No. 16-1178

In the Supreme Court of the United States

STEVEN DONZIGER, *et al.*,
Petitioners,

v.

CHEVRON CORPORATION,
Respondent.

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

BRIEF OF FRIENDS OF THE EARTH AND 14 OTHER NON-PROFIT ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae ("*Amici*") are non-profit organizations dedicated to advancing environmental protection, human rights, corporate accountability, and economic justice.[1] *Amici* regularly engage in First Amendment-protected activities similar to those that were found to be predicate acts under RICO in this case. *Amici* bring, participate in, and support strategic litigation intended to help achieve important societal goals. In conjunction with such litigation they seek to educate the public and to influence public opinion and government and corporate behavior through public relations campaigns, websites and blogs, press releases about ongoing litigation, corporate shareholder resolutions, public demonstrations, and letter-writing campaigns to government or corporate officials.

If the district court's decision, now affirmed by the Second Circuit, that this type of protected activity can form the basis of a RICO violation is not overturned, *Amici*'s exercise of their First Amendment rights of free speech, association, and petitioning government will be severely chilled by the very real possibility that they

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[1] Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *Amici Curiae*, their members or their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, all parties with counsel listed on the docket have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all listed parties received notice at least 10 days prior to the due date of *Amici Curiae's* intention to file this brief.

will have to mount costly defenses to retaliatory litigation brought by deep-pocketed corporations whose conduct *Amici* publicly oppose. The First Amendment plays an essential role in fostering an environment in which organizations across the political spectrum can advocate on issues of public importance without threat of intimidation and retribution. The RICO statute cannot be allowed to be used to erode these fundamental protections.

Amici are: 350 Bay Area; Center for Environmental Health; CT Citizens Action Group; Food and Water Watch; Friends of the Earth; Global Exchange; The Global Initiative for Economic, Social and Cultural Rights; Greenaction for Health and Environmental Justice; The International Accountability Project; Justice In Nigeria Now!; Marin Interfaith Task Force on the Americas; Media Alliance; Pachamama Alliance; Rights Action; and the Sunflower Alliance. Further information about each *Amicus Curiae* is set forth below in the List of Amici Curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for writ of certiorari should be granted because the Second Circuit's decision undermines fundamental First Amendment rights in sharp departure from the decisions of other courts concerning the proper application of RICO. Allowing the vaguely defined scope and heavy penalties of RICO – enacted to support law enforcement efforts against organized crime syndicates – to be wielded by private parties against public interest groups and activists engaged in litigation, petitioning government agencies, and public pressure campaigns against human rights violations

poses a severe threat to the rights to expression, association, political participation, and access to courts guaranteed by the First Amendment.

Interpreting RICO to allow injunctive relief to private parties and to allow preemptive collateral attacks on judgments of other courts in the absence of any actual enforcement action would significantly expand the scope of a statute already widely seen as problematically unfettered. This Court and others have long been concerned that the vaguely defined reach and heavy penalties of RICO render it susceptible to abuse. *See, e.g., Sedima, SPRL v. Imrex Co., Inc.*, 473 U.S. 479, 481 (1985) (sympathizing with "concern over the consequences of an unbridled reading of the statute"); *id.* at 500 (noting doubts about "the breadth of the predicate offenses").[2] It is widely recognized that civil RICO should be interpreted with

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[2] *See also Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451, 471 (2006) (Thomas, J., dissenting) ("Judicial sentiment that civil RICO's evolution is undesirable is widespread"); *Vicom, Inc. v. Harbridge Merch. Serv., Inc.*, 20 F.3d 771, 785 (7th Cir. 1994) (Cudahy, J., concurring) ("RICO is a judge's nightmare and doggedly persistent efforts to hammer it into a rational shape deserve the utmost respect even though they can rarely accomplish the impossible"); William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 9 (1989) ("Virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended"); David B. Sentelle, *Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers,* 12 Campbell L. Rev. 145, 148 (1990) ("every single district judge with whom I have discussed the subject (and I'm talking in the dozens of district judges from across the country") echoes the entreaty expressed in the Chief Justice's title in *The Wall Street Journal* [*Get RICO Cases Out of My Courtroom*, May 19, 1989]").

restraint and judiciousness, because "[c]ivil RICO is an unusually potent weapon – the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). The Second Circuit's expansion of civil RICO liability does precisely the opposite.

Beyond the important questions of whether RICO authorizes injunctive relief in civil cases brought by private parties and preemptive collateral attacks on the judgments of other courts, the decision below sets a dangerous precedent by upholding a finding of RICO liability based essentially on litigation and advocacy activity. *See Chevron Corp. v. Donziger*, 833 F.3d 74, 132-35 (2d Cir. 2016) (Petition for a Writ of Certiorari, Appendix ("Pet. App.") at 108a-113a) (citing *Chevron v. Donziger*, 974 F. Supp. 2d 362, 576-99, 601 (S.D.N.Y. 2014) (Pet. App. at 541a-590a). This result is at odds with other courts that have considered the issue. Because of the very real potential for such applications of civil RICO to impinge on the right to petition the courts, other circuits have explicitly determined that litigation activities – even when involving fraud or other misconduct – cannot be RICO predicate offenses.

This caution is warranted. Defendants in all sorts of cases could argue that aggressive litigation and public relation tactics by the other side are fraudulent or extortionate. After all, defendants often claim that litigation brought against them is baseless. If the decisions below in this case are allowed to stand, routine litigation activities could serve as the basis for RICO predicate acts, whenever there is any allegation of misconduct – "an absurd result [that] would chill litigants and lawyers and frustrate the well-established

public policy goal of maintaining open access to the courts." *Curtis & Assoc., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 173 (E.D.N.Y. 2010), *aff'd sub nom. Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App'x 582 (2d Cir. 2011).

