No. 03-283

In the Supreme Court of the United States

SHELL PETROLEUM INC., AND
SUBSIDIARY CORPORATIONS, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

RICHARD FARBER
STEVEN W. PARKS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioners are collaterally estopped by the decision in *Shell Petroleum, Inc.* v. *United States*, 182 F.3d 212 (3d Cir. 1999) from relitigating whether oil produced using enhanced recovery techniques that were in use in 1980 qualifies for the tax credit for "oil produced from * * * tar sands" under 26 U.S.C. 29.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 03-283

SHELL PETROLEUM INC., AND
SUBSIDIARY CORPORATIONS, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 319 F.3d 1334. The opinion of the Court of Federal Claims (Pet. App. 28a-64a) is reported at 50 Fed. Cl. 524.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2003. Pet. App. 26a-27a. The petition for rehearing was denied on May 29, 2003. Pet. App. 24a-25a. The petition for a writ of certiorari was filed on August 19, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1979, President Carter announced his intention to phase out price controls over crude oil. See S. Rep. No. 394, 96th Cong., 1st Sess. 6 (1979). In anticipation of the substantial windfall that oil companies were expected to realize as a result of the rise in the price of crude oil to prevailing market prices, Congress enacted the Crude Oil Windfall Profit Tax Act of 1980 (COWPTA), Pub. L. No. 96-223, 94 Stat. 229. That Act imposed a tax on domestically produced crude oil that ranged from 30 to 70 percent of the "windfall profit" that resulted from price decontrol. 26 U.S.C. 4986(a) (Supp. IV 1980); 26 U.S.C. 4987(b) (Supp. IV 1980); *United States* v. *Ptasynski*, 462 U.S. 74, 76 (1983). Under this Act, the term "crude oil" was to have the same meaning given that term in prior regulations that had defined the term "crude oil" to include any oil produced using enhanced recovery techniques, such as steam drive injection and cyclic steam injection. 26 U.S.C. 4996(b)(1) (Supp. IV 1980) (incorporating 10 C.F.R. 212.78 (1980)).

In enacting this windfall profits tax on crude oil, Congress recognized the need to provide tax incentives "to encourage businesses to * * * produce alternative sources of energy." S. Rep. No. 394, *supra*, at 3. The novel and largely experimental alternative sources of energy considered at that time included "solar, wind, geothermal, wood, biomass, hydroelectric, ocean thermal, oil shale, *tar sands*, coal liquefaction and gasification and unconventional natural gas." *Id.* at 8 (emphasis added). To provide such an incentive, Congress established a tax credit of $3 per barrel-of-oil equivalent for "oil produced from * * * tar sands." 26 U.S.C. 44D (Supp. IV 1980). This tax credit was rede-

signated as Section 29 of the Internal Revenue Code, 26 U.S.C. 29 (Supp. II 1984), in the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 471, 98 Stat. 826.

In enacting this limited tax credit, Congress clearly distinguished between crude oil, on one hand, and oil from tar sands, on the other hand. The House Report emphasized that these are mutually exclusive categories and that "[t]he term 'crude oil' * * * does not apply to synthetic petroleum such as oil production from * * * tar sands." H.R. Rep. No. 817, 96th Cong., 2d Sess. 114 (1980). The Senate Report made the same point. S. Rep. No. 394, *supra*, at 56 ("'crude oil' * * * does not include synthetic petroleum, such as oil from * * * tar sands"). A large portion of the revenues anticipated from the windfall profit tax on crude oil was intended for use in financing the tax credit provided for alternative fuels. *Id.* at 8.

2. Petitioners produce oil using steam drive and cyclic steam oil production methods—which are also known as steam flood and steam soak. Pet. App. 3a. Those enhanced oil recovery techniques produce oil by introducing steam into a reservoir to reduce the viscosity of the oil in the ground, thus enabling the oil to move to a well bore from which it may be pumped to the surface. *Id.* at 3a, 66a-67a n.2. Both of these procedures were widely accepted methods of producing oil long before enactment of the COWPTA. *Id.* at 3a, 55a, 71a.

In a case that involved the 1983 and 1984 tax years, petitioners sought tax credits under 26 U.S.C. 29 (Supp. II 1984) for oil they produced from the North Midway Sunset Field using steam drive and steam soak recovery techniques. *Shell Petroleum, Inc.* v. *United States*, 182 F.3d 212 (3d Cir. 1999), aff'g 996 F. Supp. 361 (D.Del. 1997) (*Shell I*); see Pet. App. 71a, 85a. The

district court in that case rejected petitioners' claims (Pet. App. 95a-122a), and the Third Circuit affirmed that decision (*id.* at 65a-94a). The court of appeals stated in *Shell I* that resolution of petitioners' appeal "turn[ed] on the proper definition of 'oil produced from tar sands' * * * ." *Id.* at 66a. After examining the text, structure, history and purposes of the COWPTA, the court of appeals concluded that oil produced using enhanced recovery techniques that were available in 1980 did not qualify as oil from tar sands for purposes of the tax credit. *Id.* at 84a-91a.

