No. 16-1178

In The
Supreme Court of the United States

Steven Donziger, et al.,
Petitioners,

v.

Chevron Corporation,
Respondent.

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

BRIEF OF INTERNATIONAL LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are law professors who practice, teach, and write about all aspects of public international law, including international environmental law, at law schools, colleges, and universities throughout the world. Amici are listed individually in the appendix following this brief. We have no personal stake in the outcome of this case. Our interest is in seeing the international rule of law upheld and applicable international law applied in a manner consistent with Article VI, cl. 2 of the Constitution of the United States.

As we did in the Second Circuit Court of Appeals, we seek to call attention to the principles of public international law and comity that the district court and court of appeals failed to heed.[2] We are concerned that the misapplication of principles of international law and comity in this case will have far-reaching and unanticipated effects. These errors warrant this Court's review.

REASONS FOR GRANTING THE PETITION

The decisions below, which authorized the pre-emptive, collateral attack on a foreign judgment and the imposition of a worldwide constructive trust

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[1] No person other than the named amici or their counsel authored this brief or provided financial support for it. Notice of intent to file this brief was provided to counsel of record for all parties, and all parties have consented to the filing of this brief under Rule 37.

[2] *See* Brief for International Law Professors as Amici Curiae in Support of Appellants, *Chevron Corp. v. Donzinger,* 833 F.3d 74 (2d Cir. 2016) (14-826, 14-832), 2014 WL 3571724.

implicate important principles of international law worthy of this Court's review.

The relief below offends settled norms of international comity. Passing on the integrity of the judiciary of a sovereign nation is not a task to be taken lightly. Principles of international law and comity forbid the practice unless doing so is unavoidable—where one party seeks to enforce a judgment and another party raises the issue as a defense to enforcing the judgment. Here, the lower courts took the extraordinary—and unprecedented—step of entertaining a wholesale attack on the judiciary of a sovereign country in the absence of any concrete need to do so.

The lower courts compounded the error by imposing their own terms of exclusive relief in the form of a constructive trust that the district court improperly insists be recognized by every other court in the world.[3] The extraterritorial application of the constructive trust directly intrudes upon the administration of Ecuadorian justice both internally and externally in places where its judgment might be recognized and enforced.

The combined effect of the lower courts' rulings will be widespread and overwhelmingly negative. Absent correction from this Court, parties the world over will be encouraged to engage in a

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[3] We note that this constructive trust is limited to three defendants: Donziger, Camacho, and Piaguaje. Pet. App. 679a–680a; *Chevron Corp. v. Donziger*, Pet. App. 675a (the relief ordered only applies to "the three defendants who appeared at trial"). Accordingly, the other 45 successful plaintiffs in the Lago Agrio litigation in Ecuador are free to seek recognition and enforcement of the Ecuadorian judgment outside of Ecuador without regard to the erroneous judgment by the district court in this case.

game of forum shopping—picking and choosing venues to attack judgments (unbounded by any attempt by opposing parties to enforce such judgments) and relying on local law to thwart enforcement in other states. Courts will routinely be called upon to put the judicial process of other nations on trial, undermining sovereign relations.

International comity does not work this way. It could not do so and still function as a coherent doctrine. Moreover, the extraterritorial constructive trust breaches the international legal obligation of the United States not to intervene in the domestic and external affairs of other states. This Court's review is necessary to reaffirm these principles and correct the lower courts' contrary holdings.

I. THE DECISIONS BELOW VIOLATED THE NORMS OF INTERNATIONAL COMITY AND INTERNATIONAL LAW.

On March 4, 2014, the district court produced a 343-page opinion to announce its findings and explain its judgment in this action. Pet. App. 148a–677a. On the same day, it entered its "Judgment as to Donziger Defendants and Defendants Camacho and Piaguje." Pet. App. 678a–683a. Among other things, the district court's judgment, in two nearly identical paragraphs for the different defendants, purports to impose:

> a constructive trust for the benefit of Chevron on all property . . . that [the defendants Donzinger, Camacho and Piaguaje], and each of them, has . . . or . . . may receive, . . . or to which [the defendants Donzinger, Camacho and Piaguaje], and each of them, now has, or hereafter obtains, any right, title, or interest, … that is traceable to the Judgment [entered by the Ecuadorian

> Sucumbíos Provincial Court of Justice in the Lago Agrio case] or the enforcement of the Judgment anywhere in the world. [The defendants Donzinger, Camacho and Piaguaje], and each of them, shall transfer and forthwith assign to Chevron all such property ….