Not only was the RICO liability here based principally on litigation activity, but the bulk of the activities of the purported "enterprise" involved public advocacy, assembly, and petitioning of government protected by the First Amendment.[3] If upheld, the opinions below will exert a chilling effect on such activities. Participants in public discourse will face the possibility of crushing defense costs and possible liability if they act in coordination with someone later found to have engaged in illegal activities or to have made false statements. The cost of defending against even non-meritorious RICO charges imposes a formidable deterrent to advocating positions adverse to deep-pocketed interests. *See Pelletier v. Zweifel*, 921 F.2d 1465, 1522 (11th Cir. 1991) ("[w]hen used improperly, … [civil RICO complaints] allow a complainant to shake down his opponent and, given the expense of defending a RICO charge, to extort a settlement"); *see also Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983) ("A lawsuit no doubt may be used … as a powerful instrument of coercion or retaliation"; suing persons who engage in protected activities gives "notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the … suit is, the [defendant] will most

[3] The First Amendment issue was raised in the Second Circuit, but the court declined to address it.

likely have to retain counsel and incur substantial legal expenses.").

First Amendment protections extend to statements intended to pressure others through the threat of economic harm. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982). To safeguard "breathing space" for First Amendment freedoms, *NAACP v. Button*, 371 U.S. 415, 433 (1963), protections extend even to some deliberate deceptions about matters of public concern. *United States v. Alvarez*, 567 U.S. 709, 132 S. Ct. 2537, 2548 (2012). The conduct at issue in this case occurred in the context of activities at the core of First Amendment protections: expression on topics of public concern and petitioning of government through lobbying, public advocacy, and the courts. In such circumstances, the First Amendment demands that allegations of wrongdoing be examined with more than usual rigor. *Claiborne Hardware*, 458 U.S. at 916. The district court failed to apply the "'precision of regulation' … demanded" by the First Amendment, *id.* at 916 (quoting *Button*, 371 U.S. at 438), and the Second Circuit failed even to consider this error.

Certiorari is needed, so that the lower courts' expansion of civil RICO in disregard of core First Amendment protections for speech, assembly, and petitioning, will not stand.

ARGUMENT

I. RICO IS NOT AN APPROPRIATE TOOL FOR POLICING LITIGATION MISCONDUCT

The Second Circuit's decision conflicts with decisions of other Courts of Appeals in upholding RICO liability based on litigation activity. If litigation activities could constitute RICO predicate acts, the deterrent effect of the fear of retaliatory lawsuits by deep-pocketed defendants would open the door to endless relitigating of the judgments of other courts, and impinge on the right to petition the courts. In recognition of both dangers, virtually all courts to consider the issues have made it clear that litigation and litigation activities – even involving fraud or other misconduct – cannot be RICO predicate offenses.

RICO liability in this case was predicated almost entirely on litigation activities. As summarized by the Second Circuit, the RICO "enterprise" consisted of "persons or entities … 'associated in fact for the common purpose of pursuing the recovery of money from Chevron via the Lago Agrio litigation, whether by settlement or by enforceable judgment, coupled with the exertion of pressure on Chevron to pay.'" Pet. App. 109a (quoting *Chevron*, 974 F. Supp. 2d at 576). Every one of the predicate acts reviewed by the Second Circuit is directly connected to this litigation: "extortion" consisted of preparing false litigation documents, ghostwriting a judgment and bribery in connection with both, in order to "extort" an excessive judgment or settlement from Chevron, Pet. App. 109a-111a (quoting *Chevron*, 974 F. Supp. 2d at 594, 601); "obstruction of justice" consisted of seeking to prevent the truth about the preparation of the same false

litigation documents from being discovered, Pet. App. 109a (quoting *Chevron*, 974 F. Supp. 2d at 594); "wire fraud" consisted of interstate and international emails coordinating the foregoing. Pet. App. 109a-111a (quoting *Chevron*, 974 F. Supp. 2d at 440, 590, 591-92).[4]

By contrast, courts that have considered the issue previously have generally held that neither bringing or threatening to bring litigation, nor the ordinary activities attendant on litigation, may serve as predicate acts for RICO liability – even if the lawsuit is brought in bad faith or involves fraud. If RICO liability could be predicated on litigation activities, almost every state or federal action could lead to corollary federal RICO actions, an absurd result. Litigation activities have been found insufficient to establish any of the kinds of predicate acts alleged in this case.

Extortion: Litigation and threats of litigation, even when involving bad faith or fraud, do not constitute the predicate act of extortion. *See United States v. Pendergraft,* 297 F.3d 1198, 1208 (11th Cir. 2002) ("threat to file litigation … even if made in bad

[4] Though this *amcius* brief demonstrates that the rulings of the district court and the Second Circuit must be overturned even if there had been fraudulent acts, *Amici* note that newly discovered evidence of bribery of a witness by Chevron completely undercuts the predicate for district court's finding of criminality or fraud by petitioners. This evidence discloses that Chevron's prime witness, an Ecuadorian judge who asserted he had been bribed by petitioners, has retracted his testimony and admitted that such testimony was false, and that Chevron had paid him to testify falsely against petitioners. Petition for Writ of Certiorari of Steven Donziger, The Law Offices of Steven R. Donziger, Donziger & Associates, PLLC, and Hugo Gerado Camacho Naranjo, at 12-14, 15-16; *Amicus* Brief of Earthrights International.

