls personal jurisdiction and provides for personal jurisdiction if the defendant corporation does business or is found anywhere within the United States, and that the acceptance had an effect on U.S. commerce. Since all the Respondents in this case are domiciled or do business in the United States, they are subject to personal jurisdiction in any federal forum for purposes of resolving any antitrust claims leveled against them.[3]

The Respondents have no immunity. Contrary to the rulings by the courts below, the Petitioners suit is not barred by the Act of State doctrine, since such "defense" is limited to cases in which a court is required to determine the legality of a sovereign state's official acts under that sovereign's own laws. *See W. S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400 (U.S. 1990). Contrary to the suggestions by the Court of Appeals, the Petitioners did not request the Court to make any ruling whatsoever on the laws of Russia or Saudia Arabia or to determine whether their oil companies obeyed those laws. Petitioners respectfully submit that those foreign laws are irrelevant and have nothing to do with the price-fixing in this case. Nor does this case

---

[3] The District Court erred in denying personal jurisdiction over non-California Defendants under Rule 12(b)(1) and denying Petitioners' request for jurisdictional discovery. The Ninth Circuit overruled the lower court on this issue. App. A, p.11, fn. 1.

raise any "nonjusticiable political question" since the issue presented is strictly a legal issue involving the antitrust laws over which this Court is competent to decide and enforce as the Court did in *Socony*. The issue of the involvement of the executive branch in the price-fixing case is not beyond the competency of the federal court, nor is the ability of the federal court to enforce a judgment. This Court already did so in *Socony*. The courts below did not even mention *Socony*, much less attempt to distinguish it and certainly did not follow it. Petitioners have brought this action only against the named American oil companies that entered into an illegal agreement among themselves to cut oil production in the United States in violation of the U.S. antitrust laws.

Finally, Petitioners respectfully submit that the lower courts erred by prohibiting Petitioners to supplement the Complaint pursuant to Rule 15 following their discovery of new evidence. In his book Mr. Kushner sheds light on the machinations behind the oil production reduction, while his statements directly implicated the Respondents in the self-described, unlawful "deal to raise oil prices," which the Respondents successfully did. Kushner had corroborated the conspiracy. Other than the fact that this evidence was so damning, there was no prejudice to the Respondents by its inclusion in the supplemental pleading under Rule 15. The proposed pleading is neither deficient, nor subject to dismissal, and is therefore not futile. The courts below have made no arguments that could not be cured by the supplement of additional facts.

Moreover, while Petitioners were not permitted any discovery. *See* App. D, p. 41a. The limited discovery that the Petitioners sought was the deposition of Jared Kushner after it was discovered what he had written in his new book that the President instructed him "... to make a deal to raise the price of oil." Mr. Kushner and the American oil companies agreed to reduce production and raise the price of oil. The new evidence was mostly communicated from the lips of an active, percipient witness. Mr. Kushner's deposition would certainly lead to relevant and judicially admissible information. The Court rejected the additional discovery notwithstanding the Petitioners' pleas under Rules 12(d) and 56(d).

STATEMENT

Price-Fixing Conspiracy

• Up until March of 2020, Saudi Arabia and Russia oil companies (OPEC+) had an agreement to control the production of oil in order to stabilize prices. This agreement was scheduled to be renewed and reconfirmed at a meeting in Vienna on March 6, 2020. (Compl. ¶¶ 8-9).

• On March 6, 2020, the meeting broke up when Putin walked out. The Russian dictator complained that the agreement had allowed the new shale oil industry in America to undercut the Saudi/Russian agreement. Putin declared that he intended to substantially increase production and thereby "squeeze" the American shale oil producers. (Compl. ¶¶ 8-9).

- On March 7, 2020, Saudi Arabia, the largest member of OPEC, announced it would retaliate against the Russians by "slashing prices and substantially increasing production." (Compl. ¶ 10).
- On March 8, 2020, the price war between Russia and Saudi Arabia broke out, resulting in the plummeting of the price of oil per barrel per day. (Compl. ¶¶ 11-13).
- President Trump praised the substantial lowering of oil prices caused by reason of the Saudi/Russian price war. (Compl. ¶ 20).
- During the second and third week of March, the American oil companies and the American Petroleum Institute discussed how to cope with the new oversupply of oil and the falling prices caused by the Saudi/Russian price war. They decided to reduce production, cut back investments for exploration and production, and remove as much of the supply from the market as they could in order to control pricing. (Compl. ¶¶ 14-17, 34, 36).
- On March 24, 2020, the major oil companies announced the reduction in their production of oil and efforts to remove excess oil supply off the market. (Compl. ¶ 17).
- During the last week of March 2020, and particularly on March 31, 2020, Saudi Arabia announced the largest oil production in its history. (Compl. ¶ 19).
- At the end of March 2020, President Trump, apparently without knowledge of the Petitioners' agreement, welcomed the results of the price war and stated publicly, "the price of gasoline will be reduced to 99 cents and lower," and that, "the free enterprise system was a great thing," and that "there is so much

supply nobody knows what to do with it," and finally, "…and now, gasoline is going to be 99 cents a gallon and less. You know that. That's already starting. It's popping up. 99 cents. So that's like giving a massive tax cut to the people of our country." (Compl. ¶ 20).

- On April 1 or 2, 2020, the Chief Executive Officer of American Petroleum Institute, Mike Sommers, was able to arrange a private and secret meeting with President Trump and the various CEOs of the American oil companies for Friday April 3, 2020. Mr. Sommers publicly stated that the oil companies were not seeking any governmental mandate or tariffs, or government involvement, but only a "friendly" facilitation to end the Saudi/Russian price war. (Compl. ¶¶ 14, 25-28, 34).
- On Thursday, April 2, 2020, following communications from the American oil companies, President Trump tweeted that he had called his "friends" Putin and MBS with regard to ending their price war. It was reported at that time that Putin said the price war would not end unless and until the American oil companies also agreed to cut production. (Compl. ¶ 24).
- On Friday April 3, 2020, the following CEOs of the Respondent companies and three members of the executive branch met secretly with President Trump:
  - o American Petroleum Institute (API) CEO, Mike Sommers;
  - o Exxon Mobil Corporation Chairman and CEO, Darren Woods;
  - o Chevron Corporation Chairman and CEO, Michael Wirth;

- Phillips 66 Company Chairman and CEO, Greg Garland[4];
- Occidental Petroleum President and CEO, Vicki Hollub;
- Devon Energy Corporation President and CEO, David Hager;
- Continental Resources, Inc. Chairman, Harold Hamm;
- Hilcorp Energy Founder and Chairman, Jeff Hildenbrand;
- Energy Transfer Partners Executive Chairman, Kelcy Warren;
- The U.S. Secretary Department of Interior, David Bernhardt;
- The U.S. Secretary Department of Energy, Dan Brouillette; and
- The Office of the U.S. Trade Representative, Robert Lighthizer.

• Upon doing so, he advised the former Secretary of Energy, Dan Brouillette, to purchase oil at these very low prices, and have it stored in the Strategic Petroleum Reserve (SPR). The Secretary agreed to do as the President said. However, after the meeting, when the Secretary was made aware of the objectives of the American oil companies, instead of purchasing the oil at low prices for the United States, he simply took the American oil companies' excess oil off the market and stored it in the SPR in order to eliminate available supply, and have the prices increase. He called his action "a message." (Compl. ¶¶ 21, 25, 31, 36).

---

[4] Mr. Garland later served as the CEO of API.

- On Thursday, April 9, 2020, OPEC met to discuss the agreement to end the price war. (Compl. ¶ 33).
- On Friday April 10, 2020, at the G-20 meeting, Secretary Brouillette, in substance and effect, confirmed the conspiracy and admitted that the U.S. had agreed to cut production by two to three million barrels per day. (Compl. ¶¶ 35-37):

> "Speaking for my own country, the United States (sic) …. We estimate by the end of this year, U.S. production will see a reduction of nearly 2 million barrels per day. Some models show even more dramatic figures. For example, up to 3 million barrels per day.
>
> * * *
>
> "For our part, the United States (sic) is taking action to open our Strategic Petroleum Reserve to store as much oil as possible. This will take surplus oil off the market at a time when commercial storage is filling up and the market is oversupplied."

Petitioners filed the Complaint on March 28, 2022. On July 1, 2022, the Respondents filed their Motions to Dismiss. Subsequent to the filing of the Complaint, Petitioners discovered direct evidence, via specific statements made by the third parties, Mr. Jared Kushner and President Trump, detailing and corroborating the factual account of the conspiracy among the Respondents. Specifically, Petitioners discovered a presentation on Mr. Kushner's website

for his new company, Affinity Partners, that identified one of his most significant accomplishments as follows:

> "… leading the negotiations on the historic **OPEC+ oil agreement in April 2020 among the United States, Saudi Arabia and Russia, which led to the largest oil production reductions in history**…" [Emphasis added.] [*See* www.documentcloud.org/documents/21639665-affinity-deckclean, pg. 19J.

In addition, the new evidence discovered by the Petitioners includes Mr. Kushner's new book, entitled, "*Breaking History: A White House Memoir*," in which, among other things, Mr. Kushner identified a direct quote from the President instructing him "**to make a deal to raise oil prices**." Jared Kushner, *Breaking History: A White House Memoir* (2022), pp. 369-70 (Emphasis added). The United States is NOT in the oil business!

Consequently, the Respondents reported their largest annual profits ever as they released their results for the fourth quarter of 2022. Specifically, ExxonMobil reported the highest profits in its history for any Western oil company with $59.1 billion, with Chevron earning $36.5 billion and Total Energies earning $36.2 billion. Following suit, Shell announced the biggest profits in the company's 115-year history ($39.9 billion) and BP ($27.7 billion) similarly set new records.

