No. 14-1131

In the Supreme Court of the United States

ZHENLI YE GON, PETITIONER

v.

FLOYD AYLOR, WARDEN, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner's extradition to Mexico is permissible under the applicable extradition treaty's *non bis in idem* clause, which prohibits extradition when the person sought has been prosecuted or has been tried and convicted or acquitted for the offense for which extradition is requested.

2. Whether the court of appeals correctly held that Mexico's extradition request satisfied the applicable treaty's dual-criminality clause, which permits extradition only for acts that are punishable under the laws of both Mexico and the United States.

3. Whether the court of appeals correctly declined to address petitioner's request for an order purporting to bar Mexico from prosecuting him on charges other than those for which extradition is ultimately granted by the State Department.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 774 F.3d 207. The amended memorandum opinion of the district court (Pet. App. 31-91) is reported at 992 F. Supp. 2d 637. The district court's memorandum opinion granting in part petitioner's motion to alter, amend, or correct its final judgment (Pet. App. 92-103) is not published in the Federal Supplement but is available at 2014 WL 202107. The opinion of the magistrate judge certifying petitioner's extraditability to Mexico (Pet. App. 104-158) is reported at 768 F. Supp. 2d 69.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2014. A petition for rehearing was denied on February 13, 2015 (Pet. App. 161-162). The

petition for a writ of certiorari was filed on March 13, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal magistrate judge in the District of Columbia certified that petitioner was extraditable to Mexico on charges related to organized crime, drug trafficking, firearms, and money laundering. Pet. App. 104-158. The United States District Court for the Western District of Virginia denied petitioner's petition for a writ of habeas corpus. *Id.* at 31-103. The court of appeals affirmed. *Id.* at 1-30.

1. Petitioner, a Chinese national with Mexican citizenship, owned and operated Unimed Pharm Chem (Unimed), a pharmaceutical company in Mexico City. Pet. App. 7, 107-108. Between 2003 and 2005, Unimed lawfully imported ephedrine and pseudoephedrine into Mexico. *Id.* at 108. Those substances are classified as psychotropic substances under Mexican law, and it is illegal to import or manufacture them without authorization. *Ibid.*

In July 2005, after determining that imports of ephedrine and pseudoephedrine were exceeding the quantities required for lawful medical use and were instead being diverted to the illicit production of methamphetamines, the Mexican government reduced the number of companies authorized to import psychotropic substances. Pet. App. 110. Although Unimed was one of the companies that lost its authorization, it continued to import psychotropic substances into Mexico throughout 2005 and 2006. *Id.* at 110-114. Unimed's senior chemist made false certifications about the nature of the imported chemicals, and petitioner made false representations about the origin of

one of the shipments after it was intercepted by Mexican authorities. *Id.* at 111-113.

Unimed was never authorized to manufacture psychotropic substances. Pet. App. 109, 115. Beginning in April 2006, however, Unimed operated a plant in Toluca, Mexico, that manufactured more than 600 kilograms per day of a white crystalline powder using a process corresponding to the production of pseudoephedrine hydrochloride, a psychotropic substance and methamphetamine precursor. *Id.* at 110, 114-115; Gov't C.A. Br. 5-6. The powder was driven away each day by petitioner or by his personal driver. Pet. App. 116. All transactions at the plant were handled in cash, and cash from apparent sales was delivered directly to petitioner. *Id.* at 117. Neither Unimed nor petitioner reported any income from the Toluca plant, and the powder produced there was not reflected in the company's inventory. *Id.* at 116-117.

In March 2007, Mexican authorities searched the Toluca plant and seized samples of substances later determined to contain ephedrine, pseudoephedrine, and other psychotropic substances. Pet. App. 115. Authorities also searched petitioner's office in Mexico City, where they found 12 bags of pseudoephedrine hydrochloride and a 9mm pistol with an obliterated serial number. *Id.* at 116, 140-141. A search of petitioner's Mexico City home revealed four firearms and more than $205 million in cash in a concealed room off the master bedroom. *Id.* at 117-118, 140-141. On June 13, 2007, a Mexican court issued a warrant for petitioner's arrest. *Id.* at 8; C.A. J.A. 119-125.

2. On June 15, 2007, the United States filed a criminal complaint in the United States District Court for the District of Columbia in which it charged petitioner

with conspiring to aid and abet the manufacturing of drugs for importation into the United States. Pet. App. 8; C.A. J.A. 139. Petitioner was arrested in Maryland and transferred to the custody of the United States Marshal for the District of Columbia. Pet. App. 8. A superseding indictment was later returned charging him with conspiring to aid and abet the manufacture of 500 grams or more of methamphetamine, knowing and intending that it would be imported into the United States, in violation of 21 U.S.C. 959, 960, 963 and 18 U.S.C. 2. Pet. App. 8.

