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,
PETITIONER

v.

CHEVRON CORPORATION,
RESPONDENT

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

BRIEF FOR THE REPUBLIC OF ECUADOR AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

Amicus will address the following question:

Whether Article III and traditional notions of comity permit federal courts to entertain a preemptive collateral attack on a judgment issued by a foreign court where there is no imminent threat of the enforcement of that judgment in the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTORY AND TREATY PROVISIONS

OTHER AUTHORITIES

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[*]

The Republic of Ecuador has a vital interest in the Court's review of the Second Circuit's unprecedented decision in this case, which raises critical issues concerning the relationship between Article III's "case or controversy" requirement and the doctrine of international comity. That decision threatens to expand dramatically the circumstances in which U.S. courts assess allegations that foreign judgments were procured by fraud, and thus are invalid. It authorizes such review even when the judgment creditor has not brought an enforcement action in the United States and the prospect of its doing so remains speculative.

Petitioners have shown that the decision below conflicts with other circuits' decisions limiting review of the validity of foreign judgments to cases in which the judgment creditor affirmatively seeks to enforce them —i.e., where the judgment is challenged as a defense to its enforcement. Ecuador agrees with that showing. It files this brief to underscore that review is also warranted because, in sanctioning preemptive collateral attacks on foreign judgments, the ruling below threatens the United States' foreign relations and conflicts with this Court's Article III and foreign affairs precedents.

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[*] Pursuant to Rule 37.2(a), *amicus* provided timely notice of its intention to file this brief. All parties consented. In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens." *Hilton* v. *Guyot*, 159 U.S. 113, 163–164 (1895). Comity thus calls for the federal courts to balance the due process rights of U.S. citizens against the interests of foreign sovereigns in proper respect for their courts' judgments. In striking that balance here, however, the Second Circuit gave undue weight to the speculative risk of enforcement and insufficient weight to foreign nations' interests.

First, citing the Ecuador's Appeal Division's statement that it "has no competence to rule on" Chevron's fraud allegations, the Second Circuit treated this limit on Ecuadorian *appellate jurisdiction* as an invitation to entertain a preemptive attack on an Ecuadorian judgment. Pet. App. 74a (citation omitted). But as Ecuador's courts elsewhere explained—in holdings that the court below ignored—Ecuador does provide a process for adjudicating allegations of fraud in the procurement of a judgment. That process is an action under Ecuador's Collusion Prosecution Act ("CPA"). In neglecting this Act, the decision below broke from "the highest considerations of international comity and expediency" (*Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 417–418 (1964)) that undergird the rule that "[e]very sovereign state is bound to respect the independence of every other sovereign state" (*Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897)).

Exceptions to the rule that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory" (*ibid.*) should not be invoked lightly. "To permit the validity

of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would certainly 'imperil the amicable relations between governments and vex the peace of nations.'" *Banco Nacional*, 376 U.S. at 418 (quoting *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918)). That is particularly true when, as here, doing so is unnecessary and stretches Article III beyond its traditional bounds, and the party that obtains a court order condemning another nation's judiciary then uses it politically to disrupt bilateral relations. *Infra* at 19–23.

Second, the court below reasoned that the Lago Agrio Plaintiffs ("LAPs") "intend to seek enforcement 'in the United States when they conclude that it is tactically advantageous to do so.'" Pet. App. 77a (quoting Pet. App. 473a). But such speculation cannot satisfy Article III—particularly absent any enforcement suit in the United States. The decision below thus conflicts with this Court's decisions holding that "guesswork as to how independent decisionmakers will exercise their judgment" cannot demonstrate a "certainly impending" injury. *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147, 1150 (2013). And by authorizing federal judges to invalidate foreign judgments absent either an enforcement action or affirmative authorization from Congress, the decision conflicts with the Constitution's commitment of the "conduct of the foreign relations of our government" to "'the political'[] departments." *Oetjen*, 246 U.S. at 302. *Infra* at 23–24.

