No. 16-1178

IN THE
Supreme Court of the United States

STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, DONZIGER & ASSOCIATES, PLLC, and HUGO GERARDO CAMACHO NARANJO,
Petitioners,
v.

CHEVRON CORPORATION,
Respondent.

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

BRIEF FOR *AMICI CURIAE* AMAZON WATCH AND RAINFOREST ACTION NETWORK IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Chevron's own misconduct demonstrates why courts should not entertain collateral attacks on foreign judgments: because of that misconduct, the District Court accepted what subsequent evidence revealed to be admittedly false testimony, and the known facts now show that the District Court was actually wrong in many of its conclusions regarding the trial in Ecuador. And Chevron's own wrongdoing could itself give rise to a collateral attack on the judgment below, leading to an unending cycle of litigation.

In Ecuador, Chevron paid millions to its agent who faked a bribery scandal, which Chevron used to have the presiding judge recused. And then in New York, Chevron paid its star witness – a corrupt former judge who had previously solicited bribes from Chevron – a relative fortune. That turned out to be money well spent for Chevron, because, as the witness admitted after trial, he lied in his testimony in this case – testimony that formed the bedrock of many of the District Court's key conclusions.

Courts should generally refrain from investigations into foreign trials because they are liable to get them wrong, and because they could result in lawsuits bouncing between different countries: just as Chevron did, the Petitioners here could launch a preemptive attack on the judgment below anywhere in the world, at least anywhere that Chevron is subject to jurisdiction.

While examination of the course of foreign litigation may be necessary where a party seeks to enforce a foreign judgment, a preemptive, collateral

attack on such a judgment is highly inappropriate.

Indeed, the only reason Chevron's massive pollution was litigated in Ecuador, rather than New York, where the Ecuadorian Plaintiffs originally sued, was because *Chevron* successfully argued Ecuador was a more suitable forum. Chevron reversed course only when it appeared it might lose in Ecuador. Since cases already dismissed on *forum non conveniens* grounds will often have a preexisting nexus to that U.S. forum, under the Second Circuit's ruling, *forum non conveniens* dismissal will typically be the beginning, not the end, of U.S. litigation. The loser could simply return to the U.S. to launch a preemptive collateral attack on the foreign judgment.

Since allowing the decision below to stand would have sweeping ramifications for relations among courts worldwide and *forum non conveniens*, this Court should grant *certiorari* on Petitioners' first question presented:

> Do federal courts have jurisdiction to entertain preemptive collateral attacks on money judgments issued by foreign courts?

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Amazon Watch and Rainforest Action Network submit this brief in support of the Petition for Writ of Certiorari.[1]

Amazon Watch is a nonprofit organization focused on protecting the rights of indigenous peoples in the Amazon Basin. Amazon Watch supports the cause of the more than 30,000 indigenous people living in and around the "Oriente" region of Ecuador, where the operations of Chevron's predecessor, Texaco, caused one of the worst environmental disasters in history.

For over fifteen years, Amazon Watch has been involved in activism concerning the pollution in Ecuador, supporting the affected communities' efforts to obtain remediation, potable water, and funds for health care to address contamination-related illnesses.

Rainforest Action Network (RAN) is a nonprofit organization that campaigns for the forests, their inhabitants and the natural systems that sustain life through education, grassroots organizing, and non-violent direct action. RAN's work includes informing and educating people about environmental and social justice issues, including legal cases such as the lawsuit in Ecuador against Chevron and Chevron's obligation to compensate its victims in Ecuador. RAN has campaigned around the case to support the Ecuadorians who continue to suffer from

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties were provided at least 10 days' notice and consented to the filing of this brief.

the effects of ongoing pollution.

SUMMARY OF ARGUMENT

Allowing preemptive collateral attacks on a foreign money judgment is likely to result in numerous evidentiary errors, and may well result in interminable litigation. The facts here demonstrate both risks. The proper forum for a collateral attack on a judgment is the forum that issued the judgment. That is especially so where, as here, the complaining party chose that forum by way of a successful *forum non conveniens* challenge.

The facts here demonstrate the folly of attempting a definitive re-litigation of a foreign trial, rather than simply determining whether a judgment may be enforced. In that trial, Chevron's hands were anything but clean. After securing dismissal of the original litigation from New York, Chevron tampered with evidence of pollution, lied to the Ecuadorian court, paid millions of dollars to avoid damaging testimony, and sought to entrap a judge in a fabricated bribery scandal, creating the appearance of corruption in order to prevent enforcement if it lost in Ecuador.