No Written Agreement

There was no written agreement. The efforts by the Respondent oil companies and the oil companies in the past, when they agreed on production control, were never memorialized in any written agreements in order to preserve deniability if they were ever caught. Just as the oil companies at the Achnacarry "as is" agreement at the turn of the 20th century, as well as Socony, the Respondent oil companies in this case were likewise very cautious not to put their arrangement in writing.

Decisions Below

On June 8, 2022, the District Court imposed a *de facto* stay of discovery pending the rulings on the Motion to Dismiss (ECF No. 80), and on January 9, 2023, the Court without notice of a hearing and without a hearing granted Respondents' dispositive Motions to Dismiss and entered a judgment in favor of Respondents and against Petitioners. The Court also denied Petitioners' Motion for Leave to Supplement the Complaint and for leave to file Motion for Reconsideration. App. C, p. 23a. On March 16, 2023, the District Court denied Petitioners' motion to set aside the judgment. App. B, p. 20a.

On September 17, 2024, the U.S. Court of Appeals for the Ninth Circuit issued an order affirming the judgment of the District Court. App. A, p. 1a. On October 25, 2024, the Court of Appeals denied the petition for panel rehearing and rehearing *en banc*. App. E, p. 43a.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS ERRED BY DISMISSING THE COMPLAINT WHICH SUFFICIENTLY ALLEGED A PRICE-FIXING CONSPIRACY AMONG AMERICAN OIL COMPANIES WITH AN EFFECT OF RAISING OIL AND GASOLINE PRICES IN THE UNITED STATES

The Complaint States the Classic Conspiracy in Violation of the Antitrust Laws

The classic statement of the elements to prove a combination or conspiracy in violation of the antitrust laws was clearly articulated by this Court in the seminal case of *American Tobacco Co. v. United States*, 328 U.S. 781 (1946):

> "It is not the form of the combination, or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in

> pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words." *Id.* at 808-10.

No "express" agreement is required to prove a conspiracy in violation of Section 1 of the Sherman Act. "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) (citations omitted).

Bell Atlantic v. Twombly did not require Petitioners to plead evidence, as the courts below appear to suggest. In *Twombly*, this Court simply required plaintiffs to provide factual allegations that "raise a right to relief above the speculative level" and that offer more than just "a formulaic recitation of the elements of a cause of action." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). This, Plaintiffs have done. The Court made clear that plaintiffs do "not need detailed factual allegations," and it did not "require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 555, 570. This Court did not intend

for its "plausibility" requirement to expand into a "probability" hurdle, and it allowed a complaint to proceed "even if it strikes a savvy judge that actual proof of these facts is improbable." *Id*. at 556. Similarly, the Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) made clear that "[t]he plausibility standard is not akin to a 'probability requirement,'" and it required a "context-specific" analysis in which "the reviewing court [] draw[s] on its judicial experience and common sense." *Id*. at 679. Rule 8 requires only a short and plain statement of the claim and its grounds. That standard applies here.

Petitioners in this case have met and exceeded the pleading standards of *Twombly* and *Iqbal*. The Complaint alleges, unambiguously and concisely, very specific and detailed, plausible facts demonstrating in clear and open view a combination and, separately, a conspiracy, in restraint of trade – which the Court must accept as true – and which, when proved, will demonstrate that Respondents have violated the law. *Iqbal*, 556 U.S. at 678.

Notwithstanding the rules governing Rule 12(b)(6) requirements, the Panel asserted opinions as facts which have no resemblance to the Petitioners' allegations, including consistently equating the Respondents to the U.S. government, making up facts and failing to accept the Petitioners' allegations as true or draw all reasonable inferences in favor of the Petitioners, as follows:

- Petitioners **did not** "allege that then-President Trump engineered an antitrust conspiracy among

the United States, Saudi Arabia, Russia, and Defendants." App. A, p.3a.

- Petitioners **did not** allege that "Saudi Arabia and Russia required the United States, Canada and Mexico to cut production." App. A, p4a.
- Petitioners **did not** allege "a global oil conspiracy involving the United States, Russia, and Saudi Arabia." App. A, p. 7a.
- Petitioners **did not** "ask the Judicial Branch to second-guess the foreign policy decisions of the Executive Branch" nor did they ask the Court "to evaluate the decisions of two foreign countries—Russia and Saudi Arabia." App. A, p. 7a.
- Petitioners **did not** "contend that President Trump [] negotiated an end to an international oil price war." App. A, p. 10a.
- Petitioners **did not** "seek to disrupt the power of OPEC and decouple our country's oil markets from the decisions of foreign nations, some of which have national interests adverse to our own." App. A, p. 12a.
- Petitioners **did not** ask the Court "to evaluate foreign relations decisions of sovereign nations, including our own." App. A, p. 12a.
- Petitioners **did not** "specifically implicate President Trump's foreign policy decision to negotiate with foreign powers." App. A, p. 13a.
- Petitioners **did not** "seek to control how sovereign nations—Russia and Saudi Arabia—manage their own petroleum resources" nor did Petitioners "allege that these countries were indispensable co-conspirators in the scheme to reduce oil production." App. A, p. 15a.

Instead, Petitioners alleged an agreement to reduce production among the American oil companies for the purpose of raising the price of oil before attempting to see the President. Since the agreement among the Respondents was insufficient to stop the decrease in price of oil because of the price war between the oil companies of Russia and Saudi Arabia, the Respondents, through the Respondent American Petroleum Institute and its CEO, sought to have the President use his "friendship" with Vladimir Putin and MBS of Saudi Arabia to facilitate in ending their price war. The Respondents wanted the President to be a "facilitator." They neither sought any mandate from the President or any other governmental official, nor did they seek to enact any law or to request enforcement of any law, nor to complain to any grievance against the United States. All the Respondents wanted was for the President to call his friends and stop the price war. The facts alleged in the Complaint establish *per se* violations of the antitrust laws for price-fixing and are almost identical to the facts in the *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

The Complaint Alleges a Conspiracy in Which Each Respondent Participated

Unlike the complaint found lacking in *Twombly*, the Complaint here does not seek to draw an inference of an agreement based merely on passive parallel behavior and inaction. *See Twombly*, 550 U.S. at 564-65. Rather, this Complaint directly alleges an agreement, openly confirmed by Kushner and even Secretary Brouillette at the 2020 G-20 meeting,

where he publicly admitted that the U.S. oil companies had agreed to cut production by two to three million barrels per day (Compl. ¶¶ 35-37) – an agreement that none of the Respondents deny. In *In Re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323-24 (3d Cir. 2010), the Court found that "[a]llegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate" to state a Section 1 claim.

In this case, each Respondent's participation as a co-conspirator in the agreement is specifically detailed and plausibly alleged. The top executives from each of the American oil companies participated in a closed session meeting at the White House on April 3, 2020, with President Trump in an attempt to convince him to intercede to stop the price war. (Compl. ¶¶ 25-28).

The Complaint Alleges a Conspiracy to Monopolize

A conspiracy to monopolize is a conspiracy to achieve the power to either fix prices or to exclude competition. *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946). The Respondents in this case did both.

In a conspiracy to monopolize case, it is only necessary to establish the parties' agreement, the general intent to accomplish the unlawful objective, and the overt act taken in furtherance of that intent. *Id.* at 801-10. Unlike an attempt to monopolize or monopolization itself, which may involve single firm conduct, *Spectrum Sports v. McQuillan*, 506 U.S. 447

(1993), conspiracy to monopolize does not require the allegation of a relevant market.

Petitioners sufficiently alleged antitrust injury, which is proved by the fact of the purchase of the fixed product. Petitioners have alleged that they have purchased gasoline during the period. (Compl. ¶¶ 66-67). The retail prices, since the agreement, and in accordance with the agreement, have consistently and significantly increased since April of 2020. (Compl. ¶¶ 59).

What's more, Petitioners are not required to establish the amount of their injury in their Complaint. Allegations of the amount of damage Petitioners have suffered are "not required in order to establish injury-in-fact at the pleading stage." *Sky Angel U.S., LLC v. Nat'l Cable Satellite Corp.*, 947 F. Supp. 2d 88, 106 (D.D.C. 2013). However, under the before and after test, it is clear that the consumers of gasoline paid three to four dollars more than they would have paid in the absence of the agreement to limit supply, cut production, and raise the prices of oil and gasoline. (Compl. ¶¶ 49-52).

Respondents' price-fixing conspiracy impacted the pricing of gasoline, inflicting financial harm on Petitioners and others. (Compl. ¶¶ 50-53). The Complaint alleges that Respondents' anticompetitive conduct directly impacted the inflated prices Petitioners pay to Respondents for gasoline, and that Petitioners pay more than they would have in the absence of Respondents' collusion. (Compl. ¶¶ 50-53). These allegations are more than sufficient to establish that Respondents' unlawful agreement

resulted in Petitioners paying overcharges – the classic form of antitrust damages in a price-fixing case.[5]

Accordingly, Petitioners have more than met their burden.

II. THE LOWER COURTS' FAILURE TO MENTION THE BINDING AND CONTROLLING AUTHORITY OF THIS COURT IN *SOCONY-VACUUM OIL*, A MIRROR IMAGE OF THE CASE AT HAND, IS CONSPICUOUS

The essential basis of the lower courts' rulings was that the Respondents' conduct was immunized by reason of certain doctrines. As discussed below, none of the so-called "doctrines" of immunity apply in this case, and the participation by the President does not in any way grant immunity for price-fixing without congressional sanction.