faith and supported by false affidavits, was not 'wrongful' within the meaning of" the federal statute criminalizing extortion); *Deck v. Engineered Laminates*, 349 F.3d 1253, 1258 (10th Cir. 2003) ("we join a multitude of other courts in holding that meritless litigation is not extortion under [18 U.S.C.] § 1951," and therefore cannot constitute a RICO predicate offense, even "when the plaintiff resorts to fraudulent evidence"); *accord Bixler v. Foster*, 596 F.3d 751, 758 (10th Cir. 2010); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 134 (6th Cir. 1994) ("[a] threat of litigation if a party fails to fulfill even a fraudulent contract … does not constitute extortion"); *I.S. Joseph Co., Inc. v. J. Lauritzen A/S*, 751 F.2d 265, 267 (8th Cir. 1984) (even assuming that threat to bring civil suit "was groundless and made in bad faith," it was not extortion and thus not a RICO predicate, because it "did not involve 'force' or 'violence'"). As the Tenth Circuit explained,

> [R]ecognizing abusive litigation as a form of extortion would subject almost any unsuccessful lawsuit to a colorable extortion (and often a RICO) claim. Whenever an adverse verdict results from failure of the factfinder to believe some evidence presented by the plaintiff, the adverse party could contend that the plaintiff engaged in extortionate litigation.

Deck, 349 F.3d at 1258.

Mail and wire fraud: Similarly, various courts have held that the use of the mail and wires for litigation activities does not constitute the predicate acts of mail or wire fraud, even when the litigation has fraudulent aspects. *See Curtis*, 758 F. Supp. 2d at 173 ("this court joins a long line of cases in finding, as a

matter of law, that the 'litigation activities' pleaded … [which involved mailing of pleadings and litigation correspondence in a series of allegedly 'fraudulent and frivolous lawsuits'] cannot constitute predicate acts for the purposes of RICO"); *see also Auburn Med. Ctr. v. Andrus*, 9 F. Supp. 2d 1291, 1297 (M.D. Ala. 1998) ("engaging in the type of litigation activities described in this [allegedly fraudulent] action does not constitute mail fraud for purposes of supporting a RICO claim"); *Paul S. Mullin & Assoc., Inc. v. Bassett*, 632 F. Supp. 532, 540 (D. Del. 1986) ("[t]he Court finds absurd plaintiffs' apparent suggestion that a lawyer's act in posting a letter which states a client's legal position in a dispute can constitute mail fraud"); *Spiegel v. Continental Illinois Nat'l Bank,* 609 F. Supp. 1083, 1089 (N.D. Ill.1985), *aff'd*, 790 F.2d 638 (7th Cir. 1986) (subjecting correspondence between attorneys concerning an issue in pending litigation "to the mail fraud statute would chill an attorney's efforts and duty to represent his or her client in the course of pending litigation" and "would, as it did here, give birth to collateral suits"). Moreover, as former Chief Justice Rehnquist observed: "With the growth of long distance communication and technology, mail fraud and wire fraud—which applies to all telephone calls—have a much wider sweep now than they did when the statutes were enacted. On the criminal side this greater breadth is kept under control by the use of prosecutorial discretion by United States attorneys. … But there is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys." Rehnquist, *supra*, 21 St. Mary's L.J. at 10.

Perjury: Perjury does not constitute a predicate act under RICO. *See United States v. Eisen*, 974 F.2d

246, 254 (2d Cir. 1992) ("Congress did not wish to permit instances of federal or state court perjury as such to constitute a pattern of RICO racketeering acts" due to "an understandable reluctance to use federal criminal law as a back-stop for all state court litigation"); *Speight v. Benedict*, 2007 WL 951492, at *6 n.2 (N.D.N.Y. Mar. 28, 2007) ("suborning perjury, perjury, filing a court action, filing a false affidavit, and giving false testimony do not constitute predicate acts within the meaning of the RICO statute").

Obstruction of justice: Obstruction of justice is defined under RICO as violation of 18 U.S.C. § 1503. 18 U.S.C. § 1961(1). But § 1503 applies only to proceedings in federal courts of the United States. *See O'Malley v. N.Y. City Transit Auth.*, 896 F.2d 704, 707 (2d Cir. 1990) (alleged obstruction of justice in state courts and administrative proceedings could not constitute RICO predicate offenses, because "[t]o constitute an offense under [18 U.S.C. § 1503], the act must relate to a proceeding in a federal court of the United States"). Consequently, actions to interfere with proceedings in foreign courts, such as in this case, cannot constitute obstruction of justice under RICO.

In sum, each of the predicate acts in this case was based on litigation activity that other courts have found could not constitute RICO predicate acts.

Of course, *amici* do not condone fraud – or any deception or other misconduct – in litigation. But the greater danger here is not facilitating fraud on the

courts – which have ample remedies already,[5] but that the threat of RICO's heavy penalties and stigma, and the broad sweep of RICO lawsuits such as this one will significantly deter civil society organizations and others seeking social change, and the attorneys who might represent them, from exercising their First Amendment right to petition the courts. *See I.S. Joseph Co.*, 751 F.2d at 267 (if threats to file a lawsuit could be found to constitute "a 'pattern of racketeering activity,' citizens and foreigners alike might feel that their right of access to the courts of this country had been severely chilled"). Just the costs of defending against even non-meritorious RICO actions can act as a significant deterrent. "Corporate defendants' … retaliatory RICO suits threaten to … skew the civil justice system further in favor of well-heeled players." Nora F. Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 644-45 (2017).

