No.

IN THE

Supreme Court of the United States

CHEVRONTEXACO CORPORATION AND
TEXACO PETROLEUM COMPANY,

Petitioners,

v.

REPUBLIC OF ECUADOR AND PETROECUADOR,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal common law, a contractual arbitration clause generally may be enforced against a nonsignatory pursuant to ordinary principles of contract and agency, including either assumption or estoppel. This case raises a split of authority on an important legal question within this framework:

Where a government entity steps into the shoes of a private party in a commercial joint venture and takes substantial and direct benefits under the venture's joint operating agreement, is it bound by the arbitration provision in the joint operating agreement?

CORPORATE DISCLOSURE STATEMENT

Petitioner ChevronTexaco Corporation, whose name was changed to Chevron Corporation in 2005, has no parent corporation and no publicly held company owns ten percent or more of its stock.

Petitioner Texaco Petroleum Company's ultimate parent is Chevron Corporation; no other publicly held company owns ten percent or more of Texaco Petroleum Company's stock.

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PETITION FOR WRIT OF CERTIORARI

Chevron Corporation and Texaco Petroleum Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York was issued on June 19, 2007, and is reported at 499 F. Supp. 2d 452 (Pet. App. 3a-37a).

The summary order of the United States Court of Appeals for the Second Circuit was issued on October 7, 2008, and is reported at 296 F. App'x 124 (Pet. App. 1a-2a).

JURISDICTION

The summary order of the United States Court of Appeals for the Second Circuit was issued on October 7, 2008. Pet. App. 1a-2a. Petitioners' petition for panel rehearing and rehearing *en banc* in the Second Circuit was denied on December 8, 2008. Pet. App. 132a-133a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented is governed by federal common law. Included in the Appendix are relevant provisions of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517, *reprinted at* 9 U.S.C. § 201 note; and the Inter-American Convention on International Commercial Arbitration of January 30,

1975, O.A.S.T.S. No. 42, *reprinted at* 9 U.S.C. § 301 note. Pet. App. 134a-157a.

STATEMENT

In 1974, by government edict, respondent Petroecuador, a state-owned oil company, became an owner—and in 1977 became majority owner—of a Consortium that produced crude oil in Ecuador until 1992. When Petroecuador entered the Consortium, its partner, petitioner Texaco Petroleum Company ("TexPet"), was serving as the Consortium's operator under the Napo Joint Operating Agreement ("JOA"). Although Petroecuador did not sign the JOA, it took substantial and direct benefits from the contract. Over the course of nearly two decades, Petroecuador repeatedly invoked provisions of the JOA that it deemed advantageous and received billions of dollars in revenue as a direct result of TexPet's labors as operator under the agreement.

It is settled federal common law that a nonsignatory is bound by a contract from which it has taken benefits. But Petroecuador now denies that it has any corresponding obligations under the JOA—including the obligation to resolve Consortium-related disputes in a neutral arbitral forum that acts in accordance with the rule of law. Specifically, Petroecuador resists arbitration of its obligations with respect to a pending Ecuadorian lawsuit in which a court-appointed "expert" has recommended damages against TexPet's parent corporation of over $27 *billion* based upon Consortium operations conducted under the JOA.

In allowing Petroecuador to achieve this inequitable result, the judgment below creates a conflict with another circuit court and departs from

settled principles of assumption and estoppel. That judgment, furthermore, was issued without opinion—the Second Circuit merely adopted the reasoning of the district court as its own in a summary order. Given the weighty issues involved and the importance of uniformity in the federal common law, this was a wholly inappropriate departure from traditional appellate decisionmaking. Without providing any independent analysis, the Second Circuit has adopted a rule of law that undermines the certainty of international arbitration and exposes U.S. companies to the caprices of foreign governments. In an era of extraordinary government intervention and investment in private business, both in the United States and abroad, this case raises important and timely legal issues that demand clarification by this Court.

A. The Consortium and Its Joint Operating Agreement

From 1964 until 1992, TexPet participated in a Consortium for the exploration and production of petroleum in the Oriente region of Ecuador. Originally, the Consortium was comprised of TexPet and Ecuadorian Gulf Oil Company ("Gulf"), another U.S. corporation. (A-2235; A-2248.)[1] TexPet and Gulf operated in Ecuador by the authority granted them under various concession agreements with respondent the Republic of Ecuador. (A-1982; A-1998-99; A-2035-36; A-2235; A-2248; A-2398.) As is routine in such major petroleum joint ventures, to address issues concerning their internal commercial, operational, and administrative relationship, TexPet

[1] A-____ refers to the Joint Appendix filed in the Court of Appeals.

and Gulf separately entered into the JOA in 1965. (A-2000; A-2295-2331.) The cardinal *quid pro quo* of the JOA was that one party would serve as the operator free of charge in return for the other party's agreement to bear its share of operating costs and to indemnify the operator for its share of any third-party liability. (A-2295-2331.) The JOA secured these rights and obligations by expressly requiring the parties to arbitrate any disputes with the American Arbitration Association under the laws of New York. (A-2326; A-2329.)