3. On June 9, 2008, Mexico requested petitioner's extradition under the Treaty on Extradition Between the United States of America and the United Mexican States (Treaty), signed May 4, 1978, 31 U.S.T. 5059. The request sought extradition on charges of (1) participating in organized crime for the purposes of committing drug and money-laundering crimes; (2) various drug offenses, including importing and transporting psychotropic substances and possessing those substances with intent to manufacture narcotics; (3) unlawfully possessing firearms; and (4) money laundering. Pet. App. 122-123. In September 2008, the government filed a complaint in the United States District Court for the District of Columbia seeking a certification that petitioner was subject to extradition on those charges. *Id.* at 105; see 18 U.S.C. 3184, 3186 (establishing procedures for extraditions).

In June 2009, the government moved to dismiss the pending federal indictment against petitioner to allow him to be extradited and tried in Mexico. Pet. App. 8-9. The government explained that although the Mexican charges were "based on legally and factually distinct offenses, the conduct with which [petitioner]

is charged in the U.S. case occurred largely within the territory of Mexico and much of the evidence and witnesses upon which the government would rely are from Mexico." C.A. J.A. 208. The government also cited Mexico's strong interest in prosecuting its own citizen on charges involving "multi-ton quantities of methamphetamine precursor chemicals and millions of dollars in illicit drug proceeds." *Id.* at 209.[1] In August 2009, with the government's consent, the district court dismissed the indictment with prejudice. Pet. App. 9.

4. A federal magistrate judge in the District of Columbia certified that petitioner was extraditable to Mexico on all submitted charges. Pet. App. 104-158.

a. As relevant here, the magistrate judge rejected petitioner's contention that the Treaty's *non bis in idem* clause barred his extradition. Pet. App. 151-158.[2] That clause provides that "[e]xtradition shall not be granted when the person sought has been prosecuted or has been tried and convicted or acquitted by the requested Party for the offense for which extradition is requested." Treaty art. 6. Petitioner argued that the filing and dismissal of the U.S. drug conspiracy charge meant that he had been "prosecuted" on that charge, and further argued that the conspiracy

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[1] The government also noted that one witness had recanted statements made about petitioner and that another had expressed reluctance to testify. C.A. J.A. 209. But the government did not "suggest that [it] ha[d] any doubts about [petitioner's] guilt or that [it] believe[d] [it] d[id] not have a provable case." *Id.* at 1217. Rather, the government explained that it had found "sufficient reasons * * * to defer to Mexico's request for the return of its citizen for trial there." *Ibid.*

[2] "*Non bis in idem*" means "[n]ot twice for the same thing." *Black's Law Dictionary* 1150 (9th ed. 2009).

qualified as the same "offense" as the charges on which Mexico sought extradition. Pet. App. 151-152. Without deciding whether the proceedings on the dismissed indictment qualified as a "prosecut[ion]" within the meaning of the Treaty, the judge held that extradition was proper because the Mexican charges involved different "offense[s]." *Id.* at 152.

The magistrate judge held that the test for determining whether two offenses are the same for purposes of the *non bis in idem* clause is the one that governs the identical inquiry under the Fifth Amendment's Double Jeopardy Clause: "whether each [offense] requires proof of a fact which the other does not," *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Pet. App. 152. The judge declined to follow the broader approach adopted in *Sindona* v. *Grant*, 619 F.2d 167 (2d Cir. 1980), which interpreted a *non bis in idem* clause in a different treaty to apply when "the same conduct or transaction underlies the criminal charges," *id.* at 178 (citation omitted); see Pet. App. 153-155. But the judge also concluded, in the alternative, that petitioner could not prevail even under the *Sindona* standard because "the differences between the foreign charges and the American indictment clearly demonstrate that [petitioner] would not be punished for the same crime in Mexico as he would be for the crime charged in the American indictment." Pet. App. 158.

b. The magistrate judge also rejected petitioner's contention that the Mexican charges failed to satisfy the Treaty's dual-criminality requirement. Pet. App. 125-142. The relevant clause of the Treaty provides that extradition shall take place "for wilful acts which * * * are punishable in accordance with the laws of

both Contracting Parties by deprivation of liberty the maximum of which shall not be less than one year." Treaty art. 2(1). The judge explained that, under *Collins* v. *Loisel*, 259 U.S. 309, 311-312 (1922), such a dual-criminality requirement "does not oblige either sovereign to establish that their laws are identical." Pet. App. 126. Instead, the question is whether "the acts charged in the demanding state's papers would * * * also be a crime in the requested state because, putting aside the titles and specific elements of the acts, the laws of both states would punish them." *Id.* at 129. The judge then held that each of the acts charged by Mexico would be punishable as a felony under the laws of the United States. *Id.* at 134-142.

5. Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Western District of Virginia.[3] The district court denied the petition. Pet. App. 31-91.

a. The district court held that petitioner's extradition is consistent with the *non bis in idem* clause for two independent reasons. Pet. App. 50-67. First, the court held that because the U.S. conspiracy charge was dismissed before trial, petitioner was not "prosecuted or * * * tried and convicted or acquitted" on that charge within the meaning of the Treaty. *Id.* at 51-57. Second, the court agreed with the magistrate judge that none of the Mexican charges qualified as

[3] Because a certification of extraditability is not appealable, the only avenue for challenging such a certification is a petition for a writ of habeas corpus. Pet. App. 4. Petitioner was being held in a state jail in Virginia when he filed his habeas petition, and he named as respondents (among other individuals) the jail's warden (Floyd Aylor) and the United States Marshal for the Western District of Virginia (Gerald S. Holt). Gov't C.A. Br. 2-3.

the same offense as the drug conspiracy charged in the U.S. indictment. *Id.* at 58-67. The court did not decide whether the proper mode of comparison was *Blockburger*'s same-elements test or *Sindona*'s same-conduct test because it agreed with the magistrate judge that petitioner could not prevail under either standard. *Id.* at 65-66. Among other things, the court explained that "the acts for which Mexico seeks to prosecute [petitioner] are significantly broader than the U.S. charge." *Id.* at 66.

b. The district court also rejected petitioner's dual-criminality claim. Pet. App. 68-79. The court observed that the Treaty "requires that the act charged be criminal in both countries, not that the offenses are named the same or have the same elements." *Id.* at 69 (citing *Collins*, 259 U.S. at 312). And the court concluded that the facts found by the magistrate judge "support the finding that [petitioner's] acts constitute crimes in both countries." *Id.* at 70; see *id.* at 74-79.

c. In response to petitioner's motion to alter or amend its judgment, the district court denied petitioner's request—made for the first time in the motion—for an order providing that he may not be prosecuted in Mexico on charges other than those for which extradition is authorized. Pet. App. 99-102. Petitioner's request was based on the Treaty's "[r]ule of [s]pecialty," which provides that a person extradited under the Treaty "shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted" unless one of several exceptions applies. Treaty art. 17(1). Petitioner explained that the press had reported that Mexico had filed additional charges against him after its extradition request, and

he sought an order barring Mexico from trying him on any such charges. Pet. App. 100. The court denied the request, explaining that it was not ripe because extradition "ha[d] not yet occurred" and because the Treaty contains exceptions specifying circumstances in which a person may be tried on additional charges. *Id.* at 101.

6. The court of appeals affirmed. Pet. App. 1-31.

a. As relevant here, the court of appeals first held that the *non bis in idem* clause does not bar petitioner's extradition because "the American conspiracy proceedings were not 'for the offense[s]' for which Mexico has requested extradition." Pet. App. 14 (brackets in original; citation omitted); see *id.* at 14-20. The court therefore did not decide whether the filing and dismissal of the U.S. charge meant that petitioner "'ha[d] been prosecuted or has been tried and convicted or acquitted' by the United States." *Id.* at 14.

Petitioner did not deny that the U.S. and Mexican charges involved different offenses under *Blockburger*'s same-elements test, arguing only that the court should apply *Sindona*'s broader same-conduct test. Pet. App. 19-20. The court of appeals rejected that argument and held that the *non bis in idem* clause calls for a *Blockburger* analysis. *Id.* at 15-19. The court began "with the language of the Treaty," noting that the *non bis in idem* clause focuses on "offense[s]" whereas a different provision—the dual-criminality clause—focuses on the charged "acts." *Id.* at 15. The court explained that "[t]he most natural reading of 'offense,' as distinct from 'acts,' is that 'offense' refers to the definition of the crime itself." *Ibid.* The court also explained that the State Depart-

ment has consistently interpreted similar *non bis in idem* clauses to call for a *Blockburger* analysis, and such interpretations are entitled to "'substantial deference' from the courts." *Id.* at 16 (citation omitted). Finally, the court explained that *Sindona*'s same-conduct test was based in part on an understanding of the Fifth Amendment's Double Jeopardy Clause that this Court later rejected as "wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy." *Id.* at 18 (quoting *United States* v. *Dixon*, 509 U.S. 688, 704 (1993)).

b. The court of appeals next held that the Treaty's dual-criminality provision posed no bar to petitioner's extradition. Pet. App. 20-26. Petitioner conceded that, to satisfy the dual-criminality requirement, "the elements of the two countries' crimes need not be exactly the same." *Id.* at 20. He argued, however, that "the acts alleged in the Mexican charging documents must be sufficient, standing alone, to support United States criminal charges" and that the magistrate judge and district court erred in looking beyond the charging documents to conclude that his actions would have been punishable under U.S. law. *Ibid.* The court rejected that argument, explaining that Mexico "ha[d] no reason to plead in its own charging documents all facts necessary to make out an American criminal charge" and that other circuits had likewise "consider[ed] conduct outside that alleged in the requesting country's charging documents when performing a dual criminality analysis." *Id.* at 21 (citing *Clarey* v. *Gregg*, 138 F.3d 764, 766 (9th Cir.), cert. denied, 525 U.S. 853 (1998), and *Lo Duca* v. *United States*, 93 F.3d 1100, 1112 (2d Cir.), cert. denied, 519