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[5] Chevron had several other remedies available to it to challenge any alleged fraud or deception. Chevron could have collaterally attacked the judgment in the Ecuadorian courts, if it could demonstrate that the verdict had been obtained by fraud. CA2 SPA-631 (Collusion Prosecution Act). In any country in which the Ecuadorian plaintiffs attempted to enforce and execute on the judgment, Chevron could have asserted such alleged fraud as a defense, and sanctions could be moved for in that action if appropriate. *See Chevron v. Naranjo*, 667 F.3d 232, 246 (2d Cir. 2012) (holding that this is a "far better remedy" than a preemptive collateral attack). Thus, the judgment of the Ecuadorian court, as affirmed by the Supreme Court of Ecuador, remains effective, holding that Chevron failed to remediate its oil drilling sites in the Ecuadorian rainforest, causing devastating damage to the indigenous community.

II. THE OPINIONS BELOW THREATEN FIRST AMENDMENT RIGHTS OF EXPRESSION, ASSOCIATION AND PETITIONING

In addition to litigation activities, the district court's opinion relied on core First Amendment protected activities of speech, assembly, and petitioning government as the basis for finding a racketeering "enterprise." These conclusions were challenged in the Second Circuit,[6] but that court declined to address First Amendment issues on appeal. The district court's finding, affirmed by the Second Circuit, that a campaign for environmental justice was a racketeering "enterprise" runs afoul of the First Amendment in two ways. First, most of the activities attributed to the "enterprise" were entirely legal, falling within the core protections of the First Amendment. Second, when illegal conduct is alleged within the context of concerted protected activities, heightened burdens of proof and greater precision than ordinary are required to establish liability. Because the district court came nowhere near meeting such a heightened standard, its findings of liability should have been reversed.

A. Most Of The "Enterprise's" Activities Were Within The Core Of First Amendment Protections

As an initial matter, most of the activities of the alleged enterprise were entirely legal, core protected expression. The principal activities engaged in by the enterprise, recited by the district court, were ones

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[6] *See, e.g.*, Donziger CA2 Opening Br. at 112; Donziger Post-Trial Br. at 64-66, (S.D.N.Y. Dec. 23, 2013), ECF 1850.

protected by the First Amendment: an "expansive media campaign" (Pet. App. 475a); "efforts to precipitate disinvestments in Chevron stock" (*id.*); "overtures to government officials and agencies to investigate Chevron" (*id.*); "enlistment of celebrities and NGOs to apply pressure" (Pet. App. 199a); "issu[ing] press releases and blog posts to generate media interest in the case" (Pet. App. 202a) "lobby[ing] regulatory agencies and elected officials" (Pet. App. 204a); "using strategies and tactics … employed in political campaigns" (Pet. App. 203a); "submitt[ing] [complaints] to the SEC and memoranda . . . to elected officials regarding Chevron" (Pet. App. 205a); "launch[ing] a website . . . [d]ubbed 'ChevronToxico' [that posted] information about the litigation" (Pet. App. 206a); "organiz[ing] several demonstrations outside the courthouse to protest [the judge's] rulings" (Pet. App. 234a); and the list goes on.[7]

Indeed, the district court propounded a legal standard that likely would have subjected the NAACP to racketeering liability for its organizing activities that led to the Supreme Court's historic decision in *Brown v. Board of Education,* 347 U.S. 483 (1954). *See*

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[7] *See also* Pet. App. 199a ("an aggressive media strategy"); Pet. App. 475a (attempts to "driv[e] Chevron to the settlement table"); Pet. App. 199a (efforts to obtain coverage by the "national, international, and Ecuadorian press"); Pet. App. 203a ("apply[ing] shareholder pressure on Chevron" and "publiciz[ing] the lawsuit,"); Pet. App. 204a (seeking "support among Chevron shareholders for a settlement, and … media attention through press releases"); Pet. App. 545a ("efforts to pressure Chevron to settle without exhausting the legal process").

Richard Kluger, *Simple Justice* (1976).[8] What the district court designated a RICO "enterprise" in this case resembled the coalition of attorneys and activists who paved the way for *Brown*: a collection of individuals and organizations working with varying degrees of coordination to seek justice through strategic litigation, public advocacy, and efforts to spur government action. *See* Pet. App. 541a-542a; *see also* Pet. App. 206a (describing the co-conspirators as engaged in a multi-faceted "pressure campaign against Chevron").

Such orchestrated campaigns for social change are a revered part of American history, and are accorded the highest degree of constitutional protection. *Claiborne Hardware Co.*, 458 U.S. at 913 ("expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values"). It receives the highest protection no less when advocacy organizations and individuals "exercise … First Amendment rights" "of speech, assembly, association, and petition" "to bring about political, social, and economic change." *Id.* at 911 (referring to boycott and associated protests and advocacy). Litigation seeking to effect societal change is likewise "a form of political expression" entitled to the highest degree of constitutional protection, as is "vigorous advocacy." *NAACP v. Button*, 371 U.S. 415, 429 (1963).

Advocacy is protected even when it includes efforts to apply economic or social pressure to influence others.

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[8] All corners of the political spectrum engage in such campaigns. *See, e.g.,* Keith Cassidy, *The Right to Life Movement: Sources, Development, and Strategies*, 7 J. Policy Hist. 128 (1995).