B. Petroecuador Enters the Consortium and Adheres to the Joint Operating Agreement

The Ecuador Government mandated that Petroecuador join the Consortium, and it did so in 1974 by taking a 12.5 percent interest from TexPet and Gulf, respectively. (A-2397; A-2035.) In 1977, Petroecuador acquired Gulf's remaining interest and, with a 62.5 percent share, obtained the majority voice in the Consortium. (A-2243; A-2455-66.)[2]

Upon its entry into the Consortium, Petroecuador received from TexPet a copy of the JOA, which by its terms was binding on successors and assigns of the original parties. (A-2323-31.) Although Petroecuador never signed the JOA, TexPet continued serving as the Consortium's operator and conducting operations as it always had under the JOA. (*E.g.*, A-2037; A-

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[2] In addition to Petroecuador's share of production, the Republic of Ecuador received a "host government take" in oil and cash. (A-2035; A-2241; A-769; A-2358.) All told, respondents received approximately 95 percent of the Consortium's revenues, totaling nearly $25 billion during the life of the Consortium—roughly half of Ecuador's gross national product over the same period. (A-2246.)

2039; A-2223-24; A-2242; A2887-89; A-3086-3087; A-3105-06; A-3196; A-3386; A-3389.) Petroecuador consistently recognized that, by its entry into the Consortium, it had become a party to the JOA. For example, a former general manager for Petroecuador averred that Petroecuador "became a party to the . . . JOA" when it joined the Consortium, and an Ecuadorian official in 1979 similarly acknowledged that TexPet had "the right to continue being the Operator" because the JOA so provided and Petroecuador "did not state a different opinion." (A-2223; A-3377.) In addition, at the end of the Consortium, respondents in a settlement agreement listed the JOA among the "Consortium Agreements" under which "oil exploration and production operations [were] carried out." (A-2618; A-2640.) At no time during the Consortium did Petroecuador deny the existence or continued operation of the JOA.

Consistent with this understanding, Petroecuador repeatedly invoked the provisions of the JOA to its benefit. For example, Petroecuador's internal auditors—noting that Consortium operations were "governed" by the JOA—identified perceived lapses by TexPet with respect to various JOA provisions (*e.g.*, the schedule for making cash calls) and demanded compliance. (A-2216; A-3540; A-3547-92; A-3725-28.) In addition, in order to obtain a loan, Petroecuador told the Ecuador Central Bank that the JOA "regulates the operations of the Petroecuador-Texaco Consortium." (A-4089.) Petroecuador also invoked article 6 of the JOA to support its claim to become the Consortium operator in 1982. (A-3512; A-3517-18.) When TexPet responded with the possibility that the JOA was invalid, Petroecuador "refuse[d] to accept this possibility"—prompting

TexPet to acknowledge Petroecuador's right to invoke the JOA. (A-1392; A-3514.)[3]

C. The Settlement and Release

The concession, and TexPet's joint venture with Petroecuador, ended in 1992, after which TexPet entered into a settlement with respondents to address environmental impacts arising from Consortium operations. (A-2615.) Under a series of agreements, TexPet performed its share of remedial work at a cost of $40 million, and respondents—after reviewing and certifying that work—gave TexPet a broad release from any further liability for environmental conditions in the former concession area. (A-2591-93; A-2606-09; A-2615-41; A-2670-75; A-3048-55.) For the past 17 years, Petroecuador has been the sole owner and operator of the oil fields in the former concession area. (A-2246.)

D. Petitioners Seek Arbitration Under the Joint Operating Agreement

Pursuant to the JOA, petitioners in 2004 initiated arbitration against Petroecuador to recover the costs of a Consortium-related lawsuit pending against petitioner Chevron Corporation ("Chevron") in Lago Agrio, Ecuador. (A-233-51.) The Lago Agrio lawsuit, brought by Ecuadorian citizens represented by U.S. plaintiffs' lawyers, alleges that Consortium operations caused environmental harm. (A-2595; A-2743-69.) Despite their majority interest in the

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[3] Because it turned out that Petroecuador did not have the capacity to become operator at the time, the parties agreed to defer the transition, which ultimately took place in 1990. (A-2484-86.) They continued to adhere to the JOA until a new joint operating agreement was signed in 1991. (A-2043; A-2244-45; A-2557-58; A-4172-94.)