U.S. 1007 (1996)). The court then held that the charged offenses satisfied the dual-criminality requirement because the conduct at issue was "criminal under United States law." *Id.* at 22; see *id.* at 22-26.

c. Finally, the court of appeals declined to rule on petitioner's request for an order limiting the charges that could be brought against him in Mexico to those for which the courts had approved extradition. Pet. App. 27-29. First, the court held that petitioner lacked standing to make such a request because "[t]he rule of specialty is a privilege of the asylum state, which it may assert or waive as it so chooses; it is not a substantive right under the Treaty accruing to [petitioner]." *Id.* at 27. Second, the court held that even if petitioner had standing, his claim was not yet ripe because "the final decision whether to extradite [petitioner], and on what charges, rests not with [the courts] but with the State Department," which "may elect to waive the rule of specialty." *Id.* at 28-29; see 18 U.S.C. 3186. And the court "decline[d] to assume that Mexico [would] violate its Treaty obligations" by trying petitioner on additional charges if the State Department did not waive the rule. Pet. App. 29.

ARGUMENT

Petitioner renews (Pet. 12-28) his challenges to his extradition and his request for an order limiting the charges that may be brought against him in Mexico. The court of appeals correctly rejected those arguments, and its decision neither conflicts with any decision of this Court nor implicates any disagreement in the lower courts warranting this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioner first contends (Pet. 12-16) that the court of appeals erred and created a circuit conflict by

holding that the Treaty's *non bis in idem* clause does not bar his extradition. The court correctly rejected petitioner's claim, and its disagreement with the Second Circuit's analysis in *Sindona* v. *Grant*, 619 F.2d 167 (1980), does not create any conflict meriting this Court's intervention. In addition, this case would be a poor vehicle in which to consider the question presented even if that question otherwise warranted review.

a. The court of appeals correctly rejected petitioner's interpretation of the *non bis in idem* clause. "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellin* v. *Texas*, 552 U.S. 491, 506 (2008). The *non bis in idem* clause provides that "[e]xtradition shall not be granted when the person sought has been prosecuted or has been tried and convicted or acquitted by the requested Party for the *offense* for which extradition is requested." Treaty art. 6 (emphasis added). The dual-criminality clause, in contrast, refers to extradition for criminal "acts." *Id.* art. 2(1). As the court of appeals explained, "[t]he use of the word 'offense' in this context and 'acts' in another signifies that the 'offenses' to be compared" in the *non bis in idem* analysis "must be something other than the acts underlying those offenses." Pet. App. 15; see *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (courts ordinarily decline to presume that "differing language" in two provisions "has the same meaning in each"). And as the court further explained, "[t]he most natural reading of 'offense,' as distinct from 'acts,' is that 'offense' refers to the definition of the crime itself"—that is, to the elements of the offense. Pet. App. 15.

The same-elements interpretation is confirmed by the government's position in this case and by the State Department's understanding of similar provisions in other extradition treaties. "It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) (quoting *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184 n.10 (1982)). The State Department has consistently interpreted *non bis in idem* clauses like the one at issue here to bar extradition only when the elements of the crimes at issue in the domestic prosecution and the extradition request are the same. Pet. App. 16.[4] Accordingly, to the extent that the text of the *non bis in idem* clause left any ambiguity, it would be resolved by the "well-established canon of deference" to Executive Branch interpretations of ambiguous treaty provisions. *Abbott*, 560 U.S. at 15.

Petitioner contends (Pet. 12-16) that the court of appeals should have applied the same-conduct standard adopted in *Sindona*. In that case, the Second Circuit addressed the *non bis in idem* clause of the

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[4] See, *e.g.*, Extradition Treaty with the Philippines, S. Exec. Rep. No. 29, 104th Cong., 2d Sess. 10-11 (1996) (explaining that the treaty's offense-based *non bis in idem* clause applied only where the crimes in the two countries are "exactly the same" and that "[i]t is not enough that the same facts were involved"); Extradition Treaty with Thailand, S. Exec. Rep. No. 29, 98th Cong., 2d Sess. 2, 4 (1984) (explaining that the treaty's offense-based *non bis in idem* clause "was drafted narrowly to ensure that extradition is barred by this provision only in cases where the offense charged in each country is the same"); Extradition Treaty with Costa Rica, S. Exec. Rep. No. 30, 98th Cong., 2d Sess. 5 (1984) (noting that prosecution would be permissible for "different offenses * * * arising out of the same basic transaction").