"The claim that … expressions were intended to exercise a coercive impact … does not remove them from the reach of the First Amendment." *Claiborne Hardware*, 458 U.S. at 911. "Speech does not lose its protected character … simply because it may embarrass others or coerce them into action." *Id.* at 910. "'[T]hreats' of 'social ostracism, vilification, and traduction,'" *id.* at 921, unlike intimidation by threats of violence, are constitutionally protected. *Id.* at 926. Foreseeing – and even intending – that the target of a campaign sustain economic injury likewise does not remove First Amendment protections from a nonviolent, politically motivated campaign designed to force governmental and economic change and to effectuate rights. *Id.* at 914.

Organizing demonstrations outside a courthouse — cited by the district court as an instance of coercive tactics, *see* Pet. App. 234a — is likewise an entirely legitimate exercise of core First Amendment rights. *See United States v. Grace*, 461 U.S. 171, 180 (1983) ("public sidewalks forming the perimeter of the Supreme Court grounds … are public forums and should be treated as such for First Amendment purposes").[9] Such demonstrations are protected, notwithstanding the possibility that they might convey the appearance that the court is subject to outside pressure. *Id.* at 183.

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[9] Ironically, a recent documentary, *The Case Against 8*, is a celebration of how Theodore Olson, appellate counsel for Chevron, orchestrated a massive media and publicity campaign – including protests in front of courthouses – to support his litigation against California's same-sex marriage ban. *See http://thecaseagainst8.com*.

Even deceptive statements receive a significant measure of constitutional protection. *See Button*, 371 U.S. at 444-45 ("the Constitution protects expression and association without regard to the truth … of the ideas and beliefs which are offered"). To safeguard "breathing space" for First Amendment freedoms, *id.* at 433, even deliberate deceptions are sometimes protected. *See United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012) (striking down law punishing false representations that one has received a military decoration, because countenancing such "broad censorial power" would cast a "a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom").

B. Because The Challenged Conduct Occurred In A Context Of Core Protected Activities, The Allegations Should Have Been Scrutinized With Heightened Care

Most crucially for this case, "[b]ecause First Amendment freedoms need breathing space to survive," *Button*, 371 U.S. at 338, when allegedly illegal conduct[10] occurs "in the context of constitutionally protected activity, … 'precision of regulation' is demanded." *Claiborne Hardware*, 458 U.S. at 916 (quoting *Button*, 371 U.S. at 438). "A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be

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[10] *Amici* believe that the district court's findings of illegal activities are not entitled to deference, and that the evidence demonstrates that no illegal activities occurred (*see* note 4, *supra*), but the concern here is that the district court decision runs severely afoul of the First Amendment regardless.

characterized as a [criminal] conspiracy simply by reference to the ephemeral consequences of relatively few [criminal] acts." *Claiborne Hardware*, 458 U.S. at 933 (with reference to campaign against discriminating businesses including boycott, protests, and public mobilization, but also violence and intimidation).

Additionally, given "the importance of avoiding the imposition of punishment for constitutionally protected activity," *id.* at 934, a heightened burden of proof – and a heightened degree of scrutiny by a reviewing court – is required. *See id.* at 933-34 ("[t]he burden of demonstrating" that "[a] massive and prolonged effort to change the social, political, and economic structure of a local environment" is predominantly a criminal conspiracy is "heavy"); *id.* at 915 (a context of constitutionally protected activity "imposes a special obligation … to examine critically the basis on which liability was imposed"); *id.* at 919 (there must be "clear proof" of specific intent to further an unlawful aim; "intent must be judged according to the strictest law").

The district court in this case came nowhere near the "precision of regulation" required when entering such a "sensitive field." *Id.* at 916, 920. Even though a heightened burden of proof was demanded, the district court stated explicitly that it was applying the "preponderance of evidence" standard appropriate to an ordinary civil case. SPA-353. Nor did the court give any indication that it was exercising "extreme care," *Claiborne Hardware*, 458 U.S. at 927, to examine Chevron's allegations "critically," *id.* at 915, or that it was "wary" of the conspiracy charges. *Id.* at 934. To the contrary, it regularly excluded exculpatory evidence that should have been admitted even in an ordinary

civil case. *See*, *e.g.*, Pet. App. 452a. The court also erred in treating the legal and illegal aspects of concerted action as a unity "without differentiation," *Claiborne Hardware*, 458 U.S. at 921, transmogrifying the entirety of a "massive and prolonged" campaign, *id.* at 933, for environmental justice into a racketeering conspiracy. Finally, the court erred in concluding that the LAP defendants were liable for the actions of other members of the "enterprise" under agency law. Pet. App. 522a n.1304. In order that the "freedom to engage in association for the advancement of beliefs and ideas," *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958), not be curtailed, the First Amendment requires that in the context of a concerted action pursuing social justice through protected activities, each individual's liability be individually assessed. *Claiborne Hardware*, 458 U.S. at 916-17, 933-34.[11]

On the basis of just such errors, *Claiborne Hardware* overturned a decision finding leaders and participants liable for the economic consequences of a "concerted action" that included both protected First Amendment activity and illegal actions in pursuit of a worthy social goal. 458 U.S. at 888. The Second Circuit should have done the same here.

If the decisions below are allowed to stand, activists everywhere are likely to be chilled in exercising their First Amendment rights by the prospect that, no

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[11] The district court was correct as to the general parameters of agency law. But the lesson of *Claiborne Hardware* is that stricter standards for liability are required where defendants were principally engaged in core protected First Amendment activities.

matter how scrupulously they strive for truth, they may have to defend against charges that they acted in concert with others who made deceptive statements or that their own statements were on occasion misleading. Even when such charges lack merit, the decisions below invite future retaliatory litigation against citizens exercising their right to advocate on matters of public concern simply to:

> foist[] upon the target the expenses of a defense…. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism.… The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.