Consortium and their release of TexPet from any further remedial liability, respondents were not named in the Lago Agrio complaint. Instead, as reflected in emails between Ecuador's Assistant Attorney General and representatives of plaintiffs, the Ecuador Government has been working with plaintiffs to "nullify or undermine the value of the [TexPet settlement]." (A-4262.) In the shadow of the President of Ecuador's personal denunciation of Chevron (A-4819), a court-appointed "expert" in the Lago Agrio case has recommended that one of the largest verdicts in history, over $27 *billion*, be awarded against Chevron (*Chevron: Errors Continue*, Latin Bus. Chron. (Feb. 12, 2009), *available at* http://www.latinbusinesschronicle.com/app/article.aspx?id=3142 (last visited Mar. 5, 2009)).

E. District Court Rulings

Respondents brought an action in state court to enjoin the arbitration, and petitioners removed the case to the United States District Court for the Southern District of New York. In their Amended Complaint, respondents requested, as relevant here, a permanent injunction on the theory that Petroecuador is not bound by the JOA's arbitration provision. (A-86-115.)

Respondents' first motion for summary judgment was denied by the district court on June 27, 2005. *See Rep. of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334 (S.D.N.Y. 2005) (Pet. App. 38a-131a). After determining that it had jurisdiction under 28 U.S.C. § 1332(a)(4) and 9 U.S.C. § 205, the district court agreed with respondents that the question of arbitrability should be determined by federal common law. Pet. App. 57a-59a, 65a, 71a n.15, 79a.

Focusing upon principles of estoppel, the district court noted that a nonsignatory may be bound to arbitrate where it "receives a direct benefit from a contract containing an arbitration clause." Pet. App. 79a (internal quotation marks omitted). It then reviewed the evidence of Petroecuador's acknowledgment and exploitation of the JOA, some of which is discussed above, *see* pp. 4-6, *supra*, and found "sufficient evidence in the record . . . to raise a genuine issue of material fact regarding whether Petroecuador became bound by the arbitration clause in the 1965 JOA." Pet. App. 81a.

Later, after the parties had engaged in extensive discovery and had fully briefed and argued their cross-motions for summary judgment on the issue of arbitrability, the district court *sua sponte* ordered a foreign-law hearing under Federal Rule of Civil Procedure 44.1. (A-4817.) On June 19, 2007, after that hearing, the district court granted summary judgment to respondents, permanently enjoining arbitration under the JOA. *See Rep. of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452 (S.D.N.Y. 2007) (Pet. App. 3a-37a).[4]

In so doing, the district court, in apparent reversal of its prior holding that there was sufficient evidence

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[4] Respondents' other claims and petitioners' counterclaims remain pending in the district court. *See generally Rep. of Ecuador v. ChevronTexaco Corp.*, 426 F. Supp. 2d 159 (S.D.N.Y. 2006). Respondents have taken the position that their other claims were made "conditional" retroactively and will "self-extinguish" if this Court does not overturn the rulings below; the district court has indicated that it will not consider the remaining claims and counterclaims until the issue of arbitrability is finally resolved. *See generally* Pet. App. 36a-37a.

to raise a material dispute of fact, ruled that Petroecuador's repeated invocations of the JOA were legally "irrelevant." Pet. App. 35a. The relevant inquiry, the district court now held, was not *Petroecuador's* conduct throughout the Consortium, but rather *TexPet's* reliance on "Ecuadorian law" at the outset of the Consortium. Pet. App. 14a; *accord* Pet. App. 17a (asking whether "reliance [by TexPet] on the laws of Ecuador . . . was reasonable"). While repeating that federal common law provided the rule of decision, the district court stated that it was "impossible to properly analyze" the case under federal common law "without reference to the underlying Ecuadorian law." Pet. App. 14a. Given the existence of potential Ecuadorian law defenses that Petroecuador might have raised to the JOA upon its entry into the Consortium, the district court found that Ecuadorian law was "too unsettled in 1974" for there to have been a "reasonable expectation by Chevron that the JOA had continuing validity." Pet. App. 18a-19a. It further held that Petroecuador could not be bound in the absence of evidence that TexPet "actually believed" the JOA was binding at the beginning of Petroecuador's participation in the joint venture. Pet App. 18a-19a. The district court viewed its conclusions regarding the uncertainty of Ecuadorian law as dispositive, and it declined to consider Petroecuador's 17-year course of conduct under the JOA. Pet. App. 36a ("The Court need not engage in a determination of whether PetroEcuador can be estopped under the American federal law of estoppel from denying that it is bound to the JOA by its course of conduct because any reliance on a course of conduct in Ecuador would be unreasonable."). As in its prior opinion, the district court's analysis

focused solely upon estoppel and did not separately address Chevron's arguments under assumption. Pet. App. 14a-17a.