And Chevron's tactics before the District Court below led that court to factual errors – indeed, we now know that some of the facts found by the District Court were simply wrong. Central to Chevron's case below was its claim that Petitioners had offered (but never paid) a bribe to the Ecuadorian judge to let them "ghostwrite" the judgment. Despite virtually limitless discovery, Chevron never produced a draft of the judgment, nor any communications by Petitioners evidencing a ghostwriting or bribery scheme. Instead Chevron relied on the testimony of Alberto Guerra, an admittedly corrupt former judge who came with a

multi-million-dollar price tag. The District Court relied heavily on Guerra's testimony, and it is the only evidence for numerous conclusions of fact. But Guerra subsequently admitted to lying on the stand during the RICO trial about central facets of his bribery and ghostwriting allegations. And much of the "corroborating evidence" that supposedly supported Guerra's self-interested testimony has been refuted in later, related proceedings.

Chevron's conduct below highlights the risk that one collateral attack will only beget another; that the loser in the collateral action will challenge *that* ruling in another forum. Chevron's misdeeds could easily give Petitioners a basis to attack the judgment below in a collateral proceeding in another country, leading to yet more judicial chaos.

Instead, collateral attacks on money judgments should be limited to the country that issued the judgment. Of course, U.S. courts can assess foreign litigation in determining whether to allow enforcement in the U.S., but they cannot arrogate to themselves the task of a definitive examination of a foreign trial.

This is all the more so here, where Chevron succeeded in moving the litigation to Ecuador via *forum non conveniens*. Chevron's request that a federal court oversee the Ecuadorian judiciary was a 180-degree reversal from its prior position that the case should be tried in Ecuador, *not* New York. *Forum non conveniens* dismissal usually ends a federal court's involvement. But the decision below encourages losing parties to return here and challenge the foreign judgment – indeed, it encourages any losing party, in litigation anywhere in the world, to

seek a second look in a friendlier jurisdiction. That would undermine judicial efficiency, create perverse incentives and lead to litigation without end.

Making matters worse, the decision below only re-examined events in Ecuador to Chevron's benefit: it judged the judicial process in Ecuador, without bothering to determine whether, as the Ecuadorian court found, Chevron is actually responsible for the harms. Chevron never contested in this action that it dumped toxic oil drilling wastes into streams and unlined pits on a massive scale. Nor has it denied that the Ecuadorian plaintiffs have suffered terribly for Chevron's recklessness.

FACTUAL BACKGROUND

For more than three decades, Chevron (then Texaco) discharged billions of gallons of toxic drilling wastes into unlined pits – and rivers and streams – in a vast, previously pristine area of the Ecuadorian Amazon. Chevron has polluted local indigenous peoples' drinking water to this day. Chevron's neighbors originally sought redress in Texaco's home forum, New York, but the Court dismissed to Ecuador on *forum non conveniens* grounds. An Ecuadorian court eventually found Chevron liable, and that judgment was upheld on appeal. While that case was still being litigated, Chevron filed this action, but it did not, at trial, attempt to deny that it is responsible for massive pollution in Ecuador.

I. After securing dismissal to Ecuador, Chevron engaged in a pattern of corrupt and illegal behavior.

A. Chevron engaged in political pressure and unethical and fraudulent tactics to try to win the case in Ecuador.

After prevailing on *forum non conveniens*, *see Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002), Chevron tried to steer the re-filed Ecuadorian litigation its way. Chevron met with the Attorney General of Ecuador, *see* CA2 App. A-422-23, and aggressively lobbied Ecuadorian presidents "to use their authority to halt litigation." *Id.* A-2202 n.55 (quoting Ecuador's Ambassador); *id.* A-2201-204. Chevron even lobbied the U.S. government to threaten to revoke trade benefits to pressure the Ecuadorian government to make the case disappear. *See, e.g.,* Kenneth P. Vogel, *Chevron's lobby campaign backfires,* Politico, (Nov. 11, 2009), http://www.politico.com/story/2009/11/chevrons-lobby-campaign-backfires-029560.

Chevron also engaged in corrupt litigation tactics, including an extensive campaign to skew the scientific sampling. Chevron set up front companies to analyze samples that were supposed to look like independent labs. CA2 App. A-1585-86, A-1588-90. Before site inspections where the judge would supervise the collection of samples by the parties' experts, Chevron secretly conducted pre-inspection tests to determine how to hide contamination. *See, e.g.,* CA2 Dkt. 150 at 12-13. Chevron used its relationships with the military to create a non-existent security threat to get the court to cancel inspections of sites it knew to be

contaminated. CA2 App. A-1091-93; *id.* A-1093 ("the Court . . . was in fact misled by Chevron Corporation's attorney . . . to suspend a judicial proceeding based on false information"). Chevron repeatedly used delay, disruption, and intimidation tactics in the court proceedings. *See, e.g., id.* A-3212-18.