Petitioners respectfully submit that the Ninth Circuit, as the Court below, failed to offer analysis of any kind with regard to the controlling decision by this Court in *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940). In that case, a mirror image of this case, with many of the predecessors of the Respondents in this case, agreed among themselves

---

[5] *See, e.g., Kneeboard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) ("When horizontal price-fixing causes buyers to pay more . . . than the prices that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs.").

to reduce production and to eliminate oil supplies from the market. In attempting this effort, they had the cooperation of many governmental officials including the Secretary of the Interior. This Court, in affirming the criminal convictions, specifically, directly, and unambiguously decided that without congressional approval the participation of government officials was irrelevant:

> "...As to knowledge or acquiescence of the officers of the Federal Government little need be said. . .. Though employees of the government may have known of these programs and winked at them or passively approved them, no immunity would have thereby been obtained... For Congress had specified the precise manner and method of securing immunity. None other would suffice. . .. For as we have seen price-fixing combinations which lack Congressional sanction are illegal *per se*. . . ." *Socony-Vacuum, supra,* at 226-27..." (Emphasis added.)

This Court explicitly held that "ruinous competition, financial disaster, evils of price cutting and the like" from price wars are not an excuse to fix prices (*Id*. at 221-23). Congressional sanction is required. The Respondents in this case did not seek, nor did they receive, any sanction from the U.S. Congress to engage in price-fixing.

This scheme constitutes horizontal competitor price-fixing, just as was held to be illegal by this Court in *Socony*. "In this case, the result was to place a floor under the market – a floor which served the function

of increasing the stability and firmness of market prices." *Socony, supra,* at 223. History repeats, and, just as in *Socony*, these Respondents agreed to reduce the U.S. oil supply and to take surplus oil off the market. Just as in *Socony*, their conduct lacked any Congressional sanction. *Id*. at 226-27. And just as in *Socony*, these Respondents have engaged in *per se* illegal price-fixing in violation of Sections 1 and 2 of the Sherman Act. (Compl. ¶¶ 82-87).

III. THE RESPONDENTS' CONDUCT IS NOT IMMUNIZED

Petitioners respectfully submit that the lower courts simply got it wrong. These Respondents have no immunity. As this Court noted in *Socony*, "For as we have seen price-fixing combinations which lack congressional sanction are illegal *per se*…." *Socony, supra,* at 226-27. Similarly, the Respondents' combination here, albeit tacitly encouraged by government officers, has not been made immune nor protected by reason of any Congressional sanction and is therefore actionable anticompetitive conduct proscribed by the antitrust laws. *Id*.

As noted above, Petitioners did not allege "a global oil conspiracy involving the United States, Russia, and Saudi Arabia." App. A, p. 7a. These Defendants did not "advocat[e] to the former President and his administration for a diplomatic solution to the global price war over petroleum products." App. C, p. 34a. Any implication of the sovereign immunity doctrine by the lower courts is entirely improper in this case.

The record in this case discloses the actual wrongs committed by the Respondents. Immunity is neither applicable under the circumstances, nor is it absolute, and there is no waiver of any sovereign immunity potentially claimed by these Respondents, who engaged in the activity of a strictly commercial nature and may not invoke immunity from liability for their misconduct. Notwithstanding, Petitioners' Complaint contains factual allegations against the Defendants that would invoke an exception to the rule. (ECF No. 1 ¶¶ 14, 15, 25, 27, 34; ECF No. 109-3 ¶¶ 14-17, 21-23, 28-31, 39). Private companies operating behind the façade of governments are deemed private commercial entities operating for profit. (ECF No. 109-3, ¶ 6.) Commerce is business, not politics!

The Suit Is Not Barred by The Political Question Doctrine

The Ninth Circuit erroneously found that Petitioners' claims "of a conspiracy between the President, foreign sovereigns, and American corporations raise exactly the non-justiciable issue barred by the political question doctrine." App. A, p. 6a. However, quite to the contrary, this lawsuit depicts a private attempt by the Respondents to use their resources to influence the outcome of the emerging oil price war and to minimize their personal business losses. Importantly, and a fact ignored by the lower courts, their conduct lacked any Congressional sanction. In *Socony*, the oil defendants argued that various government agencies had reviewed and sanctioned their price-fixing

agreement. That argument was rejected out of hand in *Socony*. Likewise, it should be rejected here. Price-fixing is not the policy of the United States!

The Panel's reliance on *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012), citing *Nixon v. United States*, 506 U.S. 224, 228 (1993) is flawed. While both cases address the Political Question Doctrine, neither is factually applicable here. *Zivotofsky* involved a lawsuit over the constitutionality of a statute, filed by a foreign-born individual against the U.S. Secretary of State for the officials' refusal to record his birth place on a consular report of birth abroad and on his passport, which the Court found to lack any "political question." *Zivotofsky, supra*. *Nixon* dealt with the interpretation of the constitutional language of the Impeachment Trial Clause, Art. I, § 3, cl., which the Court determined to place the impeachment power in the Legislature, with no judicial involvement, even for the limited purpose of judicial review. *Nixon, supra*.

Likewise, the Court's reliance on *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 203 (1986) is factually unwarranted. That case involved a major confrontation over interpretations of the Pelly Amendment to the Fisherman's Protection Act of 1967 and Packwood Amendment to the Fishery Conservation and Management Act of 1976, in which Japan Whaling asked this Court to determine whether the Secretary of Commerce had discretion to negotiate with Japan over its whaling practices. Nothing can be further from the facts at hand or the Court's inference that the present case involves a

controversy that "impacts our country's foreign policy." App. A, p. 11a, citing *Japan Whaling, supra*.

Moreover, *Spectrum Stores v. Citgo Petroleum*, 632 F.3d 938 (5th Cir. 2011) does not advance the lower courts' rulings on the political question issue. That case required the Court to determine the legality of the OPEC cartel under the laws of the members of the cartel. In *Spectrum*, the district court characterized the complaints "as challenging 'the decisions of sovereign states to restrict the production of crude oil located within their own territories.'" *Id*. at 945. The Fifth Circuit agreed that the conspiracy alleged in that case was one among "OPEC member nations to fix the price of crude oil." *Id*. at 947. In this case Petitioners have alleged a much different conspiracy among the American oil companies – not sovereign foreign companies – to fix the price of oil in the United States by limiting production. The Respondents reached their unlawful agreement entirely on their own and irrespective of the President's actions, and whatever the laws were controlling the Russian oil company and the Saudi Arabian oil company and whether they violated their owns laws is irrelevant.

The Suit Is Not Barred by The Act of State Doctrine

The Petitioners' claims are not barred by the Act of State doctrine. This Court has limited the application or the Act of State defense to cases in which a court is asked or required to determine the legality of a sovereign state's official acts under that sovereign's own laws. *See W. S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400 (U.S. 1990).

The Panel's decision makes it apparent that the Court misapprehended the undisputed facts stated in the Complaint. Petitioners did not sue Saudi Arabia or Russia or any official of either country, or any local official, nor have they asked the Court to determine the legality of either Russia's or Saudi Arabia's official acts or their laws.

Moreover, the Panel makes suggestions that are simply not true. Unlike *International Ass'n of Machinists and Aerospace Workers v. Organization of the Petroleum Exporting Countries (OPEC)*, 648 F.2d 1354, 1358 (9th Cir. 1981), in which the members of the International Association of Machinists and Aerospace Workers (IAM) sued the OPEC and its member nations, alleging that their price-setting activities violated U.S. antitrust laws, the alleged conspiracy at hand does not involve OPEC or any foreign sovereigns. Petitioners did not sue any foreign states or state officials. The Complaint does not name Russia, Saudi Arabia, President Trump or any U.S. government officials as defendants.

Petitioners did not ask the Court to determine what the law may or may not be in Russia or Saudi Arabia; nor does this case seek any determination by any Court whether or not the oil companies of Russian and Saudi Arabia violated any of their own laws. The legality of the Sovereign's act or the legality of the "sovereign acts" of the Russian or Saudi Arabian oil companies is not at issue. Accordingly, the Act of State immunity simply does not apply.

The decisions of the lower courts threaten the American public with a failure of justice and thwart

the effective and important enforcement of the antitrust laws by private citizens.

CONCLUSION

For the foregoing reasons, this Court should grant this petition. The interests of justice demand nothing less.

Respectfully submitted,

JOSEPH M. ALIOTO
Counsel of Record
TATIANA V. WALLACE
ALIOTO LAW FIRM
One Sansome Street, 35th Fl.
San Francisco, CA 94104
Phone: (415) 434-8900
jmalioto@aliotolaw.com

ROBERT J. BONSIGNORE
BONSIGNORE TRIAL LAWYERS, PLLC
23 Forest Street
Medford, Massachusetts 02155
Telephone: (781) 856-7650
rbonsignore@classactions.us

LAWRENCE G. PAPALE
LAW OFFICES OF
LAWRENCE G. PAPALE
The Cornerstone Building
1308 Main Street, Suite 117

St. Helena, CA 94574
Telephone: (707)963-1704
LGPAPALE@PAPALELAW.COM

CHRISTOPHER NEDEAU
NEDEAU LAW PC
154 Baker Street
San Francisco, CA
Telephone: (415)-516-4010
CNEDEAU@NEDEAULAW.NET

JOSEPHINE LETICIA ALIOTO
VEEN FIRM, PC
20 Haight Street
San Francisco, CA 94102
Telephone: (415) 673-4800
J.Alioto@Veenfirm.com

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 16, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15878
D.C. No. 4:22-cv-01979-JSW

ROSEMARY D'AUGUSTA; BRENDA DAVIS; PAMELA FAUST; CAROLYN FJORD; DONALD C. FREELAND; DONALD FRYE; GABRIEL GARAVANIAN; VALERIE JOLLY; MICHAEL C. MALANEY; LENARD MARAZZO; LISA MCCARTHY; TIMOTHY NIEBOER; DEBORAH M. PULFER; BILL RUBINSOHN; SONDRA K. RUSSELL; JUNE STANSBURY; CLYDE D. STENSRUD; GARY TALEWSKY; PAMELA S. WARD; CHRISTINE M. WHALEN; MARY KATHERINE ARCELI; JOSE M. BRITO; JAN-MARIE BROWN; JOCELYN GARDNER,

Plaintiffs-Appellants,

v.