F. Judgment of the Court of Appeals

Chevron appealed the permanent injunction against arbitration to the United States Court of Appeals for the Second Circuit under 28 U.S.C. § 1292(a)(1) and 9 U.S.C. § 16(a)(2). In a summary order issued on October 7, 2008, the panel affirmed "for substantially the reasons stated by the District Court." Pet. App. 2a. Petitioners' petition for rehearing or rehearing *en banc* was denied by the Court of Appeals on December 8, 2008. Pet. App. 132-133a.

REASONS FOR GRANTING THE WRIT

The Second Circuit's failure to offer any analysis of its own in such important a case is unacceptable. The district court's decision conflicts with a Federal Circuit Court of Appeals case that is directly on point and with basic principles of assumption and estoppel. It dramatically circumscribes the availability of international arbitration, with the result being that petitioners and other U.S. companies must now resort to asking corrupted foreign judicial systems to hold state-owned companies responsible for their commercial obligations. The Second Circuit's affirmance of this decision is problematic enough; its determination that the circumstances did not even warrant a written opinion is incomprehensible. The circuit law established in this case, moreover, is acutely important given the nature of the issue, the frequency with which it and similar issues arise in the Second Circuit, and the timeliness of the issue in light of the increasing government intervention in

the private sector in response to the current economic crisis. The need for a reasoned decision on this issue, and for resolution of the circuit split, make review by this Court essential.

I. THE DECISION BELOW BRINGS SECOND CIRCUIT LAW INTO CONFLICT WITH THAT OF THE FEDERAL CIRCUIT AND WITH SETTLED PRINCIPLES OF ASSUMPTION AND ESTOPPEL

Certiorari should be granted to resolve a conflict between the law of the Second Circuit and the law established by the Federal Circuit in *Hardie v. United States*, 367 F.3d 1288 (Fed. Cir. 2004). In that case, the Federal Circuit held that the U.S. Government "assume[s] the obligations of [an] original party" to a joint venture agreement when it "elect[s] to step into the shoes of" an original party by "receiv[ing] that party's interest, retain[ing] it for . . . several years . . . , and conduct[ing] its business in a decidedly nonpublic and nongeneral manner." *Id.* at 1289-91 (internal quotation marks omitted). Here, by contrast, the Second Circuit—in substantially adopting the reasoning of the district court as its own—held that such a "course of conduct" was legally "irrelevant" and, thus, could not bind Petroecuador to the JOA. Pet. App. 35a.

This conflict on the ultimate legal question stems from conflicting reasoning on several anterior issues:

First, the law as it now stands in the Second Circuit is that when one seeks to enforce a contract against a nonsignatory based upon its course of conduct, the doctrine of assumption is subsumed by the doctrine of estoppel. *See* Pet. App. 14a-17a. The Federal Circuit, by contrast, focused exclusively on

assumption and did not require proof of "reasonable reliance" or other elements of estoppel.

Second, the law as it now stands in the Second Circuit is that cases applying special rules for estoppel against government entities are relevant in the commercial context. Pet. App. 14a-17a. The Federal Circuit, by contrast, concluded that the Government "shed[s] [its] public persona" by participating in a commercial joint venture and, thus, can be "bound by the terms of the joint venture agreement under the law applicable to . . . private individuals." *Hardie v. United States*, 19 F. App'x 899, 906 (Fed. Cir. 2001); *id.* at 905 (relying upon *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996)); *Hardie*, 367 F.3d at 1291 (internal quotation marks omitted).

Third, the law as it now stands in the Second Circuit is that enforcement of a commercial contract against a government is foreclosed by the failure to follow potentially applicable government contracting requirements (*e.g.*, registration of the contract in the National Hydrocarbons Registry). Pet. App. 19a-29a.[5] The Federal Circuit, by contrast, held that even though such a requirement had not been met

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[5] Almost inevitably, noncompliance with contracting requirements makes a nonsignatory's obligations uncertain *before* it takes the contract's benefits—a truism both with respect to government *and* private entities. The rationale adopted below was that this initial and temporary uncertainty forever precludes reasonable reliance on the nonsignatory's subsequent course of conduct. *See* Pet. App. 35a. Neither court below, furthermore, decided whether or not the contracting requirements asserted by respondents even applied to the JOA. Pet. App. 18a-19a (finding only that Ecuadorian law was "unsettled").