One key actor was Diego Borja, who worked as a Chevron contractor, CA2 App. A-3265, and was listed on Chevron's "Litigation Team" organizational chart as a "sample manager." *Id.* A-3154; CA2 Dkt. 150 at 17. Borja himself said "my signature is on all the evidentiary documents," CA2 App. A-1576; he "even contracted for the house where they were going to do the analysis," and had been involved "[s]ince 2004." *Id.* A-1600.

Borja was later recorded saying he had evidence of Chevron's illegal conduct in Ecuador, "things that can make the [Ecuadorian Plaintiffs] win this just like that," "conclusive evidence, photos of how they [Chevron] managed things internally"; Borja said he could make Chevron lose "right away." *Id.* A-1572-73. He said he had "proof" that the supposedly independent laboratories where Chevron sent samples to be analyzed "were more than connected, they belonged to them." *Id.* A-1585-86. And he explained how he set up four companies for Chevron "[s]o that things could be managed in an independent way." *Id.* A-1588. According to Borja, if the judge found out how Chevron "cooked things," the judge would "close them down." *Id.* A-1590.

The evidence alluded to by Borja never surfaced, but the court still repeatedly sanctioned Chevron's lawyers for its obstructive behavior. *Id.* A-3217-18; *id.* A-467 ("Chevron was ordered to pay court costs for its

manifest, notorious and evident bad faith"). The Ecuadorian appellate court described Chevron's "overtly aggressive and hostile attitude" in the proceedings, and said its "conduct in the case, rarely seen in the annals of history of the administration of Justice in Ecuador, was abusive to the point that, should this Division overlook such attitude . . . it would be an example setting a disastrous precedent for other litigants." *Id.* A-467.

B. Chevron planned for a future challenge to a judgment by attempting to corrupt the Ecuadorian proceedings.

When Chevron's own manipulated testing showed Chevron's responsibility for contamination, *see* CA2 Dkt. 150 at 20, and with neither the Government of Ecuador nor the court willing to bend to its will, Chevron changed tactics. It corrupted the appearance of the judicial process, so it could later claim any adverse judgment was unenforceable.

In October 2008 – before any evidence of any alleged misconduct was discovered – Chevron's public relations consultant detailed this strategy in a memo: key "message themes" should include "Government by Extortion in Ecuador," "Collusion between the government and the plaintiffs," "judges . . . dependent upon [President] Correa for their livelihoods and lives," and "justice as thin as the air in the Andes." Memo from Sam Singer to Chevron spokesperson Kent Robertson (Oct. 14, 2008), at 2, http://chevrontoxico.com/assets/docs/2008-10-14-singer-memo.pdf. The memo further detailed the need for "attacks against the plaintiffs focusing on their motives," messaging the patently false claim that "the

case was thrown out in America for fakery and deceit," and vilifying Donziger, the "American attorney" "pulling the strings of an emerging banana republic in Ecuador." *Id.* Chevron then implemented this strategy.

1. Borja orchestrated a fake bribery scandal which Chevron used to try to undermine the proceedings.

In the spring of 2009, Diego Borja and convicted drug trafficker Wayne Hansen posed as businessmen and secretly – and illegally – taped a meeting with an Ecuadorian businessman and two meetings with Judge Nuñez, then presiding over the Ecuadorian case. They asked Nuñez whether he would rule against Chevron; the judge refused to discuss the matter. *See, e.g.,* CA2 App. A-3265-68. Borja traveled to San Francisco to deliver the three recordings to Chevron's U.S. counsel, then promptly flew back to Ecuador for another secretly recorded meeting with the businessman. *See id.* A-3154-55; *id.* A-3266. At that meeting, Borja and Hansen discussed a bribe, but Nuñez was not there, and nothing suggests that he ever contemplated accepting a bribe. *Id.* A-3266-67. Borja admitted "there was never a bribe." *Id.* A-3268.

Although the tapes showed no bribery involving the judge, as Borja explained, "you don't only win with evidence, but with media." CA2 App. A-1582. Chevron used the tapes in a major public relations campaign claiming that they revealed "a $3 million bribery scheme implicating the judge" presiding over its case. Chevron Corp., *Press Release: Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit* (Aug. 31, 2009),

https://www.chevron.com/stories/videos-reveal-serious-judicial-misconductand-political-influencein-ecuador-lawsuit.

Borja later explained that the purpose of the Nuñez incident was "to void all the judge's rulings," CA2 App. A-1581, which was also reflected in Chevron's press releases. *See* Chevron Corp., *Press Release: Chevron Seeks Annulment of Rulings by Ecuadorian Judge* (Sept. 11, 2009), https://www.chevron.com/stories/chevron-seeks-annulmentof-rulingsby-ecuadorian-judge (if Judge Nuñez's rulings stand, "Chevron would be denied the right to impartial justice and due process").