The court held that the definition of "oil produced from * * * tar sands" that was most compatible with Congress's intent was the definition contained in FEA Ruling 1976-4, 41 Fed. Reg. 25,886 (1976).[1] That Ruling set forth the following definition of "tar sands" (Pet. App. 30a) (emphasis added):

> The several rock types that contain an extremely viscous hydrocarbon which is not recoverable in its natural state by conventional oil well production methods including *currently used enhanced recovery techniques*.

3. Petitioners brought the present tax refund suit seeking tax credits under 26 U.S.C. 29 (1988) for oil produced from the North Midway Sunset Field and seven other properties during the 1988 and 1989 tax years. Pet. App. 2a, 55a n.15. Petitioners did not disclose the

---

[1] FEA Ruling 1976-4 was issued in response to inquiries concerning whether so-called "synthetic fuels" or "crude oil substitutes" were subject to petroleum allocation and price controls. The FEA concluded in the ruling that allocation and price controls applied only to fuel resources that were threatened to be in short supply, and did not apply to "experimental" fuels such as oil from tar sands. Pet. App. 68a-69a.

method used to produce oil from one of the properties, which they referred to as their Casmalia property. *Id.* at 55a n.16. Oil from the other properties was produced using steam drive or cyclic steam oil production techniques. *Id.* at 5a.

The Court of Federal Claims granted the government's motion for summary judgment. Pet. App. 28a-64a. With respect to oil from the Casmalia property, the court concluded that petitioners were not entitled to the tax credit because they had failed to "reveal[] the production process" used to produce oil from that property. *Id.* at 55a n.16, 64a. With respect to oil produced from the remaining seven properties, the court held that petitioners were collaterally estopped by the decision in *Shell I* from relitigating whether oil produced using enhanced recovery techniques that were available in 1980 qualified as oil from tar sands. *Id.* at 31a-53a.

The court also rejected petitioners' contention that they had applied different production methods in the present case from the methods in use in 1980. The court noted that petitioners claimed that they produced this oil using "advanced modeling tools, sophisticated surveillance procedures, advanced drilling and well completion techniques, and advanced facilities designs." Pet. App. 57a. The court held, however, that an enhanced oil recovery "technique" within the meaning of FEA Ruling 1976-4 is a production technique that actually "move[s] hydrocarbons" and is a method of producing oil "in and of itself." *Id.* at 59a-60a. The court determined that the technologies on which petitioners relied in claiming that they had devised a new recovery technique were merely ancillary aides that made the well-known, enhanced recovery techniques of steam drive and cyclic steam injections production pro-

cesses more efficient and cost-effective. They therefore did not constitute a new method of producing oil. *Ibid.* The court concluded that petitioners thus failed to meet their burden of proving that the oil for which they claimed tax credits had been produced by means other than enhanced recovery techniques that were already in use in 1980. *Id.* at 62a.

4. The court of appeals affirmed. Pet. App. 1a-23a. The court noted that "[t]he Third Circuit concluded [in *Shell I*] that oil produced by 'enhanced recovery techniques' available in 1980 is crude oil and cannot be 'oil produced from tar sands.'" *Id.* at 8a. The court therefore held in this case that petitioners are "precluded from re-litigating the issue of whether hydrocarbons produced by means of enhanced recovery techniques in use * * * [in 1980], are 'crude oil' and not 'oil produced from tar sands' for purposes of the § 29 tax credit." *Id.* at 10a.

The court of appeals also rejected petitioners' contention that their use of new technologies resulted in new oil production techniques that were not in use in 1980. Pet. App. 10a-15a. The court of appeals agreed with the trial court's determination that an enhanced recovery "technique" connotes a method of producing oil, as opposed to an incremental development or improvement in a pre-existing method of oil production. *Id.* at 11a, 13a. The court of appeals sustained the trial court's conclusion that petitioners' asserted technological improvements were merely ancillary aides to the efficiency of preexisting steam drive and cyclic steam oil production methods. The court stated that "Shell has not demonstrated that its allegedly new technologies changed the pre-[1980], methods of moving hydrocarbons to the surface from the recovery methods available in 1980" and that "Shell's method of moving the

hydrocarbons was no different from the steam based recovery methods available in 1980." *Id.* at 14a.