(*i.e.*, the Government "did not waive its sovereign immunity as to binding arbitration in accordance with the Administrative Dispute Resolution Act"), the Government was "subject to the arbitration clause of the joint venture agreement just as any private party would be." *Hardie*, 367 F.3d at 1290-91.[6] In the two cases, therefore, conflicting reasoning yielded opposite answers to the question presented here.

The factual similarities between the two cases underscore the conflicts in reasoning and result. Like TexPet and Gulf here, two private parties in *Hardie* "entered into a joint venture agreement . . . to organize, own, and operate" a commercial enterprise. 367 F.3d at 1289. Years later, "the government acquired [a] general partnership interest in the enterprise," under circumstances where the remaining private party, like TexPet here, "had no choice but to accept its new 'partner.'" *Id.* at 1289, 1291 (internal quotation marks omitted).[7] After the

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[6] The Administrative Dispute Resolution Act requires, among other things, that the Government's consent to arbitration be in a writing that specifies the maximum amount of any award. 5 U.S.C. § 575(a)(2).

[7] The Government acquired its interest through forfeiture proceedings, based on the fact that one of the original parties, LCP Associates, used the venture to launder drug money. *Hardie*, 19 F. App'x at 900. The other original party, Park Place Associates, Ltd. ("PPA"), was permitted to retain its joint venture interest because it "was innocent of any criminal activity." *Hardie*, 367 F.3d at 1289. The Federal Circuit observed that there "[s]urely . . . would be privity of contract between PPA and the United States in this case if LCP had simply *sold* its interest in the . . . joint venture outright to the United States as soon as the joint venture was executed," and further concluded that it made no "difference that the United States happened to obtain its 'interest' . . . through forfeiture, as

venture continued for several more years, the remaining private party, Park Place Associates, Ltd. ("PPA"), sued the Government for breach of the joint venture agreement, and it ultimately invoked the contract's arbitration clause. *Id.* at 1289-90.

As noted, the U.S. Government's defense in *Hardie*—that it neither had affirmatively consented to the joint venture agreement nor had complied with U.S. legal requirements for government contracts—was analogous to Petroecuador's position in this case that it neither expressly agreed to the JOA nor complied with government contracting requirements under Ecuador law. PPA, like TexPet, argued that the contract nevertheless was binding because the Government, "through its lengthy course of conduct beginning with the forfeiture . . . , 'stepped into the shoes' of" an original party to the joint venture agreement. *Hardie*, 19 F. App'x at 903. Specifically, the Government participated in the venture and received more than $30 million in proceeds, just as Petroecuador participated in the Consortium and received oil production worth billions of dollars. *Id.* at 900. The Government's acknowledgments of the joint venture agreement also mirrored Petroecuador's acknowledgments of the JOA:

- In *Hardie*, the Government acknowledged it was the joint venture's "Administrative Officer"—"a position that existed solely by virtue of an explicit provision in the Joint venture agreement." 19 F. App'x at 904. Here,

(continued...)

opposed to any other means." *Hardie*, 19 F. App'x at 905 (emphasis added).

Petroecuador acknowledged TexPet was the "Operator"—a position that existed solely by virtue of an explicit provision in the JOA. (A-3540; A-3377; A-2305.)

- In *Hardie*, a settlement agreement signed by the Government expressly acknowledged that the joint venture agreement remained in existence. 19 F. App'x at 904. Here, the JOA expressly mandated its application to any successor-in-interest (A-2331), and the 1995 settlement contract listed the JOA as one of the agreements that governed the Consortium's operations (A-2618; A-2624; A-2640).
- In *Hardie*, the Government expressly acknowledged a "right of first refusal" that existed only under the joint venture agreement. 19 F. App'x at 904. Here, Petroecuador expressly acknowledged that it became operator of the Consortium by exercising its right under the JOA. (A-2617; A-3512; A-3517.)
- In *Hardie*, a Government audit report confirmed its status as a successor-in-interest. 19 F. App'x at 904-05. Here, the 1995 settlement contract acknowledged that Petroecuador was a successor-in-interest, and Petroecuador's auditor confirmed that the JOA governed the Consortium's operations. (A-2616-17; A-3540; A-3900-01; A-3967.)