Despite Borja's work for Chevron, *see, e.g.,* CA2 App. A-3154, and delivery of the tapes directly to Chevron's counsel, Chevron claimed that the recordings were made "without Chevron's knowledge." Chevron Corp.*, Press Release: Videos Reveal Serious Judicial Misconduct*. Chevron also lied to the Ecuadorian court, claiming that Borja's work for Chevron "had already concluded" by the time of the recordings and his "functions had nothing to do with the sampling process." CA2 App. A-3154 (quoting July 13, 2010 Chevron filing).

Chevron's effort to throw out Judge Nuñez's rulings failed. Nonetheless, despite the lack of evidence of his wrongdoing, Nuñez recused himself to avoid the appearance of impropriety. *Id.* A-3218.

Three weeks later, Chevron used the Nuñez incident as part of the basis of its international arbitration claim against Ecuador, alleging the judicial proceedings violated the Ecuador-United States Bilateral Investment Treaty (BIT). *Chevron Corp. v. Republic of Ecuador*, Claimant's Notice of

Arbitration, at 12 (Sept. 23, 2009), *available at* https://www.chevron.com/documents/pdf/ecuador/NoticeOfArbitration.pdf. Chevron claimed that Judge Nuñez had "revealed his bias and pre-judgment of the case," accused the government of "collu[ding]" with the plaintiffs' lawyers, and asserted "Ecuador's judicial system is incapable of functioning independently of political influence." Chevron Corp., *Press Release: Chevron files international arbitration against the Government of Ecuador over violations of the United States-Ecuador Bilateral Investment Treaty* (Sept. 23, 2009), https://www.chevron.com/stories/chevron-files-international-arbitration-againstthe-governmentof-ecuador-over-violationsofthe-united-states-ecuador-bilateral-investment-treaty.

2. Following the Nuñez recordings, Chevron paid Borja millions of dollars.

After Borja's dirty tricks, Chevron ensured that he was sufficiently well compensated so that he would not turn on the company. Chevron has paid Borja *more than $2 million* in benefits. *See* CA2 App. A-3155 (including $5,000-$10,000 as a monthly "stipend," his U.S. taxes, housing expenses, and a car, among other benefits); Pet. App. 657a ("Chevron paid for Borja's and his wife's living expenses for at least two years."). And Chevron provided Borja a fully furnished home, with a pool, on a golf course, in California. CA2 App. A-1591-93.

This plan worked: Borja told a friend months later, from his new home, "I haven't talked to anyone, they have me all cloistered away." *Id.* A-1591. Borja later signed declarations disavowing his earlier recorded

statements where he said he had evidence damaging to Chevron. *See* CA2 Dkt. 150 at 19.

3. Chevron ensured that a judge it could accuse of bribery was assigned to the case.

Following Judge Nuñez's recusal, Judge Nicolas Zambrano took over the case. In the fall of 2009, former Judge Alberto Guerra approached Chevron, purportedly on behalf of Zambrano, with an offer to "fix" the case in the company's favor. CA2 App. A-1865; Pet. App. 407a. Guerra had been assigned to the case at an earlier stage. At the time, Chevron did not report Guerra's alleged offer to the authorities. Instead, when a different judge was assigned to the case in 2010, Chevron successfully orchestrated his recusal, resulting in Judge Zambrano returning to the case. Pet. App. 185a-186a; CA2 Dkt. 353-2 at 96-97. Instead of reporting an alleged bribery offer, Chevron made sure that the judge allegedly involved presided over its case.

II. Chevron's payments to its star witness fundamentally corrupted the proceedings below.

Chevron filed its preemptive collateral attack in New York before the court in Ecuador had even issued its judgment. The testimony of Guerra – Chevron's key witness – was the only direct evidence that the Ecuadorian plaintiffs' lawyers had offered Judge Zambrano a bribe. As with Borja, however, Chevron invested millions of dollars in Guerra to ensure that his testimony was favorable. And it was. But Guerra himself subsequently confirmed that he lied.

A. Chevron's payments to its star witness make it impossible to know the truth.

Guerra approached Chevron again in April 2012, after the Ecuadorian court had issued the judgment, to try to make another deal. This time he succeeded. Guerra, who knew about Borja's handsome compensation, CA2 Dkt. 461-2 at 34, was looking "to negotiate a large payment," Pet. App. 424a, and he did.