George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 943-44 (1992) (quoting *Gordon v. Marrone*, No. 185 44/90, slip op. at 26-28 (Sup. Ct., Westchester Cty., N.Y. April 13, 1992).[12]

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[12] The present case illustrates these pitfalls. John Keker, Donziger's former attorney in the case, withdrew from the case, because, as he explained in his withdrawal motion, Donziger's lawyers could not keep up with Chevron's "endless drumbeat of motions" and depositions "from Park Avenue to Peru." ECF No. 1100, at 2. Keker noted: "Through scorched-earth litigation, executed by its army of hundreds of lawyers, Chevron is using its limitless resources to crush defendants and win this case through

CONCLUSION

Because the broad reading below of the scope of the RICO statute threatens to impinge significantly on

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might rather than merit." *Id.* at 1-2. In its order quashing Chevron's subpoenas for documents and depositions from amicus Amazon Watch, the presiding court warned that it would impose sanctions on Chevron if it issued new subpoenas to Amazon Watch that were not more "more carefully tailored to avoid infringing upon the organization's *First Amendment* rights." *Chevron Corp. v. Donziger*, 2013 U.S. Dist. LEXIS 49753, at *19 (N.D. Cal. Apr. 5, 2013) (emphasis in original). (Already two years earlier Chevron had sought discovery from "at least 30 different parties" in "an extraordinary series of … requests … in United States District Courts throughout the United States." *In re Chevron Corp.*, 633 F.3d 153, 159 (3d Cir. 2011).) Besides forcing Donziger's attorney to withdraw, Chevron succeeded in bringing enough pressure to bear to force Stratus Consulting, Donziger's environmental consulting firm, to disavow its findings of environmental damage and to agree to a settlement with Chevron that included a gag order regarding those findings, and a two-year ban on engaging in any environmental consultation that might involve Chevron; to force Burford Capital, a firm financing the litigation, to disavow the case and its lawyers; and to force the Patton Boggs firm, Donziger's co-counsel, to withdraw, pay a $15 million settlement to Chevron's lawyers, and agree to allow Chevron's lawyers to depose its lawyers. *See* Stipulation and Order, *Patton Boggs LLP v. Chevron Corp.*, No. 12-cv-9176 (S.D.N.Y. May 7, 2014), ECF 81. Bloomberg Business Week summarized what is at stake: "In forcing Patton Boggs to stand down, Chevron also served notice that law firms might want to think twice before siding with plaintiffs against big corporations in mass injury cases." Paul Barrett, Patton Boggs Surrenders in Battle With Chevron, Agrees to Pay $15 Million, BLOOMBERG BUSINESS WEEK (May 8, 2014), *available at*: https://www.bloomberg.com/news/articles/2014-05-08/patton-boggs-surrenders-in-battle-with-chevron-agrees-to-pay-15-million

First Amendment freedoms and to invite a flood of collateral litigation, certiorari should be granted.

Dated: May 1, 2017 Respectfully submitted,

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APPENDIX

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LIST OF *AMICI CURIAE*

Amici Curiae 350 Bay Area; Center for Environmental Health; CT Citizens Action Group; Food and Water Watch; Friends of the Earth; Global Exchange; The Global Initiative for Economic, Social and Cultural Rights; Greenaction for Health and Environmental Justice; The International Accountability Project; Justice In Nigeria Now!; Marin Interfaith Task Force on the Americas; Media Alliance; Pachamama Alliance; Rights Action; and Sunflower Alliance, provide the following more detailed information concerning their interests in this appeal:

350 Bay Area

350 Bay Area is a non-profit climate advocacy grassroots organization with the mission to reduce carbon pollution in the San Francisco Bay Area and beyond. It engages in many protected activities: supporting impact legislation, seeking to educate the public and to influence public opinion and government and corporate behavior through public relations campaigns. 350 Bay Area has several issue campaigns covering various environmental issues: fracking, fossil fuel divestment, regional climate action plans, non-carbon transportation (electric vehicles, clean mass transit, bikes), environmental justice, and fossil fuel resistance. Notably, one campaign, Chevron Watch, focuses on Chevron, the world's largest corporate producer of GHGs. Chevron Watch's focus is the Chevron refinery in Richmond, California, and its

international headquarters in San Ramon, California. 350 Bay Area also has several websites (regional as well as five local/issue-specific websites) and blogs, issues press releases about ongoing litigation (fracking regulation and bans, renewable energy), and advocates concerning corporate shareholder meeting actions. 350 Bay Area holds or participates in many public demonstrations (ranging up to 5000 participants), and letter-writing and calling campaigns to government or corporate officials (*e.g.,* to the Bay Area Air Quality Management District, to California cities and counties, and to state legislators).

350 Bay Area is concerned that the district court's opinion will cause corporate entities that are the subject of 350 Bay Area's environmental campaigns to file lawsuits against 350 Bay Area, even though 350 Bay Area endeavors to provide completely truthful information. Any such lawsuits will drain 350 Bay Area of its small resources and volunteer-only time. Because of this concern, 350 Bay Area believes that the district court's opinion, if upheld, will cast a chilling, highly cautionary set of restrictions on its communications, civil rights exercises and expression of its free speech, since profitable and powerful businesses will have an immediate and structural advantage to suppress its work through the fear of liability that risks not only the small resources of 350 Bay Area, but also the few financial resources, homes and livelihood of 350 Bay Area's employees and volunteers, and other individuals providing services in support of 350 Bay Area.