AMERICAN PETROLEUM INSTITUTE; EXXON MOBIL CORPORATION; CHEVRONTEXACO CAPITAL CORPORATION; PHILLIPS 66 COMPANY; OCCIDENTAL PETROLEUM CORPORATION; DEVON ENERGY CORPORATION; ENERGY TRANSFER LP; HILCORP ENERGY; CONTINENTAL RESOURCES, INC.,

Defendants-Appellees.

Appendix A

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Argued and Submitted June 14, 2024
San Francisco, California

Filed September 16, 2024

Before: Ronald M. Gould, Richard C. Tallman,
and Ryan D. Nelson, Circuit Judges.

Opinion by Judge R. Nelson

OPINION

R. NELSON, Circuit Judge:

Rosemary D'Augusta and other gasoline consumers sued various oil producers for an antitrust conspiracy to limit oil production. Plaintiffs allege that Defendants colluded with the U.S. government, including then-President Trump, to negotiate with Russia and Saudi Arabia to end their price war on oil. These claims are largely barred by the political question and act of state doctrines. Plaintiffs' separate allegations—that Defendants conspired among themselves to raise oil prices—fail to plead an antitrust conspiracy. Thus, we affirm the district court's order dismissing Plaintiffs' claims.

Appendix A

I

A

Plaintiffs are individual consumers who purchased gasoline from stores owned by Defendants. Suing individually, Plaintiffs allege that then-President Trump engineered an antitrust conspiracy among the United States, Saudi Arabia, Russia, and Defendants. This conspiracy entailed cutting oil production, limiting future oil exploration, and terminating the price war between certain oil-producing countries. Doing so would ensure a rise in gas prices and increase Defendants' profits.

Plaintiffs allege that Saudi Arabia and Russia hold extensive control of the global oil and gas market. Saudi Arabia is a member of the Organization of Petroleum Exporting Countries (OPEC), an intergovernmental organization that coordinates member countries' oil production to regulate prices. Russia joined an expansion of OPEC, along with other oil-producing countries, called OPEC+. Historically, both Russia and Saudi Arabia produce most of the world's crude oil each year.

From November 2016 to March 2020, Plaintiffs allege that OPEC and Russia agreed to limit the production and sale of oil and gasoline. Colluding this way would keep prices high to increase profits. That arrangement, however, allegedly ended in March 2020. At that time, Plaintiffs suggested that Russia refused to renew its agreement with OPEC, sparking a new price war where

both Russia and Saudi Arabia rapidly increased oil production. By producing oil that far exceeded demand, Plaintiffs believe that these actions caused a precipitous drop in global oil prices.

The Russian-Saudi Arabian price war allegedly shocked Defendants. They now had to lower oil and gasoline prices to compete. To prevent further price decreases, Defendants privately agreed among themselves "to take any surplus oil off the market, cut their production, and substantially reduce their investment in exploration and production." But Defendants' private efforts to collude were in vain. Prices continued to plummet. Eventually, Defendants sought an urgent meeting with President Trump, hoping that he could broker an agreement with Saudi Arabia and Russia to stop the price war. Shortly after this meeting, President Trump allegedly spoke with Russian President Vladimir Putin and the crown prince of Saudi Arabia. This led to an agreement that if Saudi Arabia and Russia stopped their price war, Defendants would increase their oil and gas prices.

Within a few days, major news organizations began reporting on President Trump's successful efforts to broker an agreement between Saudi Arabia and Russia. According to Plaintiffs, Saudi Arabia and Russia required the United States, Canada and Mexico to cut production. And as a positive signal towards that reduction, President Trump tweeted: "There is so much production, no one knows what to do with it." The Secretary of Energy also allegedly bought up excess oil from U.S. producers for the United States' Strategic Petroleum Reserve.

Almost immediately, OPEC held an emergency meeting that resulted in an agreement between Russia and Saudi Arabia to end the price war. The next day, President Putin announced at a G-20 meeting that "his country made a deal with OPEC and the United States," and "a collective cut of 10 million barrels a day" would be necessary to stabilize the markets. Similarly, the Secretary of Energy announced that U.S. oil production would also decrease by nearly 2 million barrels a day.

Thus, Plaintiffs allege, the cartel now included OPEC+ and the Americans. Plaintiffs allege that these agreements caused the price of a barrel of oil to rise from less than $20.00 to over $100.00. In sum, Defendants allegedly used President Trump to cajole foreign powers to cut oil production and raise gas prices.

B

Plaintiffs plead three claims based on Defendants' alleged antitrust activity. First, they allege that Defendants' agreement fixed gas prices in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Second, Defendants allegedly engaged in a conspiracy to suppress competition in oil production in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. And third, Plaintiffs sought relief for certain Defendants' anticompetitive mergers and acquisitions in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Plaintiffs sought declaratory relief, damages, disgorgement of profits, and injunctive relief. They

asked the district court to enjoin any future agreements among Defendants, Russia, and Saudi Arabia. And they requested an order requiring that the largest of Defendants—Exxon, Chevron, and Phillips—"be split up into individual companies as made necessary to restore competition in the oil industry."

The district court granted Defendants' motion to dismiss. *D'Augusta v. Am. Petroleum Inst.*, No. 22-cv-01979-JSW, 2023 U.S. Dist. LEXIS 3767, 2023 WL 137474, at *7 (N.D. Cal. Jan. 9, 2023). The court first found that it lacked subject-matter jurisdiction as Plaintiffs' claims were barred by the political question, act of state, and *Noerr-Pennington* doctrines. 2023 U.S. Dist. LEXIS 3767, [WL] at *3-5. At their core, Plaintiffs' claims dealt with non-justiciable questions over the United States' diplomacy with foreign nations. *Id.* For the claims related to Defendants' purely private conduct, Plaintiffs failed to adequately plead any agreement that could give rise to antitrust violations. 2023 U.S. Dist. LEXIS 3767, [WL] at *5. Separate from any subject-matter issues, the court also granted Defendant Energy Transfer's motion to dismiss for lack of personal jurisdiction. 2023 U.S. Dist. LEXIS 3767, [WL] at *6.

The district court denied Plaintiffs leave to amend as futile to overcome the jurisdictional bars. 2023 U.S. Dist. LEXIS 3767, [WL] at *6-7. For similar reasons, it also denied Plaintiffs leave to reconsider a deposition of Jared Kushner. 2023 U.S. Dist. LEXIS 3767, [WL] at *7.

II

On appeal, Plaintiffs missed their initial deadline to file a notice of appeal. But the district court granted Plaintiffs' motion to extend time to appeal, and Plaintiffs then timely appealed.

The district court had federal-question jurisdiction. 28 U.S.C. § 1331. So we have appellate jurisdiction under 28 U.S.C. § 1291. We review an order granting a motion to dismiss de novo. *Palm v. L.A. Dep't of Water and Power*, 889 F.3d 1081, 1085 (9th Cir. 2018) (citation omitted). When conducting this review, we accept all nonconclusory factual allegations in the complaint as true. *See Ecological Rts. Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 507-08 (9th Cir. 2013). And we review the district court's denial of leave to amend and denial of discovery for abuse of discretion. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002); *see also Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 383 (9th Cir. 1993).

III

We lack subject-matter jurisdiction to adjudicate Plaintiffs' allegations of a global oil conspiracy involving the United States, Russia, and Saudi Arabia. Both the political question and act of state doctrines present insurmountable bars to Plaintiffs' claims. At bottom, Plaintiffs ask the Judicial Branch to second-guess the foreign policy decisions of the Executive Branch. That would violate well-established limits on our judicial review.

Deciding the merits of Plaintiffs' claims would also require us to evaluate the decisions of two foreign countries—Russia and Saudi Arabia. We cannot adjudicate the political decisions of foreign states. As for any allegations about Defendants' private actions, Plaintiffs do not (and cannot) plausibly allege any type of antitrust conspiracy. Thus, we affirm the district court's order of dismissal.[1]

A

The political question doctrine is a Founding Era principle that outlines the limits of judicial review of certain presidential actions. *See Marbury v. Madison*, 5 U.S. 137, 170, 2 L. Ed. 60 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."). This reflects the public understanding at the time that certain functions of government, such as the negotiation of treaties, require the "perfect secrecy" and "immediate despatch" of the Presidency. THE FEDERALIST NO. 64 (John Jay) (cleaned up); *see also* PACIFICUS NO. 1 (Alexander Hamilton) (arguing that the Executive Branch acts as "the *organ* of intercourse between the Nation and foreign [n]ations") (italics in original). The judiciary

1. The district court also held that it lacked personal jurisdiction over Defendant Energy Transfer because it held no ties to California. That was error under our precedent. We have interpreted Section 12 of the Clayton Act (15 U.S.C. § 22) to grant personal jurisdiction over any corporate antitrust defendant with minimum contacts with the nation. *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004). But we affirm the district court's order of dismissal on other grounds and need not reconsider this issue.

was ill-suited for "pronouncing upon the [government's] external political relations" as such a task would be "foreign" to it. PACIFICUS No. 1.