In July 2012, Chevron sent Andres Rivero, one of its U.S. lawyers, and a private investigator to Ecuador – with $18,000 in a suitcase – to meet with Guerra. *See* CA2 App. A-2771, A-2804. The cash was supposedly to buy Guerra's computer; Chevron hoped to find a draft of the final judgment, which Guerra claimed he had written. *See id.* A-2764. Recordings of the meeting show Rivero, the investigator, and Guerra negotiating a payment:

> INV #5: You, let's say, tell us how much, how much.
>
> GUERRA: Well, how much are you willing?
>
> …
>
> RIVERO: I'm an attorney, so then… How… for me it's, uh… I don't mind setting, uh, a, a starting figure right? Starting. Understand? Or, [INV #5] what do you think?
>
> INV #5: Yes, Yes. We have twenty thousand dollars in the…
>
> RIVERO: In hand.
>
> INV #5: In hand, right?

GUERRA: Couldn't you add a few zeroes?

Id. A-2768-69. This money was an incentive to Guerra – a witness – and not the replacement cost of his computer; in fact, Chevron gave Guerra a new computer, in addition to $18,000 in cash, in exchange for his old computer, his personal "day planners," USB drives, and permission to access his emails. *Id.* A-1300. Indeed, by the time it paid Guerra, Chevron's agents had already searched the computer, and were "unable to find the main document"; "Had we been able to find it, we would have been able to offer you a larger amount." CA2 Dkt. 461-2 at 738.

Chevron knew Guerra was unemployed and had no savings. *Id.* A-2737; *id.* A-3002. Rivero made it clear that if Guerra could deliver more, and if he could convince Zambrano to work with Chevron, Chevron would pay Guerra more money. *Id.* A-2786 ("you get yours when a deal is reached with Zambrano, a part of it . . . . The idea is that you get a, some part of the value of that, because we didn't get to Nicolas Zambrano except through you.").

In November 2012, Chevron paid Guerra another $20,000 in exchange for "bank records, credit card records, and shipping records" provided as "contemporaneous corroboration" of the information he told Chevron. *Id.* A-1301.

Though Chevron, through Guerra, offered Zambrano "a minimum of $1 million or whatever he wanted" to cooperate with Chevron, Zambrano refused. Pet. App. 433a. As Guerra was unable to deliver on a draft judgment, *see* CA2 App. A-2814, 2817-19, and unable to deliver Zambrano, the story evolved and hinged more on Guerra's testimony itself. *See, e.g.,* CA2 Dkt. 150 at 55-56. Chevron flew Guerra

to Chicago and spent four days "negotiat[ing]" the perks he would receive in exchange for testifying. *See, e.g.,* CA2 App. A-3031; *id.* A-3058-59. During those negotiations, Guerra – who by that point had been unemployed for months – signed a declaration for Chevron. *Id.* A-3043.

In January 2013, Chevron and Guerra signed a contract detailing the benefits Chevron would provide to Guerra and his family in exchange for Guerra testifying. The benefits were guaranteed for two years, with an option of renewal. *Id.* A-1303. In exchange, Guerra had to "make himself available to testify . . . in any aspect (pre-trial, trial or post-trial) of the Chevron SDNY Case[,]" and to "meet with, be interviewed by, and make himself available to Chevron Representatives and to testify . . . at the request of Chevron in any . . . proceedings related to or concerning the Lago Agrio litigation." *Id.* A-1302. The benefits Chevron agreed to pay Guerra were "compensation" and were separate from and "in addition" to "travel and other expenses" associated with testifying. *Id.* A-1303.

At least twice, Chevron surprised Guerra with promises or payments of even more money, just before he testified. In May 2013, on the day before he was to be deposed, Chevron told Guerra he would receive an additional $10,000, money he did not even ask for. *Id.* A-3065-66. Guerra did not receive the payment right away. Instead, Chevron paid him the $10,000 in October 2013, shortly before his trial testimony. *See id.* A-771-72. Again, according to Guerra, "the payment of $10,000 from Chevron was unexpected." CA2 Dkt. 461-2 at 42. Chevron gave a similar incentive just before Guerra's testimony in the arbitration proceedings, renewing its compensation

agreement for at least another year. *Id.* at 70.

All told, since July 2012, Chevron had given Guerra *at a minimum*:

- $432,000 in monthly payments;
- $12,000 for household items;
- $48,000 in cash in exchange for evidence;
- A new computer;
- Payment of all U.S. taxes;
- Expenses for Guerra and his family to move to the U.S.;
- Health insurance for Guerra and his family;
- A car and car insurance; and
- Payment for an immigration attorney for Guerra and his family, an attorney to represent Guerra in the US proceedings, an Ecuadorian attorney, a tax attorney, and an accountant.