extradition treaty between the United States and Italy. 619 F.2d at 169. That clause, like the one at issue here, barred extradition if the person sought had already been prosecuted "for the offense for which his extradition is requested." *Id.* at 176 (citation omitted). The Second Circuit stated that the clause called for an inquiry modeled on Justice Brennan's interpretation of the Double Jeopardy Clause in his concurring opinion in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), or on the Justice Department's *Petite* policy addressing successive federal and state prosecutions. 619 F.2d at 178; see *Petite* v. *United States*, 361 U.S. 529, 530-531 (1960) (per curiam). Both of those standards focus on the underlying conduct rather than the elements of the charged offenses. *Sindona*, 619 F.2d at 178.[5] But neither *Sindona* nor petitioner has identified any sound justification for applying such a same-conduct standard here.

First, *Sindona* rested on the premise that *Blockburger*'s same-elements test "d[id] not even mark the outmost bounds of protection of the double jeopardy clause of the Fifth Amendment." 619 F.2d at 178. But that premise is incorrect, as this Court's subsequent decision in *United States* v. *Dixon*, 509 U.S. 688 (1993), makes clear. *Dixon* emphasized that this Court had "upheld subsequent prosecutions after

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[5] Justice Brennan would have treated as a single offense "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe*, 397 U.S. at 453-454 (Brennan, J., concurring). The *Petite* policy in force when *Sindona* was decided provided that, subject to exceptions, "[n]o federal case should be tried when there has been a state prosecution for *substantially the same act or acts*." *Sindona*, 619 F.2d at 178 (citation omitted).

concluding that the *Blockburger* test (and *only* the *Blockburger* test) was satisfied," and it explicitly rejected any "additional requirement beyond the 'elements' standard." *Id.* at 707-708. *Dixon* thus "definitively rejected" *Sindona*'s understanding of the Double Jeopardy Clause. Pet. App. 18.[6]

Second, *Sindona* asserted that "[f]oreign countries could hardly be expected to be aware of *Blockburger*." 619 F.2d at 178. But *Blockburger*'s same-elements test is not merely a feature of U.S. double-jeopardy law; it is also the most natural understanding of the text of the *non bis in idem* clause—particularly that clause's use of the term "offense" in contrast to the broader term "acts" in another provision. Moreover, as this Court explained in *Dixon*, *Blockburger*'s "definition of what prevents two crimes from being the 'same offence' * * * has deep historical roots" in the "common-law understanding of double jeopardy." 509 U.S. at 704.

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[6] Petitioner contends that the court of appeals erred in relying on *Dixon* because the *non bis in idem* clause should be interpreted based on the law of double jeopardy as it existed when the Treaty was signed in 1978, and further contends that, at that point in time, the "*Blockburger* test [wa]s not the only standard for determining whether successive prosecutions impermissibly involve the same offense." Pet. 15 (quoting *Brown* v. *Ohio*, 432 U.S. 161, 166 n.6 (1977)). But petitioner's description of the state of the law in 1978 is incorrect. As *Dixon* explained, the *Blockburger* standard "has deep historical roots and has been accepted in numerous precedents of this Court" dating back to the early 1900s. 509 U.S. at 704; see *id.* at 708-709 & n.13 (citing *Gavieres* v. *United States*, 220 U.S. 338, 343 (1911), and *Burton* v. *United States*, 202 U.S. 344, 379-381 (1906)). *Dixon* further explained that the footnote in *Brown* on which petitioner relies was "the purest dictum" and "flatly contradict[ed] the text of the opinion." *Id.* at 706.

Third, petitioner contends (Pet. 14) that the same-elements test would effectively nullify the *non bis in idem* clause because offenses in different countries will almost always have different jurisdictional elements. That argument lacks merit. Mexico asserts extraterritorial criminal jurisdiction in certain circumstances. See Rodrigo Labardini, *Domestic Prosecution In Lieu of Extradition from Mexico*, 22 Int'l Enforcement L. Rep. 33 & n.4 (2006). As this case illustrates, the United States likewise criminalizes certain conduct occurring outside its borders. See C.A. J.A. 208 (the conduct that formed the basis for the U.S. drug conspiracy charge against petitioner "occurred largely within the territory of Mexico"); see also, *e.g.*, 18 U.S.C. 1119(b) (murder of U.S. national by U.S. national), 1837(1) (trade secrets), 2340A(a) (torture). Indeed, the Treaty itself expressly contemplates overlapping jurisdiction, providing that a country that declines to extradite its own national shall "submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense." Treaty art. 9(2).[7]