Accordingly, we lack authority to decide a case when it involves a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky v. Clinton*, 566 U.S. 189, 195, 132 S. Ct. 1421, 182 L. Ed. 2d 423 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993)).[2] That said, it would be "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Instead, we must "undertake a discriminating case-by-case analysis to determine whether the question posed lies beyond judicial cognizance." *Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005).

Still, we have held that the conduct of foreign relations lies almost exclusively with the political branches of

2. The Supreme Court also lists other considerations: "[3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Here, we decide the case on the first two factors alone.

government, leaving little for judicial review. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 983-84 (9th Cir. 2007). Thus, an American corporation could not be held liable for the use of its assets because their sale was financed as part of the U.S.' distribution of foreign and military aid. *Id.* Similarly, an American oil corporation could not be held liable for allegedly funding a foreign military group. *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 552 (9th Cir. 2014). Because the U.S. also provided military aid to this group, any liability from that funding would intrude on the political branches' exercise of U.S. foreign policy. *Id.* at 552-53; *see also Def. for Child. Int'l Palestine v. Biden*, 107 F.4th 926, 930 (9th Cir. 2024) (the political question doctrine "reflects the foundational precept, central to our form of government, that federal courts decide only matters of law, with the elected branches setting the policies of our nation").

At bottom, Plaintiffs contend that President Trump improperly negotiated an end to an international oil price war. Yet allegations of a conspiracy between the President, foreign sovereigns, and American corporations raise exactly the non-justiciable issue barred by the political question doctrine. On this point, *Corrie* is helpful. *Corrie* held that granting aid was a "political decision inherently entangled with the conduct of foreign relations." 503 F.3d at 983. And "the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government." *Id.* (quoting *Mingtai Fire & Marine Ins. v. United Parcel Serv.*, 177 F.3d 1142, 1144 (9th Cir. 1999)).

Here, regardless of any alleged meddling by Defendants, President Trump's decision to negotiate with other countries was a fundamental foreign relations decision. If we subjected it to judicial review, it would amount to second-guessing the Executive Branch's foreign policy. *See id.* at 982. And if the President cannot freely negotiate with foreign powers, then he cannot properly execute the powers given to him by our Constitution. This would undermine the foundational principle of *Marbury*: "[b]y the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion." 5 U.S. at 165-66. Recognizing Plaintiffs' claim would depart from a proper judicial respect for the President's constitutionally delegated authority.

Nor are there any "judicially discoverable and manageable standards" we could apply here. *Zivotofsky*, 566 U.S. at 195. The need to apply these standards "is not completely separate from" the concept of a textual commitment to the coordinate branches. *Nixon*, 506 U.S. at 228. When a statutory scheme can guide us, we can, at times, examine the merits of a case that impacts our country's foreign policy. *See Japan Whaling Ass'n v. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986) (judicially manageable standards exist when a "decision . . . calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below").

Plaintiffs' allegations arise under both the Sherman and Clayton Acts. But our antitrust laws are poorly suited for such a task. The pleadings show that Plaintiffs seek to disrupt the power of OPEC and decouple our country's oil markets from the decisions of foreign nations, some of which have national interests adverse to our own. But these Acts do not provide judicially manageable standards that do not intricately implicate monumental foreign policy questions. By recasting the conduct of foreign relations and national security interests into antitrust terms, we are still being asked to evaluate foreign relations decisions of sovereign nations, including our own. And oil plays a crucial role in our country's economic and national security interests, increasing the complexity of the foreign relations implications. Plaintiffs cite no case to guide us. Nor were our antitrust laws designed to handle such difficult questions on areas of statecraft. *See Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 953 (5th Cir. 2011) (declining to address legal questions "when parties couch the conduct of foreign relations and national security policy in antitrust terms while essentially asking us to make a pronouncement on the resource-exploitation decisions of foreign sovereigns"). Thus, we do not find any "judicially discoverable and manageable standards" to address these significant foreign relations policies under our antitrust laws.

More than a decade ago, the Fifth Circuit considered a similar question over an alleged antitrust conspiracy between American companies and OPEC to fix oil prices. *Id.* The Fifth Circuit held that adjudicating the case would lead to a "reexamin[ation] [of] critical foreign policy

decisions, including the Executive Branch's longstanding approach of managing relations with foreign oil-producing states through diplomacy rather than private litigation." *Id.* at 951. In addition, the court expressed skepticism that antitrust laws could provide "judicially manageable standards" for resolving such a difficult question. *Id.* at 952.

Plaintiffs' claims here are more clearly barred from judicial review than the claims in *Spectrum Stores*. Plaintiffs specifically implicate President Trump's foreign policy decision to negotiate with foreign powers. Such a direct foreign policy question was not at issue in *Spectrum Stores*. The Fifth Circuit relied on the political question doctrine to reject more generalized allegations of collusion between American oil companies and OPEC—with no Presidential or executive action. *Id.* at 944-45.

In sum, the political question bars Plaintiffs' claims because judicial review would intrude on the prerogatives of the political branches and create an unworkable judicial framework.

B

The act of state doctrine also deprives our court of subject matter jurisdiction. Historically, the act of state doctrine is a complement to the political question doctrine. It provides that a federal court "will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state." *Int'l Ass'n of Machinists and Aerospace Workers, (IAM)*

v. Org. of Petroleum Exporting Countries, 649 F.2d 1354, 1358 (9th Cir. 1981) (citing *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S. Ct. 83, 42 L. Ed. 456 (1897)). Although this doctrine is not specifically mentioned in the text of the Constitution, its "constitutional underpinnings" derive from the principle of separation of powers. *Id.* at 1359. This doctrine "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964). And like the political question doctrine, we have few precedents discussing the act of state doctrine.

IAM helps our analysis. In *IAM*, a labor union brought antitrust claims against OPEC for raising the cost of petroleum-derived goods. *IAM*, 649 F.2d at 1355. And we applied the act of state doctrine to bar the union's claims. We recognized that "the availability of oil has become a significant factor in international relations." *Id.* at 1360. So the "granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources." *Id.* at 1361. Furthermore, "adjudication of the legality of the sovereign acts of states . . . risk[s] disruption of our country's international diplomacy," intruding again on the prerogative of our political branches. *Id.* at 1358. *IAM* leads us to a single conclusion—we lack jurisdiction under this doctrine also.

Plaintiffs' claims seek to control how sovereign nations—Russia and Saudi Arabia—manage their own petroleum resources. Plaintiffs allege that these countries were indispensable co-conspirators in the scheme to reduce oil production. And these countries allegedly demanded Defendants' cooperation as "quid pro quo" to end the price war. Plaintiffs' claims are thus covered by the act of state doctrine because they seek to litigate the petroleum policy of foreign nations. *See id.* at 1358.

C

Plaintiffs' remaining allegations involve solely private conduct among Defendants. For instance, Plaintiffs allege that "Defendants agreed to take any surplus oil off the market, cut their production, and substantially reduce their investment in exploration and production." While we have jurisdiction to address these allegations of private conduct, Plaintiffs fail to adequately state a claim. *See* FED. R. CIV. P. 12(b)(6). Under Rule 12(b)(6), a court generally "is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

For a successful antitrust conspiracy claim under either Section 1 or Section 2 of the Sherman Act, a plaintiff must plead "allegations plausibly suggesting (not merely consistent with) agreement," so there is "enough factual matter (taken as true) to suggest that an [unlawful] agreement was made." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

And to support such a plausible inference, a plaintiff must plead "who, did what, to whom (or with whom), where, and when." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 n.6 (9th Cir. 2015) (citation omitted). Such facts may be "direct evidence" of a conspiracy that requires no further inference. *In re Citric Acid Litig.*, 191 F.3d 1090, 1093-94 (9th Cir. 1999). Or such facts may be "circumstantial evidence" in the form of parallel conduct among competitors and certain "plus factors" suggesting a conspiracy. *In re Musical Instruments*, 798 F.3d at 1194 & n.7.[3]

Plaintiffs' bare allegations meet neither requirement for an antitrust conspiracy. As for direct evidence, Plaintiffs allege broadly that Defendants privately "agreed [among themselves] to take any surplus oil off the market, cut their production, and substantially reduce their investment in exploration and production." There is nothing, apart from these conclusory allegations, to plausibly suggest an illegal agreement.

Similarly, Plaintiffs do not plead enough facts to establish "circumstantial evidence" of any parallel conduct. Plaintiffs allege vague statements that "major oil companies" planned to reduce their oil production. Yet Plaintiffs fail to allege which Defendants of these "major oil companies" reduced their production, or when or how they allegedly made these decisions. Nor

3. Plaintiffs' opening brief contains no legal discussion of their Clayton Act claim related to Defendants' private conduct. Accordingly, they waived any argument for that claim. *See United States v. Anekwu*, 695 F.3d 967, 985 (9th Cir. 2012).

do Plaintiffs allege the amount of production cut or why these unnamed "major oil companies" did so. Such bare and conclusory allegations do not "plausibly suggest" an antitrust conspiracy.

In addition, allegations of parallel conduct alone are not enough to raise an inference of an agreement when an "obvious alternative explanation" accounts for that same conduct. *Twombly*, 550 U.S. at 567. The "obvious alternative explanation" was the outbreak of the global Covid-19 pandemic. We take judicial notice of this historical event, *Apartment Association of Los Angeles County v. City of Los Angeles*, 10 F.4th 905, 910 n.2 (9th Cir. 2021), to acknowledge an alternative explanation. It is not hard to see why Defendants may have chosen to cut oil production beginning in March 2020. The stay-at-home and quarantine orders—both here and across the world—drastically decreased global oil demand. In fact, there was even a brief period when the price for a barrel of oil was negative![4] These circumstances provide a logical explanation for why Defendants would have reduced their oil production. Accordingly, Plaintiffs' "speculative" and "bare assertion[s]" of antitrust conspiracy are nearly identical to cases holding that the claims were implausible. *Twombly*, 550 U.S. at 555-56; *see also In re Musical Instruments*, 798 F.3d at 1194.