See CA2 App. A-1302-303, A-1370, A-770, A-778; CA2 Dkt. 461-2 at 60, 69.

B. The District Court relied heavily on Guerra's testimony despite its inconsistencies, Guerra's history of corruption and his lucrative witness salary from Chevron.

Guerra's testimony was central to Chevron's allegations and the trial court's findings. In particular, it was the only evidence of a scheme to bribe Judge Zambrano to rule against Chevron.

The District Court acknowledged Guerra's

testimony was inconsistent. *See, e.g.,* Pet App. 417a (noting an "inconsistency" that "is not easily reconciled"); *id.* at 429a. "Each recounting" of Guerra's story "yielded variations in some of the details." *Id.* at 429a; *id.* at 443a ("details of his story . . . have changed"). This included key details that should have been verifiable – for example, "Guerra's testimony regarding how he allegedly received the draft of the Judgment to begin his work on it changed." *Id.* at 430a; *see also id.* at 432a (inconsistencies in Guerra's story of how he had allegedly received a "memory aid" from the Ecuadorians' lawyer).

The District Court noted Guerra "often has been dishonest," and that he had "multiple" times in his professional history "accepted bribes," "lied," and "broken the law." *Id.* at 427a-429a, 443a. And the court noted that "Guerra's willingness to accept and solicit bribes" among "other considerations, put his credibility in serious doubt, particular in light of the benefits he has obtained from Chevron." *Id.* at 429a.

But the court nonetheless found Guerra – who, unlike Judge Zambrano, rehearsed his testimony over 50 times with Chevron's trial team, CA2 Dkt. 461-1 at 8 – to be an "impressive witness," who "testified clearly, directly and responsively," and "rarely hesitated." Pet. App. 427a. As later became clear, *infra* Section II.C., Guerra was just a practiced liar.

Ultimately, largely because it found that Guerra was telling the truth, Pet. App. 443a; *accord id.* at 358a-359a, the District Court found that Donziger and the Ecuadorian plaintiffs' counsel organized a scheme to pay $500,000 to bribe Judge Zambrano – money that was never paid – and that Donziger and his team ghostwrote the Ecuadorian decision. Guerra, of

course, was paid far more than this by Chevron, and as noted above Chevron's also unsuccessfully offered twice this amount to Zambrano if he would testify in Chevron's favor.

C. Since the District Court issued its opinion, Guerra has admitted to lying on the stand and the supposedly corroborating evidence has been thoroughly refuted.

Much of the evidence the District Court relied on subsequently fell apart. Guerra's "credibility," already virtually nonexistent, has been further undermined by his testimony in the arbitration proceedings, where he admitted to lying in this case.

At trial, Guerra testified that Judge Zambrano had an arrangement with the Ecuadorian plaintiffs' lawyers for $500,000 and that Zambrano had promised to give Guerra 20 percent. *See e.g.* CA2 App.A-817, A-782. But in the BIT proceedings, Guerra later admitted that "it wasn't true," and "I did not discuss 20 percent with Mr. Zambrano." CA2 Dkt. 461-2 at 37. Guerra also acknowledged in his testimony that he had misrepresented exchanging drafts of the judgment with Judge Zambrano via flash drive. *Id.* at 58. *See also* CA2 Dkt. 461-1 at 6-8 (summarizing other examples of lies Guerra admitted in his subsequent testimony).

The arbitration proceedings have also undermined much of the supposedly corroborating evidence. There was little evidence to corroborate Guerra's testimony to begin with; while the District Court enumerated long lists of supposedly corroborating facts, many of these were simply the court's own analysis, such as that the Ecuadorians "had huge financial and other

incentives" to want to win, Pet. App. 446a, or that the Ecuadorians admitted that Guerra solicited a bribe from them and did not report this to the authorities, *id.* at 445a – facts that apply equally to Chevron.

Much of the actual evidence concerned an alleged bribery-and-ghostwriting scheme during an earlier period when Judge Zambrano was presiding over the case. Guerra alleged, and the District Court found, that when Chevron declined Guerra's offer to "fix" the case in the fall of 2009, Guerra worked out a deal with the Ecuadorians' counsel to "move the case along in their favor," but not to fix the outcome. *Id.* at 407a-408a. One significant piece of corroborating evidence for this scheme was shipping records showing packages that Guerra exchanged with Zambrano. Pet. App. 403a-404a. The Petitioners challenged the validity of these shipping records, *see* Dist. Crt. Dkt. 1660; in any event, no one alleged, and the District Court did not find, that this scheme related to the judgment, which was issued much later.

The District Court got the facts wrong. Guerra recanted his testimony about the shipping records, confirming in the arbitration case that none of the shipments to Zambrano related to the Lago Agrio case. CA2 Dkt 461-2 at 17.