Review is needed to ensure that federal courts do not invalidate foreign court judgments gratuitously—but rather only in actual cases or controversies. Allowed to stand, the decision below would encourage

still more preemptive collateral attacks, to the detriment of the United States' foreign relations.[1]

STATEMENT

The decision below authorizes district courts to adjudicate preemptive collateral attacks on foreign judgments and declare them unenforceable based on allegations that they were procured by fraud. The court below reached that result even though the judgment creditor has never brought an enforcement action in the United States, the prospect of its doing so remains speculative, and the judgment debtor never exercised its right to seek the same relief in the nation where the judgment issued—a nation where the judgment debtor insisted that the case be heard.

The same plaintiffs whose judgment Chevron now challenges initially filed the underlying environmental suit ("*Aguinda*") in federal court in New York—Chevron's backyard. From 1993 to 2002, Chevron fought to have the case sent to Ecuador on *forum non conveniens* grounds. Supported by fourteen experts, Chevron contended that "the Ecuadorian courts provide a totally adequate forum in which these plaintiffs fairly could pursue their claims" and "would resolve [the] claims in a proper, efficient and unbiased manner." Add. 8a, Ponce Aff. Case No. 93-Civ-7527, ¶¶ 4–5 (S.D.N.Y. Dec. 13, 1995). Other experts stated that "Ecuador's judicial system is neither corrupt nor unfair" and that

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[1] Ecuador's positions on the merits of the underlying environmental action and related factual questions are set forth in UNCITRAL proceedings between Chevron and Ecuador. Here, Ecuador addresses only the first question presented, not whether the Lago Agrio judgment is enforceable in an appropriate case.

its "isolated problems are not characteristic of Ecuador's judicial system, as a whole." Ecuador's C.A. App. RA166–167, Ponce y Carbo Aff. ¶ 15 (Feb. 4, 2000); see also Appellee's Br. in *Aguinda* v. *Texaco, Inc.*, 2001 WL 36192276, *34 (2d Cir. Dec. 20, 2001) ("Ecuador's Constitution guarantees due process and equal protection, and its courts provide important procedural and substantive rights."). Chevron won its motion.

Chevron's praise for Ecuador's courts did not end, however, after that case was re-filed in Ecuador as the "Lago Agrio" Litigation. In 2006, when other Ecuadorian plaintiffs sued Chevron in California, asserting similar environmental claims, Chevron sought a stay, arguing that such claims should be heard in Ecuador. In support, Chevron cited *Aguinda* and reiterated that Ecuador remained the best forum.[2] Indeed, it was only years later—when Chevron, seeing the writing on the wall, commenced arbitration against Ecuador to thwart an adverse ruling—that Chevron first asserted that Ecuador lacked a neutral judiciary.

Even before there was a judgment in the Lago Agrio Litigation, Chevron sought to attack it preemptively. The district court found Article III jurisdiction, and the Second Circuit affirmed. The circuit court convinced itself that "international comity is not an obstacle" to adjudicating the dispute on the theory that the courts of Ecuador, which issued that original judgment, "expressly disclaimed jurisdiction to address the corruption claims" and, in discussing where the claims might be heard, "referred only to the actions in the

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[2] Amended Mot. to Dismiss Compl. or, in the Alternative, to Stay, *Jane Doe I* v. *Texaco, Inc.*, 2006 WL 2805514, *1–2, 5, 9–10 (N.D. Cal. May 25, 2006).

United States." Pet. App. 134a. That assertion, however, is demonstrably incorrect.

Ecuador's Appeal Division instead stated that it was "preserving the parties' rights to present formal complaint to the Ecuadorian criminal authorities" under the CPA. Pet. App. 134a. The Appeal Division disclaimed only its own jurisdiction to resolve the fraud claims, and only because Chevron's allegations rested on evidence submitted after the trial court record closed. Ecuador's National Court (its highest court) both affirmed that jurisdictional ruling and confirmed that Chevron could press its fraud allegations in an "independent action governed by * * * the [CPA]." Appellant's C.A. App. 3543a. As the National Court explained: "If, as [Chevron] alleges, there were irregularities in the proceeding, Ecuadorian legislation establishes actions that can be brought for these kinds of facts, disputes or conflicts, including those of an administrative and criminal nature." *Ibid.*