4. Matt French, *Crude oil prices briefly traded below $0 in spring 2020 but have since been mostly flat*, U.S. Energy Information Administration (Jan. 5, 2021), https://www.eia.gov/todayinenergy/ detail.php?id=46336 (https://perma.cc/6M8Z-856N).

D

Plaintiffs also challenge several of the district court's procedural orders—denial of supplemental pleading, additional discovery, and oral argument. We review these decisions for abuse of discretion. *Zivkovic*, 302 F.3d at 1087. And we affirm.

Plaintiffs sought leave to amend their complaint to add a corporate defendant while including new representations made by President Trump's Senior Advisor, Jared Kushner. The district court denied leave. *D'Augusta*, 2023 U.S. Dist. LEXIS 3767, 2023 WL 137474, at *6-7.

A court may "permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." FED. R. CIV. P. 15(d). "The clear weight of authority . . . permits the bringing of new claims in a supplemental complaint to promote the economical and speedy disposition of the controversy." *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988). That said, denial of leave to amend is proper when any supplemental information "would fail to cure the pleading deficiencies" in the complaint. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011).

The district court's denial of leave to amend was not an abuse of discretion. Plaintiffs allege that the CEO of Hess Corporation lobbied Mr. Kushner to ask President Trump to resolve ongoing issues with the global oil market. At that point, President Trump allegedly instructed Mr. Kushner to "call the Saudis and the Russians and work with them to make a deal." Plaintiffs believe that these

efforts succeeded. They cite Mr. Kushner's memoirs where he claimed to have led "negotiations on the historic OPEC+ oil agreement in April 2020 among the United States, Saudi Arabia and Russia, which led to the largest oil production reductions in history." Even if these negotiations succeeded, however, it would not change our disposition. These allegations continue to present non-justiciable issues over the Executive Branch's political actions and acts by foreign states.[5]

Nor did the district court err in deciding the motions on the papers. We have repeatedly held that granting a motion without oral argument is not a denial of due process. *See, e.g.*, *Toquero v. I.N.S.*, 956 F.2d 193, 196 n.4 (9th Cir. 1992) ("[I]t is well settled that oral argument is not necessary to satisfy due process.").

IV

In sum, the political question and act of state doctrines deprive us of subject matter jurisdiction over claims related to allegations of governmental collusion, both domestic and foreign. As to private collusion, Plaintiffs have not pled sufficient facts to establish a plausible antitrust conspiracy. And the district court did not abuse its discretion in denying Plaintiffs' various procedural motions.

AFFIRMED.

---

5. For similar reasons, the district court did not abuse its discretion in denying reconsideration of its decision not to allow the deposition of Mr. Kushner. Plaintiffs identify no new information from Mr. Kushner that would change our conclusion that we lack jurisdiction to address Plaintiffs' claims.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, FILED MARCH 16, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 22-cv-01979-JSW

ROSEMARY D'AUGUSTA, *et al.*,

Plaintiffs,

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Defendants.

Filed March 16, 2023

ORDER DENYING MOTION TO SET ASIDE THE JUDGMENT

Re: Dkt. No. 117

Now before the Court is motion filed by Plaintiffs to set aside the judgment and order a hearing on Defendants' dispositive motions. The Federal Rules of Civil Procedure do not require the Court to hold oral argument prior to ruling on a dispositive motion. Federal Rule of Civil Procedure 78(b) provides that "[b]y rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings." The Local Rules for the

Northern District of California provide that "[i]n the judge's discretion … a motion may be determined without oral argument." N.D. Cal. L.R. 7-1(b). In accordance with the federal rules and the local rules, this Court notified the parties that it had vacated the hearing schedule on August 2, 2022, it would take the matter under submission, and that "a written order [would] issue in due course." (Dkt. No. 92.)

Every circuit to consider the issue whether oral argument on dispositive motions is required has determined that "the 'hearing' requirements of Rule 12 and Rule 56 do not mean that an oral hearing is necessary, but only require that a party be given the opportunity to present its views to the court." *Greene v. ECI Holdings Corp.*, 136 F.3d 313, 316 (2d Cir. 1998) (citing cases in accord from the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits). The Ninth Circuit is in accord. *See, e.g.*, *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 832 n.6 (9th Cir 2003) (rejecting the "contention that the district court violated [Plaintiff's] right to due process by dismissing [Plaintiff's] claims under Federal Rule of Civil Procedure 12(b)(6) without oral argument."); *see also Morrow v. Topping*, 437 F.2d 1155, 1156-57 (9th Cir. 1971) (holding that "[f]ailure to have oral argument before acting upon the motions to dismiss" was not an abuse of discretion nor a violation of due process).

The Federal Rules, the North District Local Rules, and binding Ninth Circuit precedent all provide that it is entirely within the district court's discretion whether

to hold oral argument on any particular motion. In this case, the Court determined that it could adjudicate the motions without oral argument after a full presentation of the parties' positions in their papers.

Accordingly, the Court DENIES Plaintiffs' motion to set aside the judgment and order a hearing on Defendants' dispositive motions.

IT IS SO ORDERED.

Dated: March 16, 2023

/s/ Jeffrey S. White
JEFFREY S. WHITE
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED JANUARY 9, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 22-cv-01979-JSW

ROSEMARY D'AUGUSTA, *et al.*,

Plaintiffs,

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Defendants.

ORDER GRANTING MOTIONS TO DISMISS AND DENYING MOTIONS FOR LEAVE TO SUPPLEMENT THE COMPLAINT AND FOR RECONSIDERATION

Re: Dkt. Nos. 85, 86, 108, 109

Now before the Court are the motion to dismiss filed by defendants American Petroleum Institute, Chevron Texaco Capital Corporation, Continental Resources Inc., Devon Energy Corporation, Energy Transfer LP, Exxon Mobil Corporation, Occidental Petroleum Corporation, Phillips 66 Company (collectively, "Defendants") and the motion to dismiss filed separately by defendant Energy Transfer LP ("Energy Transfer"). Also before the Court

are the motions filed by Plaintiffs for leave to supplement their complaint and for reconsideration of this Court's order dated August 22, 2022, denying Plaintiffs' request for leave to depose third-party witness, Jared Kushner.

The omnibus motion to dismiss filed by Defendants is GRANTED without leave to amend and the motion to dismiss filed by Energy Transfer is GRANTED. Plaintiffs' motion for leave to supplement the complaint and for leave to file a motion for reconsideration for are DENIED.

BACKGROUND

Plaintiffs, consumers of gasoline in the four years prior to filing suit, allege an antitrust conspiracy between the United States, Saudi Arabia, Russia, and Defendants. Plaintiffs allege that Defendants "agreed among themselves, and with Saudi Arabia and Russia, to cut the production of oil, to remove and store excess oil supply, to limit future exploration and production of oil, and to stop the price war that had erupted between Saudi Arabia and Russia, all for the purpose and with the intended effect to raise the price of oil and gasoline and other fuels in the United States and elsewhere." (Complaint at ¶ 43.) Plaintiffs assert that the sovereign nations and Defendants formed their conspiracy as an integral part of a global settlement of a price war between Saudi Arabia and Russia. (*Id.* at ¶¶ 1, 7-9.)

Omitting any reference to the onset of the Covid-19 global pandemic, Plaintiffs assert that the price war started in March 2020 after Russia repudiated a prior

agreement with OPEC to limit oil production, Saudi Arabia retaliated by announcing plans to increase production, and Russia responded by also increasing production. (*Id.* at ¶¶ 7-9.) Plaintiffs allege that as prices for oil and gasoline continued to fall, Defendants agreed to cut their production and reduce new investment in exploration and production in an attempt to stem the price reductions. (*Id.* at ¶¶ 16, 18.) Plaintiffs allege that then-President Trump heralded the free market and praised the reduction in oil prices and then, after contact with some of the Defendant oil companies, agreed to meet with them to discuss the price war. (*Id.* at ¶¶ 20-22.) Plaintiffs allege that discussion with some Defendants, Trump sought agreement with Saudi Arabia and Russia to stop the price war and then met with the Defendants' CEOs on Friday, April 3, 2020. (*Id.* at ¶¶ 22-25.) Although the meeting itself was held in secret, allegedly, as "a condition of calling off the price war," Saudi Arabia and Russia required that the United States, Canada, and Mexico "agree to cut production." (*Id.* at ¶ 29.) As a result of political maneuvering, Plaintiffs allege that "the American oil companies agreed to cut production by 2 million barrels per day (or 3 million barrels per day) by the end of the year as a quid pro quo for the cessation of the price war, just as Russia and Saudi Arabia had demanded." (*Id.* at ¶ 37.) As a result of capitulating to foreign demand, [c]ompetition in the oil industry was eliminated." (*Id.* at ¶ 38.)

Plaintiffs further allege that by "reason of these agreements, the price of oil and gasoline was substantially increased ... [and] the price of oil and the price of gasoline would be substantially less than what they have become

as a result of these agreements, and inflation would have been far less, if non-existent." (*Id.* at ¶ 44.) Plaintiffs assert that, as consumers of gasoline, they "have been harmed and continue to be threatened with harm and damage in that they have been deprived of price competition that they otherwise would have enjoyed but for the Defendants' anticompetitive agreement to reduce the production of oil in order to raise the price of oil and gasoline." (*Id.* at ¶ 67.)