The court concluded that petitioners had failed to raise a genuine issue of material fact concerning whether the oil had been produced using production techniques that were not already in use in 1980. Pet. App. 14a-15a. Judge Newman, however, dissented from that conclusion. She stated that the factual arguments raised by petitioners concerning their more recent production methods were "not amenable to adverse summary judgment." *Id.* at 21a.

A petition for rehearing and rehearing en banc filed by petitioners was thereafter denied. Pet. App. 24a-25a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Both in *Shell I* and in the present case, the oil for which petitioners sought tax credits was produced using steam drive and cyclic steam oil production methods. Those methods produce oil by injecting steam into a reservoir in order to reduce the viscosity of oil in the ground so that it can flow to a well bore from which it may be pumped to the surface. Pet. App. 3a, 10a-15a, 66a-67a n.2, 71a, 85a. The court of appeals held in *Shell I* that oil produced using those enhanced recovery techniques is crude oil, not oil "from * * * tar sands," within the meaning of the governing tax credit provision, 26 U.S.C. 29(c)(1)(A). Pet. App. 84a-91a. In the present case, the court of appeals correctly concluded that petitioners are barred by the doctrine of collateral estoppel from relitigating that same question

in this case. As this Court has made clear, "once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation." *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984). See also *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *Montana* v. *United States*, 440 U.S. 147, 153 (1979).[2]

2. a. Petitioners nonetheless seek certiorari on the question whether the "'separable facts' doctrine of *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948)" (Pet. i) remains viable and applies to its case. This doctrine, which petitioners claim provides a "limited application of estoppel in Federal tax cases" (Pet. 6), was described by this Court in *Sunnen*, 333 U.S. at 601, as follows:

> [I]f the relevant facts in * * * two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case * * * .

Although petitioners seek certiorari on this question, they did not raise it in the court of appeals and the court of appeals did not address or decide it. Peti-

---

[2] Petitioners broadly assert (Pet. 2) that the oil at issue in this case satisfies "the industry" definition of tar sands. Petitioners failed, however, to prove that there was any such consensus industry definition in *Shell I* (Pet. App. 83a), and they introduced no evidence on that point in the present case.

Petitioners also erroneously seek to rely (Pet. 2) on the definition of "tar sands" in 30 U.S.C. 209. That statute was enacted as part of the Combined Hydrocarbon Leasing Act of 1981, Pub. L. No. 97-78, 95 Stat. 1070, and paragraph 10 of that Act expressly states that "[n]othing in this Act shall affect the taxable status of production from tar sand under the Crude Oil Windfall Profit Tax Act of 1980." 95 Stat. 1072 (reproduced at 30 U.S.C. 181 note).

tioners are incorrect in stating that they preserved this issue by raising it at page 18 of their brief to the court of appeals. Pet. 6. In fact, however, their brief did not raise any question concerning the continued viability of the "separable facts" aspect of *Sunnen* or the applicability of that doctrine to this case. The sole reference to *Sunnen* in petitioners' brief consisted of the following general statement in an introductory paragraph of their argument (Appellants Br. 18):

> In tax cases in particular, the courts have recognized that "collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice." *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948); *Kennedy v. Commissioner*, 876 F.2d 1251, 1257 (6th Cir. 1989).

The "separable facts" doctrine is not discussed in the quoted passage (or even on the cited page) from *Sunnen*, and the decision of the court of appeals in *Kennedy* did not address or involve that doctrine.

In the discussion of collateral estoppel in their appellate brief, petitioners argued only (i) that the parties in *Shell I* "did not litigate and the Court did not decide how to interpret" FEA Ruling 1976-4 and (ii) that various statements made by the Third Circuit in *Shell I* should not be given collateral estoppel effect because "they were not essential to resolving the *Shell I* litigation." Appellants Br. 19, 23 (emphasis omitted). Indeed, far from arguing that the "separable facts" doctrine applies to this case, petitioners broadly acknowledged that they "*do[] not dispute*" that they are collaterally estopped by the decision in *Shell I* "from arguing here that the FEA definition of 'tar sands' is inapplicable." *Id.* at 20 (emphasis added). And, petitioners expressly asserted that the traditional collateral

estoppel standards—the very standards applied by the court below—should govern this case. *Id.* at 18-19.