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[7] Even if petitioner's argument based on jurisdictional elements had merit, it would not support the same-conduct test he seeks. At most, it would justify disregarding jurisdictional elements in conducting the *Blockburger* analysis in this context. Cf. *Lewis* v. *United States*, 523 U.S. 155, 182-183 (1998) (Kennedy, J., dissenting) (advocating the application of the *Blockburger* methodology under the Assimilative Crimes Act, 18 U.S.C. 13, and explaining that courts should ignore jurisdictional elements in applying the same-elements test to laws adopted by different sovereigns). Such a test would not benefit petitioner because the charges on which Mexico seeks extradition have different substantive elements than the U.S. drug conspiracy charge. See Pet. App. 156-158.

b. Although the court of appeals declined to adopt the same-conduct standard and disapproved of *Sindona*'s analysis, that disagreement does not create a circuit conflict warranting this Court's intervention.

First, no square conflict exists. This case involves the United States' extradition treaty with Mexico, and the court of appeals rested its interpretation on "the language of the Treaty"—and, in particular, on the contrasting uses of "offense" in the *non bis in idem* clause and "acts" in the dual-criminality clause. Pet. App. 15. *Sindona* involved a different treaty, 619 F.2d at 169, and the language of that treaty did not contain the same contrast between "offense[s]" and "acts"—to the contrary, its dual-criminality and *non bis in idem* clauses both referred to "offense[s]." Treaty on Extradition, U.S.-Italy, arts. 2, 6(1), signed Jan. 18, 1973, 26 U.S.T. 493.

Second, the Second Circuit has not revisited this issue since *Sindona* was decided in 1980, and it is far from clear that it would adhere to the same-conduct rule—much less extend that rule to other treaties—if it confronted the issue today. As explained above, see pp. 14-15, *supra*, this Court's intervening decision in *Dixon* made clear that *Sindona* was based in part on an erroneous understanding of the Double Jeopardy Clause. In addition, the State Department has now developed a consistent interpretation of *non bis in idem* clauses like the one at issue here, and that interpretation "is entitled to great weight." *Abbott*, 560 U.S. at 15 (citation omitted); see p. 13, *supra*. *Sindona* did not consider that "well-established canon of deference," *Abbott*, 560 U.S. at 15, but the Second Circuit would be required to do so if the issue arose again. Indeed, at least one district court in the Second

Circuit declined to follow *Sindona* and instead applied *Blockburger*'s same-elements test in part because of the "deference [due] to executive branch interpretations" of treaty provisions. *Elcock* v. *United States*, 80 F. Supp. 2d 70, 82-83 (E.D.N.Y. 2000).

Third, the tension between *Sindona* and the decision below does not warrant this Court's review because the issue arises infrequently. In the 35 years since *Sindona* was decided, no other court of appeals has adopted the same-conduct test—indeed, the decision below appears to be the first appellate decision since *Sindona* to consider the question.[8]

c. Even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle in which to consider it because petitioner would not be entitled to relief from extradition even if this Court resolved that question in his favor.

First, as both the magistrate judge and the district court determined, the Mexican charges against petitioner would not qualify as the same "offense" as the dismissed U.S. drug charge even under *Sindona*'s same-conduct test. Pet. App. 65-67, 157-158. The U.S. indictment charged a single count of conspiring to manufacture and import methamphetamines into the United States, but "the Mexican charges extend far beyond th[at] narrow focus." *Id.* at 66. "Mexico has charged [petitioner] with importing into its country the precursor elements necessary for the manufacture of methamphetamines, money laundering, and the

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[8] Relying on a law professor who testified as petitioner's legal expert, petitioner asserts (Pet. 13-14, 16) that *Sindona*'s same-conduct test has been generally accepted. But neither petitioner nor his expert has cited any case in which another court of appeals has agreed with or applied *Sindona*'s standard.

illegal possession of weapons—acts which the United States never attempted to prosecute." *Ibid.* This case is thus analogous to *Sindona* itself, where the Second Circuit held that fraud charges in the United States did not involve the same offense as related fraud charges in Italy because "[t]he crimes charged in the American indictment, while serious, are on the periphery of the circle of crime charged by the Italian prosecutors." 619 F.2d at 179; see *ibid.* ("Although the alleged Italian crime may have been the 'but-for' cause of the alleged American offenses * * * , it is not the crime for which the United States is proceeding against him.").

Second, even if petitioner could demonstrate that the Mexican and U.S. charges involve the same offense, his extradition would still be consistent with the *non bis in idem* clause because he has not been "prosecuted" or "tried and convicted or acquitted" on the U.S. charge. Treaty art. 6. The U.S. charge was dismissed on the government's motion well before trial, and it was dismissed for the specific purpose of allowing petitioner to be extradited to Mexico. Pet. App. 8-9. As the district court explained, it is implausible to conclude that the contracting parties intended such a dismissal in favor of extradition to qualify as a "prosecut[ion]" barring extradition under the Treaty's *non bis in idem* clause. *Id.* at 55-56.