Based on these allegations, Plaintiffs assert claims under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The Defendants moved to dismiss in an omnibus motion as well as defendant Energy Transfer moving to dismiss separately. In addition, Plaintiffs move for leave to supplement their complaint and for reconsideration of the Court's order denying leave to depose Kushner.

The Court shall address other relevant facts in the remainder of its order.

ANALYSIS

A. Motion to Dismiss filed by All Defendants.

1. Legal Standard Pursuant to Federal Rule of Civil Procedure 12(b)(6).

Defendants move to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Under Rule 12(b)(6), a court generally "is limited to the allegations in the complaint, which are accepted as true

and construed in the light most favorable to the plaintiff." *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even under the liberal pleadings standard of Federal Rule of Civil Procedure 8(a)(2), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a claim for relief will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). Pursuant to *Twombly*, a plaintiff must not allege conduct that is conceivable but must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the Defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 556).

If a plaintiff fails to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990). However, if a plaintiff has previously amended a complaint, a court has "broad" discretion to deny leave to amend. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (quoting *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989)).

2. Legal Standard Pursuant to Federal Rule of Civil Procedure 12(b)(1).

Defendants also move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). The Court evaluates challenges to Article III standing under Federal Rule of Civil Procedure 12(b)(1). *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (motion to dismiss for lack of standing governed by Rule 12(b)(1)). Where, as here, a defendant makes a facial attack on jurisdiction, the factual allegations of the complaint are taken as true. *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996). Plaintiffs are then entitled to have those facts construed in the light most favorable to them. *Id.*

The "irreducible constitutional minimum" of standing consists of three elements: an injury-in-fact, causation, and redressability. *Spokeo v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Plaintiffs must prove each element with the same manner and degree of evidence required at each stage of the litigation. *Lujan*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)). Because Plaintiffs are the parties invoking federal jurisdiction, they "bear[] the burden of establishing these elements." *Id.*

Defendants argue that, under several doctrines, Plaintiffs lack standing to file suit. Thus, they move to dismiss pursuant to Rule 12(b)(1). In addition, Defendants contend that even if the matter was justiciable and Plaintiffs had standing to make their claims, Plaintiffs fail to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

3. Political Question Doctrine.

The political question doctrine bars courts from making any determination of issues that the Constitution commits to the political branches of government. Adjudication of those claims is jurisdictionally barred. Under the political question doctrine, a court "lacks authority to decide the dispute before it" when a case involves a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195, 132 S. Ct. 1421, 182 L. Ed. 2d 423 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993)). Courts lack jurisdiction to adjudicate "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 223, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986).

Here, Plaintiffs contend that the former President of the United States and his administration were instrumental in negotiating an end to an international

price war over the cost of petroleum products. It is well-established that allegations of a conspiracy among American corporations and foreign sovereigns raise non-justiciable political questions. *See, e.g., Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F3d. 938, 950 (5th Cir. 2011) (holding that matters relating to the conduct of foreign relations is committed exclusively to the political branches of government and largely immune from judicial inquiry or interference) (citing *Haig v. Agee*, 453 U.S. 280, 292, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981)). Plaintiffs here are barred by the political question doctrine from questioning foreign policy decisions of the coordinate branches of government. The complaint alleges that President Trump, in negotiating a fix to the international price war, sought an agreement among the American oil companies together with Saudi Arabia and Russia to agree to limit production and exploration of oil. (*See* Complaint at ¶ 1 ("Plaintiffs allege that the Defendants combined and conspired between and among themselves and with Saudi Arabia and Russia to raise the price of oil and gasoline."); ¶ 34 ("The American oil companies had agreed to the demands of Saudi Arabia and Russia. The cartel now included the Americans."); ¶ 37 ("Thus, the American oil companies agreed to cut production ... as a quid pro quo for the cessation of the price war, just as Russia and Saudi Arabia had demanded.")). Plaintiffs allege that

> [f]rom the beginning of the conspiracy and as an integral part of its success, the plan of the Defendant oil companies and API was to cajole and persuade former President Trump into abandoning any notion of the free

> enterprise principles, and, instead, to convince his "friends" Vladimir Putin of Russia and the Crown Price of Saudi Arabia to end their price war, and to commit to a substantial reduction of their production so that the prices for oil and gasoline could increase to the substantial benefit of all producers, and to the substantial and catastrophic detriment of all consumers, and others who rely on oil and gasoline in their businesses, including, commuters, vacationers, and citizens just driving to the store.

(*Id.* at ¶ 40.)

The facts proffered by Plaintiffs clearly include Russia and Saudi Arabia as indispensable members of the alleged conspiracy and include questioning the foreign policy decisions of President Trump and his administration. Although in opposition, Plaintiffs argue that they have alleged an independent and completely domestic conspiracy, the actual allegations in the complaint confirm a purported global, not just private or domestic agreement, between Saudi Arabia, Russia, and the United States to cut production of oil. The allegations include specific foreign policy decisions allegedly made by the Trump administration in furtherance of the alleged conspiracy.

The court lacks jurisdiction over a complaint that "requires and inquiry into" whether foreign nations entered an agreement with Defendants at the behest of the President of the United States. *See Spectrum Stores*,

632 F.3d at 951 (holding that adjudicating the legality of the actions of foreign states would trench on "delicate foreign policy questions" and would also require the Court to "reexamin[e] critical foreign policy decisions, including the Executive Branch's longstanding approach of managing foreign relations with foreign oil-producing states through diplomacy rather than private litigation."). Accordingly, the Court finds that the claims not justiciable and barred by the political question doctrine.

4. Act of State Doctrine.

The act of state doctrine declares that a United States court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state. *International Ass'n of Machinists and Aerospace Workers v. Organization of the Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354, 1358 (9th Cir. 1981). The doctrine "recognizes the institutional limitations of the courts and the peculiar requirements of successful foreign relations." *Id.* The political branches of government are uniquely suited "to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relationships in accordance with the best interests of the country as a whole. The courts, in contrast, focus on single disputes and make decisions on the basis of legal principles." *Id.* Like the political question doctrine and similarly derived from the respect of the separation of powers, the act of state doctrine "requires that the courts defer to the legislative and executive branches when those branches are better equipped to resolve a politically sensitive question." *Id.*

Here, the act of state doctrine bars this suit as Plaintiffs explicitly involve the sovereign countries — Russia and Saudi Arabia — and their management of their own respective petroleum resources. As pled, these countries are indispensable co-conspirators in the alleged scheme to cut production and they demanded Defendants' cooperation in the conspiracy as a "quid pro quo" for ending the price war. (*See* Complaint at ¶¶ 37-39.) The Court finds that Plaintiffs' direct challenge to the official acts of foreign nations to limit their oil production and demand that Defendants do the same, are acts of state beyond the jurisprudential scope of this Court's authority. Accordingly, the Court finds that the claims are independently barred by the act of state doctrine.

5. *Noerr-Pennington* Doctrine.

The First Amendment guarantees the "right of the people ... to petition the Government for a redress of grievances." U.S. Const. amend. I. The *Noerr-Pennington* doctrine derives from this constitutional guarantee. Generally, it holds that an individual who petitions the government for redress will be immune from any statutory liability for their petitioning conduct. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929, 934 (9th Cir. 2006) (citing *Empress LLC v. City & County of S.F.*, 419 F.3d 1052, 1056 (9th Cir. 2005)). The doctrine "immunizes petitions directed at any branch of government, including the executive, legislative, judicial and administrative agencies." *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000). Under the *Noerr-Pennington* doctrine, "[c]oncerted efforts to restrain or monopolize trade by petitioning government officials are

protected from antitrust liability." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988).

The allegations in the complaint, taken as true at this procedural posture, amount to Defendants advocating to the former President and his administration for a diplomatic solution to the global price war over petroleum products. Petitioning the President to use diplomacy to end a price war among sovereign states is constitutionally protected activity and "federal antitrust laws ... do not regulate the conduct of private individuals in seeking anticompetitive action from the government." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 379-80, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991). The complaint describes a conspiracy relating to the United States government's action in response to Defendants' alleged petitioning. Plaintiffs allege that Defendants publicly advocated for a solution to the price war and suggested methods for stabilizing the global oil market to the President and his administration. (Complaint at ¶¶ 14, 15, 22-23, 25-26, 34.) This lobbying effort is "protected petitioning activity [under] ... *Noerr-Pennington*." *See B&G Foods N. Am., Inc. v. Embry*, 29 F.4th 527, 540 (9th Cir. 2022). Taken as true, the complaint alleges that Defendants sought to have the President engage in diplomatic negotiations to end the price war. This conduct is protected by the *Noerr-Pennington* doctrine from antitrust liability.

Accordingly, the Court finds that the motion to dismiss filed by all defendants can be granted on the basis that the claims are barred by the political question doctrine, the act of state doctrine, and the *Noerr-Pennington* doctrine.

These jurisprudential bars to this litigation are each sufficient to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). However, the Court also finds that Plaintiffs have failed plausibly to state a claim by which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs have failed to allege sufficient facts to demonstrate the basis for any claim for antitrust violation, that is, they have failed to allege facts to support a plausible inference of an unlawful agreement among Defendants, including the "who, did what, to whom (or with whom), where, and when." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 n.6 (9th Cir. 2015). The bare assertion that Defendants "agreed to take any surplus oil off the market, cut their production, and substantially reduce their investment in exploration and production" is insufficient alone to support the claim of an unlawful agreement. (Complaint at ¶ 16.) The complaint simply does not allege sufficient plausible facts detailing any such agreement. In addition, during the same time period when oil and gasoline prices increased, the world faced the Covid-19 pandemic, which gave rise to stay-at-home orders, economic collapse, and plunging demand for gasoline and other fuels. This provides another explanation, omitted entirely from the complaint, for a significant drop in demand and consequent production cuts by oil companies. Although if given leave, the Plaintiffs might ostensibly plead additional facts giving rise to an inference of an unlawful agreement, because the Court finds the antitrust claims are barred by several applicable jurisprudential doctrines, the Court GRANTS Defendants' omnibus motion to dismiss without leave to amend.