The CPA provides remedies that include both nullifying any fraudulent judgment and damages, including full reparation of any harm. As Article 6 states: "[I]f the grounds for the claim are confirmed, measures to void the collusive proceeding will be issued, invalidating the act or acts * * * redressing the harm caused, * * * and, as a general matter, restoring things to the state prior to the collusion." Add. 3a, Ley para el Juzgamiento de la Colusión [Collusion Prosecution Act], as amended, Registro Oficial Suplemento [R.O.S.] 544, 9 de Marzo de 2009 (Ecuador).[3] Ecuadorian law thus provided a remedy that, if supported by

[3] An English translation of the CPA in force during the relevant time period is reproduced in the Addendum ("Add.")

the evidence, would have redressed Chevron's claims that the Lago Agrio judgment was "ghostwritten." Moreover, Chevron was not required to await the conclusion of its direct appeal to invoke the CPA; it could have filed its claim while that appeal was pending.

But Chevron never did so—even after its appeals concluded—and the U.S. courts acted as if the CPA did not exist. Instead, having persuaded the U.S. courts to send the underlying action to Ecuador, Chevron sought to use the U.S. courts to block enforcement of its chosen forum's judgment.

Initially, Chevron succeeded in obtaining a global, preliminary injunction voiding the judgment and "finally determin[ing] the controversy worldwide." *Chevron Corp.* v. *Donziger*, 768 F. Supp. 2d 581, 638 (S.D.N.Y. 2011). But the Second Circuit reversed in relevant part, explaining that, "to declare foreign judgments void and enjoin their enforcement" outside of an enforcement action would be a "grave[]" affront to international comity and "unquestionably provoke extensive friction between legal systems." *Chevron Corp.* v. *Naranjo*, 667 F.3d 232, 240, 244, 246 (2d Cir. 2012).

Chevron then sought an injunction against potential U.S. future enforcement actions (even though none had been filed). But it remained Chevron's intent to seek a global anti-enforcement injunction and then "to ask any foreign courts in which [the LAPs] have initiated recognition or enforcement actions to consider this Court's injunction and the findings supporting it," so that "the foreign court would decline to award [the LAPs] any relief." R. 1847, Pl.'s Post Trial Mem. 343

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hereto. Ecuador recently re-codified this law. Ecuadorian Gen. Code of P., art. 290 (effective May 12, 2016).

(Dec. 12, 2013). The court granted Chevron's request, and a different Second Circuit panel affirmed.

In holding that Chevron's alleged injury satisfied Article III, the circuit court relied on speculation about the LAPs' global litigation strategy. The court cited both a legal memorandum (the "Invictus Memo"), written before judgment was entered in Ecuador, suggesting the "target[ing] [of Chevron-related entities] with enforcement actions" in "the United States and abroad," and also the district court's finding "that the LAPs intend to seek enforcement 'in the United States when they conclude that it is tactically advantageous to do so.'" Pet. App. 77a. To date, however, no such action has been filed.

Since the district court ruled, Chevron has repeatedly invoked the judgment below, before Congress and federal agencies, attempting to disrupt trade and political relations between the United States and Ecuador. Chevron has also cited the opinions below against Ecuador in international arbitration, Dutch court, and United States Trade Representative ("USTR") proceedings—even though Ecuador was not a party.

REASONS FOR GRANTING THE PETITION

The Second Circuit has authorized district courts to find a foreign judgment unenforceable even absent an action to enforce the judgment in the United States or the imminent threat of such an action. As petitioner has shown, allowing preemptive attacks on foreign judgments conflicts with other circuits' decisions and gives rise to an advisory opinion, in violation of Article III. Here, Ecuador highlights two additional reasons for granting certiorari.

I. First, the decision below conflicts with principles of international comity, and therefore threatens to disrupt the United States' foreign relations. This is particularly so because Ecuador does not allow preemptive attacks on foreign judgments, but does provide a remedy that redresses judgments procured by fraud—the CPA.

Chevron, however, did not invoke the CPA, and the Second Circuit ignored it. Instead, the court declared that "international comity is not an obstacle to the present District Court judgment" because "the Ecuadorian courts have expressly disclaimed jurisdiction to address the corruption claims and stated that the matter is preserved for adjudication in the United States courts." Pet. App. 134a.