Center for Environmental Health

The Center for Environmental Health ("CEH") is a nonprofit, non-governmental organization that protects people from toxic chemicals by working with communities, consumers, workers, government, and the private sector to demand and support business practices that are safe for public health and the environment. CEH has worked for 18 years, winning victories that make children and families safer and healthier by eliminating harmful chemical exposures in millions of consumer products and exposing the health effects of toxics in our environment.

CEH's work is an important counterweight to the power and influence of the chemical and petroleum industries, which spend millions of dollars annually to counter claims about the devastating effect of practices in these industries on the health of children, families, and communities. CEH's work requires that it, and other public interest groups, communicate about these concerns and environmental effects with communities, the general public, and private- and public-sector decision makers. CEH intends that all of its communications be truthful and accurate, and its work depends on the ability to make these communications to the affected communities and to governmental and private decision makers. The district court's opinion, by making such communication efforts subject to litigation under RICO, threatens to involve CEH, as well as other similar social nonprofits, in litigation brought by the industries that CEH is communicating about, and this concern will affect CEH's ability to continue providing its important services.

CT Citizen Action Group

The CT Citizen Action Group (CCAG) is a statewide membership-based nonprofit organization dedicated to organizing concerned citizens in order to build a more just society. CCAG works on a range of issues, including economic opportunity, environmental sustainability, strengthening democratic institutions, government and corporate accountability, education equity, and human rights. To advance these efforts, CCAG utilizes a range of strategies, including litigation, citizen participation, organizing, direct action, lobbying, and communications.

Food and Water Watch

Food and Water Watch ("FWW") is a national nonprofit organization working to ensure that the food, water and fish consumed by the American public is safe, accessible and sustainably produced. To help local communities enjoy and trust in what is available to eat and drink, FWW helps people take charge of where their food comes from, works to ensure that clean affordable public tap water flows freely to peoples' homes, protects the environmental quality of oceans, communicates with government officials to ensure that the government does its job protecting citizens, and educates about the importance of keeping the global commons – our shared resources – under public control.

FWW regularly engages in many of the First Amendment protected activities that the district court deemed to be RICO predicate actions. FWW, in advocating for peoples' rights, often engages in extensive communications work to pressure

corporations to act responsibly, communicates with its membership to take action through their elected officials, and engages in media and education campaigns to inform the general public about the misdeeds of corporate and governmental officials. FWW representatives often appear and speak at rallies, seminars and demonstrations about many of the core issues with which FWW is involved, including unsustainable agribusiness practices and fracking. When able, FFW exercise rights under the laws of the United States by supporting or bringing citizen suits under the Clean Water Act and other environmental and public health laws. The district court's decision, if it stands, will have an extremely chilling effect on both FFW's Constitutional and legal rights to engage in these activities, since FFW is concerned that it will be sued by corporations on which it is focusing, even though FFW endeavors to ensure that its communications and advocacy are accurate.

Friends of the Earth

Friends of the Earth is a nonprofit non-governmental environmental advocacy organization with members in all 50 states. It particularly works in the fields of climate change and energy, forests and oceans, food and technology, and economic and financial policy. In collaboration with its supporters, community groups and other organizations, Friends of the Earth educates and urges public policymakers, corporations and financiers to make decisions which result in a healthier environment for all people. In the course of its work, Friends of the Earth regularly engages in litigation, media and public outreach,

shareholder resolutions, public demonstrations and letter-writing campaigns.

Global Exchange

Global Exchange (GX) is an international human rights nonprofit organization dedicated to promoting social, economic and environmental justice around the world. GX provides an education and action resource center, and communicates with members and constituents about environmental and social issues of concern, to empower its members and constituents to act against environmental contamination or social injustice. GX communicates with numerous constituents and others about the effects of certain corporate practices, and provides tours and hands-on experience for individuals to learn about corporate injustices, and engages in communications with such individuals about actions to take at home concerning these issues. GX has communicated with various communities on issues concerning Chevron's environmental issues, such as through a network called the True Cost of Chevron, to assist these communities that have been negatively impacted by Chevron in various locations, from Ecuador to Alaska, Nigeria to Indonesia, and provide assistance for them to engage in concerted action in their communities and in the United States, such as through demonstrations, communications with government entities and social pressure on Chevron shareholders, to help create change.

The Global Initiative for Economic, Social and Cultural Rights

The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) in an international human rights nonprofit and non-governmental organization. The vision of the GI-ESCR is of a world where economic, social and cultural rights are fully respected, protected and fulfilled and on equal footing with civil and political rights, so that all people are able to live in dignity. To that end, the GI-ESCR engages in strategic litigation in support of economic, social and cultural rights with the aim of achieving just remedies, particularly for marginalized communities, as well as shaping jurisprudence from a human rights perspective. Attorneys with the GI-ESCR have supported and contributed to litigation in support of economic, social and cultural rights before national courts and international human rights mechanisms.

Greenaction for Health and Environmental Justice

Greenaction for Health and Environmental Justice is a grassroots, multiracial, community-led nonprofit organization based in San Francisco and Kettleman City, California. Its mission is to mobilize community power to win victories that change industry and government policies and practices in order to protect health and promote environmental, economic and social justice. Greenaction was founded in 1997 by grassroots community organizations and environmental justice leaders from urban, rural and indigenous communities impacted by pollution and environmental racism and injustice, including communities negatively impacted by Chevron's industrial operations. Its work, and those

of our many environmental and environmental justice allies, is constantly a challenge due to the overwhelming odds faced by communities up against giant corporations, such as Chevron, that use their influence and vast financial resources to enable them to continue their pollution of communities. Greenaction is very concerned that the district court's opinion, if upheld, will allow Greenaction to be sued for providing support for litigation against these corporations, and for providing truthful and accurate statements in its attempt to influence public opinion and governmental action, and such a situation will cause Greenaction's speech to be seriously chilled.