These many similarities reinforce that the Second Circuit faced the same question as the Federal Circuit in *Hardie*, and the conflicting outcomes of the two cases present a clear circuit split.

This circuit split is particularly important because both cases involved enforcement of an arbitration

clause against a *government* entity, and both courts addressed arguments based on the defendant's governmental status. This is significant because the Federal Circuit makes law regarding the contractual obligations of the federal Government, *see United States v. Hohri*, 482 U.S. 64, 71-72 (1987), and the Second Circuit routinely decides contract cases involving foreign government entities, *see, e.g.*, *Capital Ventures Int'l v. Rep. of Arg.*, 552 F.3d 289 (2d Cir. 2009).[8] Indeed, Second Circuit law plays an especially large role in the context of international arbitration since New York is home to one of the world's three premier international arbitration centers, *see* Leon E. Trakman, *"Legal Traditions" and International Commercial Arbitration*, 17 Am. Rev. Int'l Arb. 1, 14 (2006), making New York "the most common location for international arbitrations in the U.S." Philip W. Engle, *Crafting International Commercial Arbitration Clauses*, ACCA Docket (July-Aug. 1995), at 20 n.10. Thus, the split divides the two primary circuits in which the issue presented is likely to arise.

As a result of the decisions below, moreover, Second Circuit law conflicts not only with *Hardie* but also with several basic legal principles. Assumption and estoppel have long existed as separate legal doctrines, and there is no basis for collapsing assumption into estoppel or for importing estoppel's reliance requirement into the analysis of assumption.

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[8] *See also, e.g., EM Ltd. v. Rep. of Arg.*, 473 F.3d 463 (2d Cir. 2007); *Compagnie Noga D'Importation et D'Exportation S.A. v. Russian Federation*, 361 F.3d 676 (2d Cir. 2004); *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000); *Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.3d 363 (2d Cir. 1999).

In addition, there is no basis to invoke special requirements for estoppel against government entities where, as here, doing so ignores the important distinction between a government's sovereign acts and its commercial acts.[9] It also ignores the distinction between estopping a government from denying statutory benefits that a government employee erroneously said were available, *see Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990), *cited in* Pet. App. 14a-15a, and estopping a government from denying the obligations of a contract from which it took substantial and direct benefits, *cf. Gould, Inc. v. United States*, 67 F.3d 925, 930 (Fed. Cir. 1995) (where claimant's "rights are not premised on a statutory entitlement, but on a contract claim," it "would be stretching *Richmond* totally out of context to apply it"). And Second Circuit law, as it now stands, is contrary to the thrust of this Court's recent cases limiting the Government's ability to invoke special rules when

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[9] *See, e.g., FDIC v. Harrison*, 735 F.2d 408, 412 (11th Cir. 1984) (FDIC subject to estoppel when it "stands in the shoes" of insolvent banks) (internal quotation marks omitted); *Azar v. U.S. Postal Serv.*, 777 F.2d 1265, 1271 (7th Cir. 1985) (Postal Service subject to estoppel when it competes with private businesses); *FDIC v. Sarandon*, No. 91-CV-5109, 1992 WL 36132, at *1 (S.D.N.Y. Feb. 19, 1992) (Mukasey, J.) (government "should be as vulnerable as any other litigant to principles of estoppel" when "acting in a commercial and not in a sovereign capacity"); *see also Rep. of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614-15 (1992) (explaining history of the commercial distinction in context of sovereign immunity); *Bank of the United States v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907 (1824) (Marshall, C.J.) (describing it as a "sound principle, that when a government becomes a partner in any trading company, it devests itself . . . of its sovereign character, and takes that of a private citizen").

contracting with private parties. *See, e.g.*, *Winstar*, 518 U.S. at 895 ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.") (internal quotation marks omitted).[10] This issue is itself sufficiently significant to warrant review in this case. *See, e.g.*, *id.* at 860 ("We took this case to consider the extent to which special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue here.").

Furthermore, the Second Circuit substantially adopted the district court's misapplication of the "reasonable reliance" requirement even as it exists in the estoppel setting. Under the view adopted below, the lack of compliance with government contracting requirements created legal uncertainty *before* Petroecuador's many years of taking benefits under the JOA, and this initial uncertainty precluded reasonable reliance *regardless* of the parties' subsequent course of conduct. This ruling inverts the doctrine of estoppel. The proper analysis begins with the premise that the contract is at least arguably unenforceable at the outset of the parties' relationship, and it asks whether the charged party's acceptance of direct benefits under the contract gives

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[10] *See also Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002) (recognizing that "limitations principles should generally apply to the Government in the same way that they apply to private parties") (internal quotation marks omitted); *id.* at 141 ("The United States does business on business terms.") (internal quotation marks omitted); *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 607 (2000) (holding that Government was liable to private parties under ordinary principles of contract repudiation).

rise to a reasonable expectation that the contract will *nonetheless* be respected. It is the merits (or demerits) of the waived contractual defenses that are irrelevant in answering this question, not the parties' subsequent conduct.[11]

A writ of certiorari, therefore, would allow this Court to resolve the conflict between Second Circuit law and these fundamental legal principles, as well as the conflict with the Federal Circuit's decision in *Hardie*.