Appendix C

B. Motion to Dismiss Filed by Defendant Energy Transfer.

Defendant Energy Transfer joins in the omnibus motion to dismiss filed on behalf of all Defendants and also files a motion separately to dismiss on the basis that the Court lacks personal jurisdiction over the company. First, Energy Transfer argues that Plaintiffs fail to allege that the defendant produces or sells oil or gasoline or that it specifically took any action that affected oil and gasoline prices. In fact, the Complaint states that the defendant transports only natural gas and propane. (Complaint at ¶ 79.) Second, Energy Transfer contends that there are no specific allegations that Plaintiffs purchased anything from the company. Third, Plaintiffs do not identify any merger or acquisition by Energy Transfer in the relevant time frame or any transaction that may have affected gasoline purchased by Plaintiffs. Lastly, although Energy Transfer concedes that it may be served in California, there are no allegations supporting the contention that this Court has personal jurisdiction over the company as it is not incorporated or have its principal place of business in the State and there are no allegations of the company doing business in the State or specific targeting activity in the jurisdiction. *See* 15 U.S.C. 22. Accordingly, the Court lacks personal jurisdiction over defendant Energy Transfer.[1] Although the Court would grant leave to amend to allege specific facts which may give rise to the exercise of personal jurisdiction, the Court has already found that the claims are barred.

---

1. The Court finds that it similarly lacks personal jurisdiction over Defendants API, Continental, Devon, Exxon Mobile, Hilcorp, and Phillips 66 as non-California Defendants.

Appendix C

C. Motion for Leave to Supplement the Complaint.

1. Legal Standard.

Plaintiffs seek leave to file a supplemental pleading under Federal Rule of Civil Procedure 15(d) to add Hess Corporation as a defendants and to add detailed representations made by Kusher. Under Rule 15(d), "[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d); *see also Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 874 (9th Cir. 2010) ("Rule 15(d) provides a mechanism for parties to file additional causes of action based on facts that didn't exist when the original complaint was filed."). Supplementation is generally favored as "a tool of judicial economy and convenience." *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988). "To determine if efficiency might be achieved, courts assess 'whether the entire controversy between the parties could be settled in one action.'" *Id.* (citation and ellipses omitted). "The clear weight of authority ... in both the cases and the commentary, permits the bringing of new claims in a supplemental complaint to promote the economical and speedy disposition of the controversy." *Id.*

"The legal standard for granting or denying a motion to supplement under Rule 15(d) is the same as for amending one under 15(a)." *Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670 SBA, 2008 U.S. Dist. LEXIS 69542, 2008 WL 4183981, at *26 (N.D. Cal. Sept. 9, 2008). The five factors commonly used to evaluate the propriety

of a motion for leave to amend (and thus, a motion to supplement) are: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure of previous amendments, (4) undue prejudice to the opposing party, and (5) futility of the amendment. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). "[T]he consideration of prejudice to the opposing party ... carries the greatest weight." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003). Absent prejudice or a "strong showing" of any other *Foman* factor, there is a presumption in favor of granting leave to supplement. *Id.*

2. Leave Denied.

Plaintiffs move to supplement their complaint to add Hess Corporation as a defendant and to supplement factual statements made by Kushner in a presentation by his new company, Affinity Partners. Plaintiffs allege that Kushner identified one of his most significant accomplishments while in his father-in-law's administration to be "leading negotiations on the historic OPEC+ oil agreement in April 2020 among the United States, Saudi Arabia and Russia, which led to the largest oil production reductions in history." (Dkt. No. 109-1, Motion at 3.) Plaintiffs also allege that Kushner specifically referred to Hess Corporation's participation in the "deal to raise oil prices" in his nearly released memoir. (*Id.* at 4.)

Because the Court has already determined that Plaintiffs' claims are barred by the political question, act of state, and *Noerr-Pennington* doctrines, the Court

finds the proposed addition of the Hess Corporation and Kushner's purported participation in the Trump administration still present non-justiciable political questions regarding the United States' foreign policy with respect to other oil-producing countries and public acts of foreign states and Defendants' possible efforts to petition the government for redress. The adjudication of these threshold questions requires dismissal of this action. Further supplementation of the complaint would be futile. Accordingly, Plaintiffs' motion for leave to supplement the complaint is DENIED.

D. Motion for Leave to File Motion for Reconsideration.

1. Legal Standard.

A motion for reconsideration may be made on one of three grounds: (1) a material difference in fact or law exists from that which was presented to the Court, which, in the exercise of reasonable diligence, the party applying for reconsideration did not know at the time of the order; (2) the emergence of new material facts or a change of law; or (3) a manifest failure by the Court to consider material facts or dispositive legal arguments presented before entry of judgment. N.D. Civ. L.R. 7-9(b)(1)-(3). The moving party may not reargue any written or oral argument previously asserted to the Court. *Id.*, 7-9(c).

2. Leave Denied.

Plaintiffs seek leave to file a motion for this Court to reconsider its ruling disallowing the deposition of Jared

Kushner based on alleged disclosures in his recently-published memoir. For the same reasons the Court finds it futile to allow Plaintiffs leave to supplement the complaint, the Court finds the addition of Kushner as a witness futile and DENIES Plaintiffs lead to file a motion for reconsideration of its earlier order.

CONCLUSION

For the foregoing reasons, the omnibus motion to dismiss filed by all defendants is GRANTED without leave to amend and the motion to dismiss filed by Energy Transfer is GRANTED. Plaintiffs' motion for leave to supplement the complaint and for leave to file a motion for reconsideration are DENIED.

IT IS SO ORDERED.

Dated: January 9, 2023

/s/ Jeffrey S. White
JEFFREY S. WHITE
United States District Judge

APPENDIX D — [~~PROPOSED~~] ORDER RE: JOINT LETTER BRIEF (DKT. 93) OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION, FILED AUGUST 22, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA,
OAKLAND DIVISION

Case No. 4:22-cv-01979-JSW

ROSEMARY D'AUGUSTA, BRENDA DAVIS, PAMELA FAUST, CAROLYN FJORD, DONALD C. FREELAND, DONALD FRYE, GABRIEL GARAVANIAN, VALARIE JOLLY, MICHAEL MALANEY, LENARD MARAZZO, LISA MCCARTHY, TIMOTHY NIEBOER, DEBORAH PULFER, BILL RUBINSOHN, SONDRA RUSSELL, JUNE STANSBURY, CLYDE DUANE STENSRUD, GARY TALEWSKY, PAMELA WARD, CHRISTINE M WHALEN, MARY KATHERINE ARCELL, JOSE BRITO,

Plaintiffs,

v.

AMERICAN PETROLEUM INSTITUTE, EXXON MOBIL CORPORATION, CHEVRON TEXACO CAPITAL CORPORATION, PHILLIPS 66 COMPANY, OCCIDENTAL PETROLEUM CORPORATION, DEVON ENERGY CORPORATION, ENERGY TRANSFER LP, HILCORP ENERGY, AND CONTINENTAL RESOURCES INC., *et al.,*

Defendants.

Appendix D

Filed August 22, 2022

[~~PROPOSED~~] ORDER RE: JOINT LETTER BRIEF (DKT. 93)

Judge: Hon. Jeffrey S. White
Crtrm.: 5 – 2nd Floor

[~~PROPOSED~~] ORDER

Having considered the positions of the parties, and good cause appearing, Plaintiffs' request for leave to take Jared Kushner's deposition (Dkt. 93) is **DENIED**.

IT IS SO ORDERED.

Dated: August 22, 2022

/s/ Jeffrey S. White
Jeffrey S. White
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 25, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15878
D.C. No. 4:22-cv-01979-JSW
Northern District of California,
Oakland

ROSEMARY D'AUGUSTA; BRENDA DAVIS; PAMELA FAUST; CAROLYN FJORD; DONALD C. FREELAND; DONALD FRYE; GABRIEL GARAVANIAN; VALERIE JOLLY; MICHAEL C. MALANEY; LENARD MARAZZO; LISA MCCARTHY; TIMOTHY NIEBOER; DEBORAH M. PULFER; BILL RUBINSOHN; SONDRA K. RUSSELL; JUNE STANSBURY; CLYDE D. STENSRUD; GARY TALEWSKY; PAMELA S. WARD; CHRISTINE M. WHALEN; MARY KATHERINE ARCELI; JOSE M. BRITO; JAN-MARIE BROWN; JOCELYN GARDNER,

Plaintiffs-Appellants,

v.

AMERICAN PETROLEUM INSTITUTE; EXXON MOBIL CORPORATION; CHEVRONTEXACO CAPITAL CORPORATION; PHILLIPS 66 COMPANY; OCCIDENTAL PETROLEUM CORPORATION; DEVON ENERGY CORPORATION; ENERGY TRANSFER LP; HILCORP ENERGY; CONTINENTAL RESOURCES, INC.,

Defendants-Appellees.

Appendix E

Filed October 25, 2024

ORDER

Before: GOULD, TALLMAN, and R. NELSON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Dkt. No. 70. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is **DENIED**.