The International Accountability Project

The International Accountability Project (IAP) is a human rights advocacy nonprofit organization that seeks to end forced eviction and create new global policy and practice for development that respects people's homes, environment and human rights. In total, IAP works to win policy change, boost local advocacy efforts and support grassroots activists and communities to access influential decision-making spaces. IAP works to ensure all people can shape the decisions that affect their homes, environment and communities. In order to accomplish these goals, IAP assists local activists and communities in media campaigns to raise interest and concerns about issues affecting the communities, in contacting government officials to convince the government to take actions to assist these communities, and to provide support for impact litigation by local communities to challenge corporate development policies that are harming the communities.

Justice In Nigeria Now!

Justice In Nigeria Now! is a San Francisco-based organization working in solidarity with communities in Nigeria and allies in the U.S. for peace and to hold multinational corporations accountable for their operations, promote peace and corporate accountability and to ensure that extractive industries operate in a manner that respects human rights, protects the environment and enhances community livelihood. This includes informing and educating people about environmental and social justice issues, including legal cases such as multiple lawsuits brought by communities in Nigeria against Chevron. Justice in Nigeria Now provides support for such lawsuits, and encourages people to take actions supporting the plaintiffs in such cases, such as contacting governmental officials or engaging in shareholder initiatives.

Marin Interfaith Task Force on the Americas

Marin Interfaith Task Force on the Americas is a nonprofit non-governmental organization that educates citizens of North America regarding the role of corporations in the Americas, as well as the role of the United States government. The Task Force on the Americas works to expose the exploitation by corporations of natural resources to the detriment of indigenous communities, and to educate the American public about the effects of international trade agreements and corporate actions and policies that could be harmful to the indigenous communities and the American public. The Task Force on the Americas regularly communicates with the American public, through educational delegations, organizing

community educational events and producing a quarterly newsletter, in which it presents its analysis of U.S. corporate actions and policies. The Task Force on the Americas communicates information it has obtained about corporate impunity, conflicts, human rights abuses and environmental degradation, and regularly encourages U.S. citizens to contact their members of Congress, the Administration and companies with their concerns, particularly in cases where U.S. corporations are profiting from the exploitation of natural resources that harm people living nearby. Additionally, the Task Force seek ways to hold perpetrators responsible and encourage compensation for victims, such as providing support and communications assistance for impact litigation on these issues.

Media Alliance

Media Alliance is an Oakland-based nonprofit resource and advocacy center for media workers, nonprofit organizations, and social justice activists, in order to ensure excellence, ethics, diversity, and accountability in all aspects of the media in the interests of peace, justice, and social responsibility. Media Alliance and its members regularly participate in advocacy-based activities similar to those characterized by the district court in this case as creating RICO liability. Media Alliance also works with numerous nonprofit organizations and community and citizen groups on communication strategies for campaigns on many issues including income inequality, environmental justice, criminal rehabilitation, surveillance and immigrant rights, including providing support for impact litigation. Media Alliance is deeply

concerned that the district court's opinion will chill the first amendment activities by Media Alliance and other social impact organizations, due to the fear that these organizations may be sued by the very corporations that it is analyzing and communicating about.

Pachamama Alliance

The Pachamama Alliance (TPA) is a nonprofit non-governmental organization that partners with indigenous people of the Amazon region of Ecuador to preserve their land and cultures. TPA also provides transformational educational programs to hundreds of thousands of people worldwide about environmental and social justice issues, and how people can take action. Part of the Pachamama Alliance's mission is to shed light on areas of injustice in the world, and the systems and structures that perpetuate them. To accomplish this mission, the Pachamama Alliance informs and educates 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, provides financial and communications support for such lawsuits, and encourages people to take actions supporting the victims and plaintiffs in such cases, such as contacting governmental officials or engaging in shareholder initiatives.

Rights Action

Rights Action is a nonprofit non-governmental organization established in 1995 to fund community-designed and implemented development, environmental and human rights protection projects in Central America, mainly in Guatemala and Honduras,

and to promote education and activism aimed at critically understanding and changing unjust north-south, global economic, military and political relationships. Rights Action funds community struggles, publishes articles and reports, coordinates speaking tours, accompanies threatened activists, and identifies and pressures responsible government agencies. As part of this work, Rights Action also informs and educates people about environmental and social justice issues and corporate malfeasance, including providing communications and support about legal cases related to environmental and human rights crimes that involve corporate actors.

Sunflower Alliance

The Sunflower Alliance is an alliance of organizations whose common vision is a fossil-free Bay Area. The Sunflower Alliance engages in many protected activities, such as providing support for impact legislation, seeking to educate the public and to influence public opinion and government and corporate behavior through public relations campaigns and campaigns to petition government officials to take appropriate actions, and issuing press releases concerning ongoing litigation against corporations engaged in environmental damage. The Sunflower Alliance also provides support for protest actions at corporate shareholder meeting actions, in attempts to convince corporations to change their destructive policies. Some of Sunflower Alliance's work has involved environmental damages caused by Chevron, such as providing communications and organizing and coordinating protests and direct actions against Chevron concerning Chevron's refinery fire in

Richmond, California, which sent 15,000 people to the hospital and caused substantial environmental damage.