Third, even if petitioner prevailed on his *non bis in idem* claim, he would be entitled at most to a restriction on the charges for which he may be extradited, not relief from extradition. In the court of appeals, petitioner argued that the Mexican organized-crime, drug, and money-laundering charges are the same offense as the U.S. drug conspiracy charge, but

he did not contend that the *non bis in idem* clause would bar his extradition on the Mexican firearms charges. Pet. C.A. Br. 29-31; see *id.* at 31 n.14 (conceding that petitioner "was never charged with firearms offenses in the U.S.").

2. Petitioner next contends (Pet. 17-23) that the court of appeals erred in holding that Mexico's extradition request satisfied the Treaty's dual-criminality requirement. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals.

a. The dual-criminality clause provides that "[e]xtradition shall take place * * * for wilful acts which * * * are punishable in accordance with the laws of both Contracting Parties by deprivation of liberty the maximum of which shall not be less than one year." Treaty art. 2(1). In *Collins* v. *Loisel*, 259 U.S. 309 (1922), this Court held that such a dual-criminality provision "does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of liability shall be coextensive, or, in other respects, the same in the two countries." *Id.* at 312. Instead, "[i]t is enough if the particular act charged is criminal in both jurisdictions." *Ibid.*

In light of *Collins*, petitioner does not challenge the court of appeals' holding that the dual-criminality clause "does not require that the [foreign and domestic] offenses contain identical elements." Pet. App. 20. Instead, he principally contends that *Collins*'s reference to "the particular act charged" requires that the facts alleged in the requesting country's charging document must be sufficient, standing alone, to support criminality in the surrendering country, and that

the lower courts therefore erred in considering materials outside the Mexican charging documents in concluding that the acts underlying the Mexican charges would have been criminal in the United States. Pet. 17-18 (citation and emphasis omitted).

As the court of appeals explained, petitioner's proposed approach is unworkable because "[t]he elements of Mexican crimes differ from the elements of American crimes, and Mexico thus has no reason to plead in its own charging documents all facts necessary to make out an American criminal charge." Pet. App. 21. Instead, the proper focus of the dual-criminality clause is on the conduct "underlying the charges" for which extradition is sought, *In re Russell*, 789 F.2d 801, 804 (9th Cir. 1986); accord *United States* v. *Sensi*, 879 F.2d 888, 895 (D.C. Cir. 1989), as that conduct is described in the evidence submitted by the requesting country in support of its request. Accordingly, other courts of appeals have likewise considered material outside the foreign charging documents in conducting a dual-criminality analysis. See *Clarey* v. *Gregg*, 138 F.3d 764, 766 (9th Cir.) (factual findings based on evidence submitted to the magistrate judge), cert. denied, 525 U.S. 853 (1998); *Lo Duca* v. *United States*, 93 F.3d 1100, 1102 (2d Cir.) (evidence from the fugitive's foreign trial), cert. denied, 519 U.S 1007 (1996). Indeed, in *Collins* itself this Court did not restrict itself to the foreign charging document, but relied on the description of the offense in "the affidavit of the British Consul General" and the other materials submitted in support of the extradition request. 259 U.S. at 312.

b. Petitioner also appears to assert (Pet. 18-23) that the court of appeals erred in applying the dual-

criminality standard to the particular offenses charged in this case. Many of those arguments simply restate petitioner's broader contention that the dual-criminality inquiry should be limited to the face of the foreign charging documents.[9] But to the extent that petitioner contends that the courts below erred in concluding that the facts found by the magistrate judge establish dual criminality, those factbound arguments lack merit.

Petitioner contends (Pet. 18) that the court of appeals erred in concluding that the conduct underlying the Mexican drug trafficking charges would have violated 21 U.S.C. 843(a)(6) and (7) because "no evidence at all was ever presented" that the psychotropic substances he imported into Mexico were "actually used to make another substance." In fact, however, the magistrate judge found that more than 600 kilograms of a white crystalline powder resembling pseudoephedrine hydrochloride—a methamphetamine precursor—was manufactured on a daily basis at Uni-

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[9] Petitioner contends that "no Mexican court *will ever need to* (or in fact *ever will*) determine" whether the conduct underlying the Mexican drug charges satisfied the elements of the U.S. offense on which the court of appeals relied to establish dual-criminality because the Mexican courts will not have to determine whether petitioner "knew or had reasonable cause to believe" that the psychotropic substances he imported into Mexico "would be used to manufacture any product [that is] illegal in the U.S." Pet. 19; see Pet. 19-20, 22-23 (similar arguments regarding the money-laundering and firearms offenses). But that simply reflects the fact that the Mexican charges have different elements from the corresponding U.S. offenses. In such cases, it will often be true that the foreign court will not be required to determine that all of the elements of the U.S. offense have been proven.

med's plant in Toluca; that a search of that plant revealed traces of essential chemical precursors of methamphetamine; and that the Toluca plant's equipment could be used to manufacture those substances. Pet. App. 114-115; Gov't C.A. Br. 5-6.