Even if the Ecuadorian courts had disclaimed jurisdiction to resolve allegations of a fraudulent judgment, such a disclaimer could not expand the federal courts' Article III jurisdiction. But the Second Circuit did not read the Ecuadorian decisions fairly. Ecuador's Appeal Division held only that "*this Division*"—i.e., the court adjudicating Chevron's direct appeal—"has no competence to rule on the [fraud issue]." Pet. App. 74a

(citation omitted) (emphasis added). The Appeal Division also "preserv[ed] the parties' rights to present formal complaint," and the National Court affirmed that Chevron could pursue its fraud allegations in an "independent action" under "the Collusion Prosecution Act." Appellant's C.A. App. 3543a.

One searches the decision below in vain for mention of these passages or of the CPA. But they belie the Second Circuit's conclusion that international comity is not implicated here. And allowing a litigant to bypass the laws of one nation to seek redress in the courts of another—especially where there is no enforcement action in the latter nation's courts—threatens to "imperil the amicable relations between governments and vex the peace of nations." *Banco Nacional*, 376 U.S. at 418. That Chevron obtained a *forum non conveniens* dismissal of the underlying case in the Southern District of New York—and later attacked the expected foreign judgment from that very district—highlights the perversity of the sanctioned maneuver.

II. Second, the decision below conflicts both with a long line of Supreme Court precedent defining what makes a threat of injury sufficiently imminent to create a "case or controversy," and with the Constitution's allocation of the foreign affairs power to Congress and the President. In finding Article III standing, the Second Circuit announced "that the LAPs intend to seek enforcement 'in the United States when they conclude that it is tactically advantageous to do so.'" Pet. App. 74a. An injury is not imminent, however, if courts must engage in "guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 133 S. Ct. at 1147. Further, "[t]he law of Article III

standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches" (*id.* at 1146), and the "conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments"—not to the judiciary. *Oetjen*, 246 U.S. at 302.

In sum, the decision below threatens to create the situation that this Court has endeavored to prevent—where U.S. courts unnecessarily sit "in judgment on the acts of * * * [a foreign] government * * * , done within its own territory." *Underhill*, 168 U.S. at 252. Review is needed to safeguard comity and to ensure that foreign nations' interests are duly respected in U.S. courts.

I. Certiorari is warranted because the Second Circuit's decision fails to accord proper deference to the interests of foreign sovereigns and threatens the United States' amicable foreign relations.

The decision below grants insufficient deference to "the absolute independence of every sovereign authority" (*Bolivarian Republic of Venezuela* v. *Helmerich & Payne International Drilling Co.*, slip op. 8 (May 1, 2017)), and thus threatens the United States' foreign relations. As this Court just today reaffirmed, "each nation state, as a matter of international comity," should "respect the independence and dignity of every other." *Ibid.* (internal citations omitted). Until now, the Second Circuit has honored that principle, stating: "It is a particularly weighty matter for a court in one country to declare that another country's legal system is so corrupt or unfair that its judgments are entitled

to no respect from the courts of other nations." *Naranjo*, 667 F.3d at 244.

Here, however, the Second Circuit did not extend to Ecuador the respect that comity warrants. Instead, it authorized district courts to "sit in judgment on the acts of * * * [a foreign] government * * * , done within its own territory," in violation of precedent. *Underhill*, 168 U.S. at 252. Moreover, by authorizing collateral, preemptive challenges to foreign court judgments before it becomes certain that the judgment creditor will seek to enforce them in the United States, the decision below impugns foreign courts—unnecessarily. Allowed to stand, that decision risks prompting retaliation and harming the United States' foreign relations.

A. The Second Circuit's holding that comity was not implicated by its decision rests on a false premise—that Ecuadorian law provides no legal process to challenge a judgment allegedly procured by fraud.

By the Second Circuit's lights, "international comity is not an obstacle to the present District Court judgment" because "the Ecuadorian courts have expressly disclaimed jurisdiction to address the corruption claims and stated that the matter is preserved for adjudication in the United States." Pet. App. 134a. The court went on to state that "the Ecuadorian Appeal Division" and "National Court," in discussing how Chevron might "pursue its claims" of "corruption," "referred only to the actions in the United States." Pet. App. 130a. But that is inaccurate.