The issue that petitioner now seeks to frame in its petition for a writ of certiorari was thus neither presented to nor decided by the court of appeals. Certiorari on that issue is therefore not warranted. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"). See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001) (declining to reach an issue "because it was not raised or briefed below"); *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 400 n.7 (1996) (internal quotation and citation omitted) ("[w]e generally do not address arguments that were not the basis for the decision below"); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958) ("Only in exceptional cases will this court review a question not raised in the court below").

b. There is, in any event, no conflict among the circuits concerning the continued viability of the "separable facts" aspect of *Sunnen*. The three circuits that have considered that question have held that the "separable facts" aspect of *Sunnen* was effectively overruled in *Montana* v. *United States*, 440 U.S. at 153. See *Kamilche Co.* v. *United States*, 53 F.3d 1059, 1062-1063 n.3 (9th Cir. 1995); *American Medical Int'l, Inc.* v. *Secretary of Health, Education and Welfare*, 677 F.2d 118, 120-121 (D.C. Cir. 1981); *Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1167 (5th Cir. 1981).[3]

---

[3] Petitioner's reliance (Pet. 12) on older decisions of the Ninth Circuit does not demonstrate a conflict among the circuits. The most recent decision of the Ninth Circuit on this question adopts the same view consistently reached by the other circuits that have

3. Petitioners err in asserting that the court of appeals improperly gave collateral estoppel effect to mere "passages" (Pet. 16), "analysis" (*ibid.*), matters "considered collaterally or incidentally" (Pet. 17) and general "reasoning" (Pet. 21) of the court of appeals in *Shell I*. The court below correctly held that the question whether oil produced by petitioners using enhanced recovery techniques that were available in 1980 qualified as oil from tar sands was (i) identical to the issue decided in *Shell I*; (ii) actually litigated in *Shell I*; (iii) essential to the final judgment in *Shell I*; and (iv) an issue that petitioner had "a full and fair opportunity to litigate" in *Shell I*. Pet. App. 7a-10a.[4] Collateral estoppel requires nothing more. *United States* v. *Mendoza*, 464 U.S. at 158; *Allen* v. *McCurry*, 449 U.S. at 94; *Montana* v. *United States*, 440 U.S. at 153.

4. Petitioner's remaining contentions are without merit. Although petitioner asserts that it was deprived of an opportunity to litigate whether its oil was unrecoverable in its "natural state" within the meaning of FEA Ruling 1976-4 (Pet. 4), its argument on that point was merely that the reduction in viscosity of oil resulting from the introduction of steam constituted a change in the oil's natural state. Appellants Br. 31-36. The reduction of the viscosity of oil by the introduction

---

addressed this question. See *Kamilche Co.* v. *United States*, 53 F.3d at 1062.

[4] Petitioners err in claiming (Pet. 19) that certiorari should be granted due to an asserted conflict among the circuits concerning the application of collateral estoppel from decisions based on alternative holdings. Petitioners raised no such argument in the court of appeals, and the court below did not address that issue. See *TRW Inc.* v. *Andrews*, 534 U.S. at 34 (declining to reach an issue "because it was not raised or briefed below").

of steam is a defining characteristic of steam-assisted, enhanced recovery techniques. Pet. App. 3a, 66a-67a n.2. Petitioners' present assertion is thus nothing more than a reargument of the *same* issues that were litigated and resolved in *Shell I*. The court expressly concluded in *Shell I* that oil produced by the use of the enhanced recovery methods that petitioners have employed does not come within the definition of "oil from * * * tar sands." *Id.* at 85a- 91a. The court below correctly held that petitioners were collaterally estopped from relitigating that prior holding in this case. *Id.* at 5a.

Petitioner's assertion that it was deprived of an opportunity to litigate the meaning of "currently used enhanced recovery technique" (Pet. 5) is also without merit. In the trial court, petitioner "agree[d] that 'currently used' means in use on or before April 2, 1980, the date of the enactment of the COWPTA." Pet. App 31a. The court of appeals sustained the trial court's holding on the merits that an "enhanced recovery technique" within the meaning of FEA Ruling 1976-4 is a method of moving oil to a reservoir from which the oil may be lifted to the surface, and must constitute a method of producing oil "in and of itself" rather than an "incremental development or improvement in pre-existing methods of production." *Id.* at 11a, 13a. The court of appeals agreed with the trial court that petitioner did *not* produce this oil through use of a new method of production and that, instead, "Shell's method of moving the hydrocarbons was no different from the steam based recovery methods available in 1980." *Id.* at 14a. The award of summary judgment on this record, "concurred in by two lower courts" (*Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982)), does not warrant review by this

Court. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

EILEEN J. O'CONNOR
Assistant Attorney General

RICHARD FARBER
STEVEN W. PARKS
Attorneys

OCTOBER 2003