Petitioner also contends (Pet. 21-23) that the court of appeals erred in finding the dual-criminality requirement satisfied as to the firearms charges because—in petitioner's view—Mexico's firearms laws are broader than those in the United States; indeed, he claims, laws of such breadth would be inconsistent with the Second Amendment. But petitioner offers no response (other than his objection to reliance on "uncharged conduct") to the court of appeals' holding that the acts at issue in *this case* satisfy the dual criminality requirement because one of petitioner's firearms had an obliterated serial number and the others were possessed in furtherance of petitioner's drug-trafficking activities. Pet. App. 25-26; see 18 U.S.C. 922(k), 924(c).

3. Finally, petitioner contends (Pet. 24-28) that the court of appeals erred in refusing to bar Mexico, under the rule of specialty, from prosecuting him for crimes other than those for which extradition is granted. The court correctly rejected that argument, and petitioner cites no authority granting an order of the sort he seeks here.

a. The court of appeals correctly concluded that petitioner's claim "is not yet ripe." Pet. App. 28. The Treaty provides that "[a] person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted." Treaty art. 17(1). That provision has not

yet been triggered because petitioner has not yet been "extradited." As the court explained, "the final decision whether to extradite [petitioner], and on what charges, rests not with [the court] but with the State Department." Pet. App. 28; see 18 U.S.C. 3186.

Moreover, "even if the State Department does extradite [petitioner], it may elect to waive the rule of specialty" and permit Mexico to prosecute him on any additional charges on which it seeks to proceed. Pet. App. 29. The relevant provision of the Treaty specifically provides that an extradited person may be tried on additional charges when "[t]he requested Party has given its consent to [the fugitive's] detention, trial, punishment or extradition to a third State for an offense other than that for which the extradition was granted." Treaty art. 17(1)(c).

If petitioner is extradited and the United States declines to waive the rule of specialty, then petitioner may attempt to assert his claim under the rule in the Mexican courts in the event that additional charges are brought. But as the court of appeals explained, there is no reason "to assume that Mexico will violate its Treaty obligations by trying, detaining, or punishing [petitioner] on the additional charges." Pet. App. 29; see *Kelly* v. *Griffin*, 241 U.S. 6, 15 (1916) ("assum[ing]" that Canada would honor rule of specialty); *Garcia-Guillern* v. *United States*, 450 F.2d 1189, 1192 (5th Cir. 1971) (similar), cert. denied, 405 U.S. 989 (1972). Petitioner cites no case in which a U.S. court purported to issue an order limiting the requesting country's subsequent prosecution of a fugitive awaiting extradition. Such an order would be improper for at least the additional reason that it "c[ould] only be advisory in character" because Mexico is not a party

to this habeas proceeding. *Shapiro* v. *Ferrandina*, 478 F.2d 894, 906 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973).[10]

b. Petitioner also notes that the court of appeals determined that he lacked prudential standing to raise the rule of specialty, and he contends (Pet. 26-27) that this Court's review is warranted on that question because the circuits are split "on whether an individual has standing to raise treaty-based defenses." That argument lacks merit. The cases in which some courts have allowed individuals to raise the rule of specialty all involved defendants being prosecuted in federal court after being extradited *to* the United States from another country. See *United States* v. *Diwan*, 864 F.2d 715, 720-721 (11th Cir.), cert. denied, 492 U.S. 921 (1989); *United States* v. *Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989); see also *United States* v. *Day*, 700 F.3d 713, 721 (4th Cir. 2012) ("assum[ing] without deciding that an individual defendant has standing to assert a specialty violation"), cert. denied, 133 S. Ct. 2038 (2013). The court of appeals expressly declined to resolve that question, emphasizing that its holding was "limited to the situation in which a fugitive who has not yet been extradited petitions an American court to limit the charges on which he may be tried once returned to the requesting country." Pet. App. 27 n.7. Petitioner

[10] The lack of any precedent for the sort of order petitioner seeks also demonstrates the error of his assertion (Pet. 25) that the court of appeals' decision "would fundamentally change the nature of extradition proceedings, and diminish the role of the U.S. Judiciary" in extraditions.

cites no authority permitting a person facing extradition to raise such a claim.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] Petitioner also errs in suggesting (Pet. 26) that the court of appeals' standing holding conflicts with *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). In that case, the Court held that the plaintiff organizations had Article III standing to raise civil claims for violations of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, because their members had suffered injury in fact from the alleged conduct; the case did not involve extradition, let alone the rule of specialty.