To be sure, Ecuador's Appeal Division disclaimed its own jurisdiction over Chevron's outside-the-record fraud allegations on direct appeal, and the National

Court affirmed. Pet. App. 133a ("this Division has no competence to rule on the [issue]" (quoting Appeal Division Op. 10)); Pet. App. 134a (affirming the Appeal Division's "lack o[f] jurisdiction to decide whether there has been procedural fraud" (quoting National Court Op. 120)).[4] But the Appeal Division was not passing on the validity of Chevron's U.S. action; it was simply noting the action's existence and acknowledging that the Appeal Division was not competent to address American law. Pet. App. 133a.

The Second Circuit treated the Appeal Division's "disclaime[r] [of] jurisdiction" (Pet. App. 134a) as a reason to find jurisdiction—as if the disclaimer could expand the federal courts' Article III powers. That is untenable. Cf. *Sosna* v. *Iowa*, 419 U.S. 393, 398 (1975) (parties "may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual 'case or controversy'"). But even more importantly, the court ignored both the Appeal Division's explanation that it was "preserving the parties' rights to present formal complaint to the Ecuadorian criminal authorities" (Pet. App. 134a) and the National Court's affirmation that Chevron could press its fraud allegations in an "independent action" under "the Collusion Prosecution Act." Appellant's C.A. App. 3543a.

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[4] Under Ecuadorian law, no party may introduce new evidence on appeal; appellate courts review only the trial court record. Ecuadorian Code of Civ. P., art. 838. But if Chevron's allegations of fraud had been based on evidence discovered *before* the December 17, 2010, *autos para sentencia*—the close of the trial court record—Chevron could have raised the allegations on direct appeal.

As Article 6 of the CPA provides, "if the grounds for the claim are confirmed, measures to void the collusive proceeding will be issued, invalidating the act * * * redressing the harm caused, * * * and, as a general matter, restoring things to the state prior to the collusion." Add. 3a. Accordingly, as the National Court explained: "If, as [Chevron] alleges, there were irregularities in the proceeding, Ecuadorian legislation establishes actions that can be brought for these kinds of facts, disputes or conflicts, including those of an administrative and criminal nature." Appellant's C.A. App. 3543a.

These statements belie the notion that Ecuador's courts, in discussing where Chevron's fraud claim might be adjudicated, "referred only to the actions in the United States." Pet. App. 130a. Ecuador's courts outlined Chevron's remedies and invited Chevron to pursue them. Appellant's C.A. App. 3453a. Moreover, under Article 5 of the CPA, Chevron could file a CPA action immediately—before its appeal concluded. Add. 3a. Chevron, however, chose not to file a CPA claim, and the Second Circuit simply ignored the statute.

The Second Circuit's selective reading of the Ecuadorian courts' decisions fails to honor international comity and cannot justify the circuit court's expansive reading of the "case or controversy" requirement. As the Third Circuit has cautioned, "[although] the Ecuadorian judicial system is different from that in the United States, those differences provide no basis for disregarding or disparaging that system." *In re Application of Chevron Corp.*, 650 F.3d 276, 294 (3d Cir. 2011). This is not to say that "fraud alleged in [a judgment's] procurement," if substantiated, is not "a sufficient ground for disregarding it." *Hilton*, 159 U.S. at 228. But, where not necessitated by an enforcement

action, allowing a litigant to bypass the laws of one nation and seek redress in another nation's courts threatens to "imperil the amicable relations between governments." *Banco Nacional*, 376 U.S. at 418.

B. Additional factors make the Second Circuit's departure from international comity particularly troubling.

The Second Circuit's break from settled principles of international comity is especially troubling given Chevron's earlier insistence that Ecuador's courts adjudicate the underlying claims and the fact that Ecuadorian law does not allow preemptive attacks on foreign judgments. After all, "[t]rue comity is equality. [Nations] should demand nothing more and concede nothing less." *Guyot*, 159 U.S. at 163 (quoting *McEwan* v. *Zimmer*, 38 Mich. 765, 769 (1878) (Cooley, J.)).