This Court's review is warranted not only by these conflicts themselves, but also by the Second Circuit's complete failure to address them. The Second Circuit issued a summary order that lacked any independent reasoning but instead rejected Chevron's arguments "for substantially the reasons stated by the District Court." Pet. App. 2a. Yet the only analysis offered by the district court was the reasoning that *created* the conflicts. In adopting the district court's analysis, the Second Circuit addressed neither *Hardie* nor the legal principles, set forth above, that are irreconcilable with its decision. Worse still, by issuing a summary affirmance, the Second Circuit

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[11] This is no novel proposition. For example, in *Wiggins Ferry Co. v. Ohio & Mississippi Railway*, 142 U.S. 396 (1892), this Court decided whether a company, after acquiring the assets of another company, was bound by a contract previously entered into by the other company. The Court observed that the acquiring company initially "was at liberty to renounce the benefit of such contract." *Id.* at 408. This lack of obligation at the outset, however, did not forever preclude reliance or render subsequent conduct irrelevant. On the contrary, the continuance of operations under the terms of the contract established the acquiring company's "adoption of such contract"—"or, at least, . . . [the acquiring company was] equitably estopped from denying that such was the case." *Id.*

has made clear that it views the disposition of this case as governed by settled circuit precedent. *See* 2d Cir. R. 32.1 cmt.[12] Yet the district court (and, thus, the Second Circuit) failed to point to any circuit precedent or decisions of this Court that even arguably control here. The disposition thus leaves Second Circuit law clear, but entirely unreasoned.

Already once this Term, the Court has granted certiorari to review an important issue that the Second Circuit dispatched in a summary order adopting the reasoning of the district court. *See Ricci v. DeStefano*, 129 S. Ct. 893, 894 (2009).[13] Indeed, this Court has not hesitated to take important cases in which the Second Circuit acted without published opinion.[14] Especially in light of this history, the

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[12] The order adopting Second Circuit Rule 32.1, dated June 26, 2007, states in part: "Summary orders are issued in cases in which a precedential opinion would serve no jurisprudential purpose because the result is dictated by pre-existing precedent. . . . Denying summary orders precedential effect does not mean that the court considers itself free to rule differently in similar cases."

[13] Faced with a *sua sponte* poll of the *en banc* Court, the *Ricci* panel converted its summary order to a *per curiam* opinion. *See Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008). Nevertheless, the panel continued to rely on the district court's reasoning, and six judges observed that this "perfunctory disposition rest[ed] uneasily with the weighty issues presented by th[e] appeal." *Id.* at 93-94, 96 (Cabranes, J., dissenting from the denial of rehearing *en banc*). And even the panel's original summary order in *Ricci* was far less problematic than the Second Circuit's decision here, because five judges in *Ricci* determined that the district court at least had applied "controlling [Circuit] authority." *Id.* at 90 (Parker, J., concurring in the denial of rehearing *en banc*).

[14] *See, e.g., Bd. of Educ. v. Tom F.*, 128 S. Ct. 1 (2007); *Massaro v. United States*, 538 U.S. 500 (2003); *Agostini v. Felton*, 521

Second Circuit's failure to address petitioners' arguments is a "depart[ure] from the accepted and usual course of judicial proceedings" that further supports a grant of certiorari, Sup. Ct. R. 10(a), or, were the issues here not so timely and important, a remand for the Second Circuit to address petitioners' arguments in a published opinion, *see Lawrence v. Chater*, 516 U.S. 163, 166-70 (1996).

II. THIS CASE RAISES IMPORTANT AND TIMELY LEGAL ISSUES THAT REQUIRE CLARIFICATION

Neutral arbitral forums are vital to the fair and impartial resolution of conflicts concerning transnational investment. As this Court has repeatedly recognized, "'[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974)); *accord The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972) ("agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting").

The availability of a neutral arbitral forum is particularly important with respect to commercial dealings with a foreign government. Regrettably, a

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(continued...)