Pet. App. 679a–680a. In a gesture to the Second Circuit's forceful comments about comity in *Chevron Corp v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), the district court's judgment recites that:

> Nothing herein enjoins [the defendants Donziger, Camacho and Piaguaje] from . . . filing or prosecuting any action for recognition or enforcement of the Judgment [entered by the Ecuadorian Sucumbíos Provincial Court of Justice in the Lago Agrio case] . . . in courts outside the United States . . . ."

Pet. App. 681a.

The district court made clear in its judgment, as the law required, that it remains the right of every court in the world to pronounce on whether or not the Ecuadorian judgment should be recognized or enforced. However, this caveat is effectively illusory, because waiting in the wings is the preordained and externally imposed constructive trust ordered by the district court. Indeed, the district court revealed what it thought about the exercise of defendants' recognition and enforcement rights in other jurisdictions as "entirely unnecessary and thus vexatious" and "subjecting Chevron to . . . added burdens." Pet. App. 662a. The constructive trust ensures that the judgments of other courts in other countries in terms of recognition and enforcement can be safely ignored. This offends international comity as much as the district court's

initial purported worldwide injunction that was vacated by the Second Circuit in *Naranjo*.

International comity, *comitas gentium*, connotes a form of accommodation characterized by mutual respect and good neighborliness. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 28 (6th ed., 2003). It is a principle of international relations founded on the fundamental values of independence, respect, and cooperation in a world of over 193 sovereign states. *See* Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS §§ 23, 31–34 (1883) (hereinafter "Story"). Comity is an essential general doctrine for legal coordination among states. *See* Friedrich K. Juenger, *General Course on Private International Law*, 193 RECUEIL DES COURS 119 (1983). These principles "induce[] every sovereign state to respect the independence and dignity of every other state[.]" *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 575 (1926) (quoting *The Parlement Belge*, L. R. 5 P. D. 197 (1880)); *Breman v. Zapata*, 407 U.S. 1, 12 (1972).

Comity "is the recognition which one nation allows another within its territory to the legislative, executive or judicial acts of other nations, having due regard to both the international duty and convenience, and of the rights of its own citizens or of other persons who are under the protection of its laws . . ." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). The principle "dictates that American courts . . . respect . . . the integrity and competence of foreign tribunals." *Roby v. Corporation of Lloyds*, 996 F.2d 1353, 1363 (2d Cir. 1993) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)).

International law rests on the foundational principle that "it is the province of every sovereignty

to administer justice in all places within its territory and under its jurisdiction . . .” Story § 585. And “[t]he rule of reciprocity has worked itself firmly into the structure of international jurisprudence.” *Hilton*, 159 U.S. at 168.

The earliest sources on the subject confirm that there is no free-floating right to attack foreign judgments. *See* Story § 608 (collecting cases). Instead, a foreign judgment may be attacked as a *defense* when a judgment creditor attempts to enforce the judgment or when a plaintiff seeks to relitigate the merits of the case. *Id.* §§ 608, 611; 2 Joseph H. Beale, *A Treatise on the Conflict of Laws* § 432.3 (1935); Restatement (First) of Judgments § 11 cmt. a.

Invalidating a foreign judgment “place[s] considerable strain on the principle that courts in one system do not sit in judgment over courts in another, for it contradicts the principle that foreign sovereigns, and their courts, are entitled to full and unquestioning respect.” Adrian Briggs, *The Principle of Comity in Private International Law* 151 (2011).

As the petitioners correctly point out, this case presents the question of whether the principles of international comity permit a losing party to mount a pre-emptive attack on the integrity of a foreign judiciary. Here, no party has sought to enforce the Ecuadorian judgment against Chevron in the United States. Instead, Chevron has asked the United States judiciary to take the unprecedented step of passing judgment on the Ecuadorian judicial system without any concrete need to do so.

Given the weighty interests at stake, modern examples of courts passing on the integrity of foreign judicial systems are few and far between. But in the handful of analogous recent examples, courts have undertaken the exercise only when forced to do so by a party affirmatively seeking to enforce a judgment. For example, in *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd.*, [2011] 1 C.L.C. 205, 211 (P.C.), English courts refused to honor a Kyrgyz judgment in a telecommunications dispute, but only after the prevailing party attempted to enforce the judgment in the Isle of Man. Even in the context of an enforcement action, the English court emphasized that "[c]omity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court . . . ." *Id.* at 232. The Australian High Court echoed this concern, explaining "there are powerful policy considerations which militate against Australian courts sitting in judgment upon the ability or willingness of the courts of another country to accord justice to the plaintiff in the particular case." *Voth v Manildra Flour Mills Pty. Ltd.*, 171 CLR 538, 539 (1990). Comity principles, the court recognized, implicate "policy considerations [that] are not dissimilar to those which lie behind the principle of 'judicial restraint or abstention', which ordinarily precludes the courts of this country from passing upon the provisions for the public order of another State . . . ." *Id.* (citations omitted).