1. From 1993 to 2002, Chevron championed Ecuador as not only "a totally adequate forum," but the *best* forum for the Lago Agrio claims. *Supra* at 4–5. Chevron submitted fourteen expert affidavits to that effect, obtaining dismissal on the condition that it submit to jurisdiction in Ecuador and "satisfy" any judgment.

Chevron reserved the right to contest enforcement of any such award "only" under New York's Uniform Foreign Country Money Judgment Recognition Act, N.Y. C.P.L.R. § 5301 *et seq*. Pet. App. 98a. That is, Chevron promised the U.S. courts to raise any fraud allegations by way of *an enforcement proceeding* in New York. *Id*. § 5304 (a)(1) (authorizing a challenge to enforcement of a foreign money judgment "rendered under a system which does not provide impartial tri-

bunals or procedures compatible with * * * due process").[5] There was no carve-out provision permitting Chevron to attack any Ecuadorian judgment preemptively. And the New York statute does not "authorize[] a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor." *Naranjo*, 667 F.3d at 240. Rather, the statute is "designed to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement in New York" and "to facilitate trust among nations." *Id*. at 241. The decision below undermines such trust.

2. Further, the evidence undergirding the decision below was at best tenuous. In concluding that the Ecuadorian judiciary "does not operate impartially, with integrity and fairness," the court below relied on Chevron's "expert," Vladimiro Álvarez Grau. App. 608a. Indeed, no fewer than 52 of the district court's 53 footnotes regarding the Ecuadorian judiciary cite Álvarez, who in turn relied almost exclusively on newspaper commentaries. Appellant's C.A. Spec. App. SPA430–440; Appellant's App. 1407a–1474a. Álvarez, however, is an avowed political opponent of Ecuador's current president. *E.g.,* Ecuador's C.A. App. RA92, *Correa Celebrates His Four Years In Office*, El Mercurio, Jan. 15, 2011 ("Álvarez * * * considers himself a 'critic' of [Correa's] socialist Government"); *id.* at 83–84, Vladimiro

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[5] The indigenous plaintiffs filed the *Aguinda* case against Texaco, Inc., which later merged with Chevron. See *Republic of Ecuador* v. *Chevron Corp*., 638 F.3d 384, 387 n.1 (2d Cir 2011). As the Second Circuit held, Chevron "remains accountable for the promises upon which we and the district court relied in dismissing Plaintiffs' action." *Id*. at 389 n.3.

Álvarez, *Emergency, a style of Rafael Correa*, El Hoy, (Mar. 7, 2007) (publically decrying President Correa's policies). The lower courts' reliance on his view of the Ecuadorian judiciary is akin to a foreign court relying on President Clinton's opinions concerning judicial appointees of President Trump.

Further, although one would not know it from the Second Circuit's opinion, the U.S. State Department Country Reports cited by the court below (see Appellant's C.A. Spec. App. SPA440–441) found—notwithstanding Chevron's heavy lobbying efforts[6]—that as to "Civil Judicial Procedures and Remedies," "[c]ivilian courts and the Administrative Conflicts Tribunal [are] generally considered independent and impartial." Appellee's C.A. Supp. App. 5922a (2008 Ecuador Human Rights Report 4); PX 1252 at 5 (2009 Ecuadorian Human Rights Report), U.S. Dep't of State, *2013 Country Reports on Human Rights Practices: Ecuador* (Feb. 25, 2009).[7] Moreover, the court ignored the international acclaim that Ecuador has received for its two decades of reforms further modernizing its courts.[8]

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[6] Ecuador C.A. App. RA26, State Dep't Email of Sept. 30, 2013; Ted Folkman, *Chevron, Lobbying, and Lago Agrio*, LETTERS BLOGATORY (Oct. 4, 2013) (Chevron sought to influence the 2009 Human Rights Report on Ecuador), https://lettersblogatory.com/2013/10/04/chevron-lobbying-lago-agrio/.

[7] Available at: https://www.state.gov/j/drl/rls/hrrpt/2013humanrightsreport/index.htm#wrapper.

[8] *E.g.*, *Commissioner Ferrero-Waldner on the Constitutional Referendum in Ecuador*, European Union Press Release (Sept. 29, 2008) (praising the referendum process and expressing EU support for new Constitution); Ecuador C.A.