Guerra's story to the District Court was that he obtained a draft judgment from the Ecuadorians' lawyer "[a]bout two weeks before the Judgment was issued in February 2011," and made only "minor" edits. Pet. App. 422a-423a. Evidence from the subsequent arbitration proceedings indicates that the District Court got this wrong too. Forensic analysis of both Zambrano's computers – which were not available to the District Court – and Guerra's

computer refute Guerra's story. *See* Track 2 Supplemental Counter-Memorial on the Merits of the Republic of Ecuador, in *Chevron Corp. v. Republic of Ecuador,* at 32 (Nov. 7, 2014), https://static.lettersblogatory.com/wp-content/uploads/2015/03/GOEbrief.pdf. As previously noted, Guerra's computer had no draft of the judgment – but Zambrano's computer *did*.

The document that ultimately became the judgment was created on Zambrano's computer in October 2010, saved hundreds of times on Zambrano's office computers, and increasingly had text added over a four month period. *Id*. at 33. No flash drives were connected to the computer and no email attachments were opened in the weeks leading up to the issuance of the judgment. *Id.* at 34, 39. The evidence was "consistent" with Judge Zambrano and his assistant "writing the Judgment over the period between October 11, 2010 and February 14, 2011" and not a third party giving it to Zambrano at the beginning of February 2011. *Id.* at 33-34 (quoting expert report).

Guerra's story was purportedly corroborated by Chevron's textual analysis of the judgment that supposedly demonstrated that parts of the judgment were copied from documents authored by the Ecuadorian plaintiffs that were never filed with the Ecuadorian court, such as the so-called "Fusion Memo." Pet. App. 376a-378a. The Petitioners argued the documents had been produced to the court and Chevron, but omitted from the docket – including documents provided at judicial inspections of contaminated sites. But the District Court found that this contention "cannot be taken seriously." *Id.* 389a. Because passages from their documents such as the Fusion Memo were found in the judgment, the District

Court found "the most logical conclusion" was that the Ecuadorians' team "wrote at least material portions of the Judgment . . . and that they copied from their own internal files in doing so." *Id.* 358a; *id*. 377a.

Again, this appears to have been an incorrect conclusion. "[V]ideo and documentary evidence" submitted in the arbitration showed that documents in fact *were* submitted to the court at the judicial inspections. *See, e.g.,* Dkt. 353-2 at 42. This evidence showed documents submitted by *both parties* were not always entered into the record, and that the record keeping was not consistent, especially for documents provided at judicial inspections. *Id.*; CA2 App. A-2166-68.

The Fusion Memo, for example, was almost certainly submitted. Contemporaneous emails show that the Ecuadorians intended to submit the memo with its exhibits at a particular judicial inspection, at which they ultimately did present on the subject. CA2 App. A-2165-66. The exhibits were all docketed in the record that day, showing they were received at the inspection site, and there are pagination errors in the record surrounding those exhibits. *Id.* A-3271, A-2169. *See also, e.g.,* CA2 Dkt. 353-2 at 43-47 (addressing the other allegedly unfiled documents). The Fusion Memo was submitted and received, but simply incorrectly docketed. Again, when attempting to reconstruct a trial and the process of drafting a judgment in another country, the District Court got it wrong.

ARGUMENT

I. Chevron's schemes in Ecuador and New York highlight why courts do not entertain collateral attacks on foreign judgments.

Courts throughout the world will hear challenges to the *enforcement* of a foreign judgment, but not preemptive collateral attacks. Pet. at 1. Indeed, prior to the ruling below, the Second Circuit justifiably sought to *preclude* parties that lose their case anywhere in the world from preemptively challenging the validity of the foreign judgment in U.S. courts. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 (2d Cir. 2012). As Petitioners note, the ruling below encourages precisely what *Naranjo* sought to bar. Pet. at 17. The Second Circuit got it right the first time.

Chevron's misconduct in this proceeding emphasizes that the Second Circuit's new regime would create chaos. Under that approach, Petitioner could challenge Chevron's acts and preemptively attack the RICO judgment in yet another forum. The parties then would litigate – anywhere Chevron could be found, from Argentina to Zimbabwe – whether Chevron compromised the U.S. proceedings by showering its key witness with money, leading to admittedly false testimony.

Indeed, a collateral attack on the judgment below could easily be premised on the fact that Chevron's arrangements with Guerra (as well as Borja, and its attempt with Zambrano) clearly violated federal law and the rules of ethics. *See, e.g.,* 18 U.S.C. § 201(c)(2) (illegal gratuity to witnesses); 18 U.S.C. § 201(b)(3) (bribery of witnesses); NY Rules of Prof. Conduct 3.4 ("A lawyer shall not . . . offer an inducement to a

witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation . . . contingent upon the content of the witness's testimony or the outcome").