U.S. 203 (1997); *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603 (1991).

foreign country, having received the investment, has strong incentives to disregard its contractual obligations and force U.S. companies to seek redress in local courts with unsettled laws. Especially where the judiciary lacks independence, the process and outcome in local courts often will be tainted by political pressure to rule for the government over a foreign investor.

Ecuador is emblematic of the difficulties U.S. investors face in foreign legal systems. According to the U.S. State Department, "[t]here are over 55,000 laws and regulations in force" in Ecuador, and "[m]any of these are conflicting, which contributes to unpredictable and sometimes contradictory judicial decisions." *2009 Investment Climate Statement – Ecuador*, *available at* http://www.state.gov/e/eeb/rls/othr/ics/2009/117668.htm (last visited Mar. 7, 2009). This legal uncertainty is compounded by "[s]ystemic weakness and susceptibility to political or economic pressures in the rule of law": "The Ecuadorian judicial system is hampered by processing delays, unpredictable judgments in civil and commercial cases, inconsistent rulings, and limited access to the courts." *Id.* The proposed $27 *billion* judgment in the underlying Lago Agrio case brings these concerns with judicial independence and the rule of law into sharp focus.

Absent assurance that commercial disputes can be resolved in an impartial forum in accordance with the rule of law, investors will be chary of engaging in foreign commerce. Yet Second Circuit law now effectively eliminates assumption and incorporates a crabbed interpretation of estoppel, making it much easier for foreign countries to deal with U.S.

companies with their fingers crossed behind their backs. Specifically, Second Circuit law allows foreign countries to free themselves of their obligations to U.S. companies by pointing to uncertainties in their local laws. But it is precisely those local uncertainties that international arbitration is designed to overcome, *viz.*, having an independent panel—unaffected by parochial biases—resolve transnational disputes under settled law. The ruling below perversely subjugates the *predictability* of international law to the *unpredictability* of local law. The Second Circuit's decision will thus have a significant and negative impact both on U.S. corporations and on foreign commerce. Permitting foreign countries to exploit commercial contracts for decades with impunity will "invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages" and "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Mitsubishi Motors Corp.*, 473 U.S. at 631 (internal quotation marks omitted); *accord* Jan Paulsson, *Third World Participation in International Investment Arbitration*, 2 ICSID Rev.—Foreign Investment L.J. 19, 63 (1987) ("[I]t is hardly surprising that the contract appears a much more attractive proposition if it is subject to a neutral dispute-resolution mechanism.").

The decision below will also have lasting significance since the Second Circuit is a primary forum for disputes over international arbitration and commercial transactions involving foreign government entities. *See* p. 16, *supra*. As it effectively holds that the district court's decision

reflects settled law that is binding on future Second Circuit panels, *see* p. 20, *supra*, the summary order here will have a substantial effect on international disputes for years to come.

The question of a government's obligations to a private party with which it has a commercial relationship is only growing in significance given the unprecedented investment by the U.S. Government and foreign governments in private business as part of the ongoing bailouts.[15] Under the existing state of the law, the U.S. Government will be the only country to be bound by its conduct under the Federal Circuit's rule, while foreign nations will be able to act with impunity under the rationale adopted by the Second Circuit. The timeliness of this issue makes it all the more important for this Court to provide definitive guidance now.

In sum, the split of authority creates substantial uncertainty in an area that demands clarity. Whatever the merits of the parties' respective positions, there is an undeniable need for uniformity in the federal common law with respect to the application of assumption and estoppel where government entities enter commercial joint ventures.

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[15] *See, e.g.*, Matthew Ericson *et al.*, *Tracking the $700 Billion Bailout*, N.Y. Times (Mar. 2, 2009), *available at* http://projects.nytimes.com/creditcrisis/recipients/table?scp=15&sq=bailout&st=cse (last visited Mar. 6, 2009); Andrew MacAskill & Jon Menon, *Lloyds Cedes Control to Government, Insures Assets*, Bloomberg (Mar. 7, 2009), *available at* http://www.bloomberg.com/apps/news?pid=20601087&sid=aUuK.B52o350&refer=home (last visited Mar. 7, 2009); *Fortis Reshaped by Government Bailout*, Int'l Herald Trib. (Sept. 29, 2008), *available at* http://www.iht.com/articles/ap/2008/09/29/business/EU-Netherlands-Fortis.php (last visited Mar. 7, 2009).

In these days of growing international commerce and unprecedented government involvement in the private sector, it is imperative that this Court provide clear guidance on the governing law.

CONCLUSION

This petition should be granted.

Respectfully submitted,

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