No sovereign's courts should be condemned by another's absent a compelling need, and even then, only upon careful examination of the foreign court system. Here, there was no such need—the LAPs had not asserted a U.S. enforcement action—let alone an unbiased study of Ecuador's courts.

Chevron nonetheless continues to invoke the judgment below before Congress and federal agencies, in hopes of disrupting Ecuador's trade and political relations. Further, Chevron has relied on the lower courts' advisory opinions when litigating against Ecuador in various fora—in international arbitration, in related Dutch court proceedings, and before the USTR—even though Ecuador was not a party. Review is warranted to ensure that foreign sovereigns are accorded the same respect that the United States would expect from the courts of sister sovereigns.

App. RA154, Int'l Oversight Comm. Rpt. (Dec. 13, 2012) (Ecuador's reforms improved "the transparency in the exercise and application of justice"); Angela Kane, *Judicial Independence as Conflict Resolution and Prevention: The Recent Case of Ecuador's High Court*, UNITED NATIONS CHRONICLE, vol. 43 no. 1 (Mar. 2006) (Ecuador's judges are "chosen for their professional standing" and subjected to "transparent public hearings * * * at which [their] backgrounds could be openly scrutinized").

II. Certiorari is also warranted because the decision below conflicts with the Court's Article III precedent and with the Constitution itself, which commits the power to conduct the nation's foreign affairs to the political branches.

Review is independently warranted because the decision below conflicts with this Court's precedent holding that allegations of Article III injury may not rest on "guesswork as to how independent decisionmakers will exercise their judgment" (*Clapper*, 133 S. Ct. at 1150) and with the Constitution's allocation of the foreign affairs power to Congress and the President.

As petitioners have shown, Article III and principles of comity together warrant a rule providing that U.S. courts will not consider the validity of a foreign judgment absent an actual lawsuit seeing to enforce it. But even short of such a bright-line rule, the decision below erodes the Constitution's structural limitations. First, it conflicts with this Court's "repeated[]" holdings that "allegations of possible future injury are not sufficient" to satisfy Article III—"[the] threatened injury must be certainly impending to constitute injury in fact." *Id.* at 1147. Second, the "conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments" (*Oetjen*, 246 U.S. at 302), and the ruling below invites the judiciary "to usurp [that] power[]." *Clapper*, 133 S. Ct. at 1146. This Court should intervene to prevent that expansion of federal judicial power.

A. The Second Circuit's decision conflicts with this Court's precedents defining what makes the threat of an injury sufficiently imminent to satisfy Article III.

1. To satisfy Article III, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 133 S. Ct. at 1147. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Ibid.* Accordingly, this Court "has repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient" to create Article III standing. *Ibid.*

In *Clapper*, for example, Amnesty International brought a constitutional challenge to certain Foreign Intelligence Surveillance Act ("FISA") amendments, alleging that Amnesty's privileged communications with individuals abroad might be intercepted under the new law. *Id.* at 1146. Amnesty maintained that it was injured by having to cease certain communications to avoid interception and having to take costly measures to protect other communications' confidentiality. *Ibid.*

This Court disagreed, holding that the alleged injury was not imminent. Noting that Amnesty's theory rested on the government targeting foreign contacts, the Court emphasized the lack of proof that the government would target Amnesty's foreign contacts. Because the law "at most *authorizes*—but does not *mandate* or *direct*—the surveillance that respondents fear,

respondents' allegations are necessarily conjectural." *Id.* at 1149. And even if it had been certain that the government would seek Amnesty's communications, Amnesty could "only speculate as to whether [the FISA] court w[ould] authorize such surveillance." *Id.* at 1149–1150. The Court thus "decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Id.* at 1150.