Fact witnesses may only be paid "the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding." 18 U.S.C. § 201(d). *Accord* NY Rule 3.4 (lawyer may pay "reasonable compensation" for "loss of time in attending, testifying, preparing to testify . . . and reasonable related expenses"). But Chevron's contract with Guerra makes clear the payments and other benefits are separate from and "in addition to" expenses associated with testifying. CA2 App. A-1303.

Regardless, the payments are entirely unreasonable. Before Guerra even took the stand in New York, Chevron had already paid him *at least* $168,000 in cash alone, and he knew he would receive at least another $180,000 if he held up his end of the agreement. He also knew he would receive more if, at the end of two years, Chevron renewed his contract.

The District Court declined to strike Guerra's testimony or sanction Chevron for its payments. Just as the Ecuadorian Appeal Division declined to consider allegations of fraud in its ruling, *see* Pet. App. 74a – the District Court declined to consider claims that the payments to Guerra violated federal law and ethical rules. Dist. Crt. Dkt. 1650.

Thus, these claims are equally ripe for collateral attack: what would stop a foreign court from determining that Chevron's conduct and violations of the law irredeemably corrupted the judicial proceedings in the United States, and enjoining

Chevron and its counsel from benefiting from the judgment below? Such a decision would exactly parallel the course of proceedings in this case, and highlight both the absurdity of this tactic and the need for this Court's review.

II. Permitting a preemptive collateral attack on a foreign judgment makes no sense where the case was originally filed in the United States and dismissed on *forum non conveniens* grounds.

Having our courts reach out to judge rulings by other judiciaries when not required to do so by the filing of an enforcement action is troubling enough in the mine run of cases. But the Second Circuit's new invitation to losing parties in foreign cases is perhaps most open where it makes the least sense: to Defendants like Chevron who succeeded in having claims dismissed on *forum non conveniens* grounds to the very forum whose judgment they now challenge. Whether jurisdiction lies for a preemptive collateral attack is a particularly important issue in this context, because such dubious jurisdiction calls into question the efficacy of *forum non conveniens* dismissal.

Where the litigation originated in a U.S. forum, there are sure to be contacts to that forum that make it a likely venue for a boomerang preemptive collateral attack; otherwise, the case probably would not have been brought there in the first place.

A litigant who voluntarily gives up the protections of the U.S. judicial system to litigate in another country cannot expect U.S. courts to oversee the courts of the forum it chose. Indeed, the Second Circuit has recognized that, after a *forum non*

conveniens dismissal, a court "ceases to have any further jurisdiction over the matter unless and until a proceeding may some day be brought to *enforce* here a final and conclusive [foreign] money judgment." *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 205 (2d Cir. 1987) (emphasis added). The Second Circuit rejected defendant's proposal that the U.S. court "retain some sort of supervisory jurisdiction" to prevent due process violations in the foreign proceedings. *Id.* In fact, it found the suggestion "impractical" and "border[ing] on the frivolous." *Id.* But just as it makes no sense to enshrine a U.S. court as a co-trial court, it is scarcely better to install it as a post-judgment supervisory appellate court.

Allowing a subsequent preemptive challenge to a foreign judgment would be a recipe for gamesmanship and unending litigation. *Forum non conveniens* would become just a defendants' first bite at the apple; they would inevitably return for another bite if they lost abroad. So too could plaintiffs. And even that would not be the end. As noted above, under the Second Circuit's reasoning, the losing party in the boomerang suit could challenge our courts' decisions abroad, in Ecuador or anywhere else. And if U.S. courts do not respect the tribunals to which they have already dismissed an action, why should other courts honor our proceedings?

In short, by destroying finality, this "*forum non conveniens* and boomerang suit" strategy would preclude the judicial efficiency that *forum non conveniens* is intended to promote. It should be disallowed for the same reasons underpinning the law of the case doctrine: to prevent "the relitigation of settled issues in a case, thus protecting the settled expectations of parties, ensuring uniformity of

decisions, and promoting judicial efficiency." *United States v. Bates*, 614 F.3d 490, 494 (8th Cir. 2010).

If a party secures dismissal on *forum non conveniens* grounds, and believes its opponent corrupted the foreign proceeding, that party may challenge *enforcement* of the judgment in U.S. courts. But a party that successfully displaces a U.S. forum cannot return to launch a preemptive collateral attack on the foreign judgment. Any other result would permit re-litigation of claims almost every time a calculated risk to seek *forum non conveniens* dismissal goes wrong and the defendant loses abroad.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

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Respectfully submitted,

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