Similarly, in *Lujan* v. *Defenders of Wildlife*, evidence that the parties intended to observe endangered species in their habitat in the future was "simply not enough" to satisfy Article III. 504 U.S. 555, 564 (1992). "[S]ome day intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of [an] 'actual or imminent' injury." *Ibid.*

2. The Second Circuit's decision squarely conflicts with this line of precedent. In holding that Chevron's alleged injury was non-speculative, the court relied on the "Invictus Memo"—a law firm memorandum that proposed a general strategy of "target[ing] [Chevron-related entities] with enforcement actions" in "the United States and abroad"—and on the lower court's finding "that the LAPs intend to seek enforcement 'in the United States when they conclude that it is tactically advantageous to do so." Pet. App. 74a; see also *id.* at 89a (quoting the Invictus Memo's statement that "[i]f we get a judgment out of the trial court, we're coming back immediately,—soon as we can,—to get that judgment enforced"). But speculation as to whether and when independent actors will find it "tactically advantageous" to file a U.S. enforcement action cannot satisfy the imminence requirement.

Beyond the fact that the Invictus Memo was written before judgment was entered and two years before it became enforceable, the eventual judgment "at most *authorize*[*d*]—but d[id] not *mandate* or *direct*" (*Clapper*, 133 S. Ct. at 1149)—that the LAPs bring an enforcement action, let alone in the United States. For that reason alone, the Second Circuit's basis for exercising jurisdiction was "necessarily conjectural." *Ibid.*

Further, whether the LAPs would deem it "tactically advantageous" to file an enforcement suit in the United States—not just elsewhere—was a question of global litigation strategy that necessarily turned on a host of practical judgments that no court could safely predict, especially given the constantly-evolving legal landscape and myriad fora adjudicating various aspects of the larger dispute. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 260 n.17 (1981) (discussing several factors that foreign plaintiffs weigh, including choice of law, federal or state court, availability of a jury trial, and attorney's fees); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507 (1947) (Jackson, J.) (discussing the "strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself"); *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984) (citing "the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations"). Indeed, the Invictus Memo acknowledged that "there are no guarantees of U.S. recognition and enforcement," and that other jurisdictions might offer "a more expedient resolution than could be obtained in the U.S." Appellee's C.A. Supp. App. 5959a. To date, the LAPs have sought enforcement in only *three* of 24 "non-exhaustive" countries listed in the Memo. *Id.* at

5962a.[9] Stated simply, the Memo lacked the "concrete plans" required to "support a finding of the 'actual or imminent' injury that [the Court's] cases require." *Lujan*, 504 U.S. at 564.

In short, the court below engaged in "guesswork as to how independent decisionmakers w[ould] exercise their judgment." *Clapper*, 133 S. Ct. at 1147. Such guesswork precludes a finding that Chevron's injury was "certainly impending." *Id.* at 1150.

B. The decision below allows the judiciary to usurp the Constitution's allocation of the foreign affairs powers to Congress and the President, which in turn are democratically accountable to the people.

Allowed to stand, the Second Circuit's decision will effectively create a new anti-enforcement regime for foreign judgments that no one is attempting to enforce. That result is especially problematic because the anti-enforcement effort would be led by the judiciary, without authorization from the political branches that bear responsibility for the nation's foreign affairs and are democratically accountable to the people.

Perhaps aware of the risk of retaliation, Congress has not authorized preemptive attacks on foreign judgments. Whatever the reason, the "conduct of the foreign relations of our government is committed by the

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[9] The Philippines, Singapore, Australia, Argentina, Brazil, Colombia, Venezuela, Angola, Canada, Chad, China, Kazakhstan, Kuwait, Nigeria, Saudi Arabia, South Africa, South Korea, Belgium, Indonesia, the Netherlands, New Zealand, Russia, Trinidad & Tobago, and United Kingdom.

Constitution to the executive and legislative—'the political'—departments." *Oetjen*, 246 U.S. at 302. And, of course, "[t]he law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 133 S. Ct. at 1146. Standing doctrine does so by limiting federal jurisdiction to "disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2341 (2014).

Relaxing the imminence requirement here not only violates Article III, but allows the judiciary "to usurp the powers of the political branches" on sensitive matters of international concern. *Driehaus*, 134 S. Ct. at 2341. That result in turn threatens to "imperil the amicable relations between governments and vex the peace of nations" (*Banco Nacional*, 376 U.S. at 417–418) by disrupting the comity that foreign nations afford to U.S. federal and state court judgments—contrary to the principle that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Underhill*, 168 U.S. at 252. This Court should intervene.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted.

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MAY 2017