The decisions below are unprecedented in a second way: the court imposed a constructive trust effectively prohibiting judgment creditors within its jurisdiction from enforcing the judgment *anywhere in the world*. In so doing, the district court effectively seeks to dictate to the courts of the entire world what

will happen if they recognize and enforce the Ecuadorian judgment. The district court's judgment disrespects independent decisions of the courts of other sovereigns by: i) presumptively dictating the only applicable remedy in a suit for recognition and enforcement being tried independently in a foreign court, and ii) claiming an exclusive right to capture any and all property awarded to the Ecuadorian judgment debtors by the courts of other countries. Both are blatant breaches of international comity. *Cf. In Re: Request for Judicial Assistance from the District Court in Svitavy, Czech Republic*, 748 F. Supp. 2d 522, 527 (E. D. Va. 2010); *Crane v. Poetic Prods.*, 593 F. Supp. 2d 585, 596 (S.D.N.Y. 2009); *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 387–88 (D.N.J. 2001).

The radical extraterritorial relief granted by the district court will almost certainly be viewed as an affront by courts that determine, under their own laws, that the Ecuadorian judgment creditors are entitled to have their judgment recognized, enforced, and satisfied. The effect is to intervene into the essential sovereign function of foreign legal systems. Under well-established principles of private international law, the law of the forum provides its own rules, free from outside interference, "to determine if a foreign judgment should be recognized and enforced in the forum." Moreover, "[i]n terms of the defences to enforcement, the question of whether a judgment was procured by fraud or involved [other defects] are to be determined exclusively according to the standards of the forum . . . ." Richard Garnett, *Substance and Procedure in Private International Law* 187–88 (2012) (emphasis added) (citing *Owens Bank Ltd v. Bracco*, [1992] 2 AC 443 (HL); *Yoon v. Song*, (2000) 158 FLR 295 (SCNSW)). It follows that a non-forum

state cannot impose extrinsic relief in a case where the forum determines that a foreign judgment should in fact be recognized, enforced, and satisfied under its own law. Doing so, as the district court has here, is a clear affront to international comity.

Imposing a worldwide collective trust materially interferes with the core judicial functions of other states. Internationally, a wide variety of approaches to judgment recognition and enforcement questions exist. *See* Russell Weaver & Francios Lichere Eds., *Recognition and Enforcement of Judgments: Comparative and International Perspective* (2010); Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 Notre Dame L. Rev. 311 (2011). For instance, the courts of a number of countries do not recognize the fitness of another country's judicial system as a ground of mandatory non-recognition of a judgment. *E.g.*, Germany, Zivilprozessordnung [ZPO] [C. Civ. Pro.], Dec. 9, 1950, §§ 328, 723 (Ger.); Japan, Minji Soshoho [Minsoho] [C. Civ. Pro.] 1996, art. 118 (Japan); Singapore, Singapore Academy of Laws, The Conflict of Laws, Chapter 6, § 4; Switzerland, Bundesgesetz über das Internationale Privatrecht, [Fed. Code on Private Int'l Law] Dec. 18, 1987, SR 291, § 5 arts. 25–32 (Switz.). For other states, the obligation to enforce a foreign judgment is governed by treaty. *See* 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, 1439 U.N.T.S. 91 (1986). And, of course, other nations remain free to adopt different standards of proof in examining foreign judgments, or may simply disagree with the district court's resolution of issues hotly disputed fact and ultimate conclusion that fraud occurred here.

The worldwide relief ordered by the lower courts runs counter to customary international law that has for centuries prohibited a state from intervening in the domestic affairs of another state. *See, e.g.*, Story § 20 at 28–29 (5th ed., 1857); Henry Wheaton, *Elements of International Law* § 63, at 91–92 (Richard Henry Dana, ed.) (8th ed., 1866); L. Oppenheim, I *International Law: A Treatise* 181–91 (1905); Charles Cheney Hyde, I *International Law Chiefly as Interpreted and Applied by the United States* § 69 at 116–18 (1922). This sort of intrusion into the international relationship between Ecuador and other states puts the United States in violation of a key international obligation because each state is permitted to decide freely whether a foreign judgment should be recognized and enforced and the consequences that flow from such a determination.

Although each of the lower courts' unprecedented steps is troubling, it is their combined effect that makes this Court's review especially imperative. Permitting each country in the international system to pre-emptively attack the judicial integrity of other courts and then mandate worldwide relief would pose a grave danger to the orderly and respectful administration of civil justice, threatening the "international duty" and "rights of . . . persons who are under the protection of . . . laws" protected by principles of international law. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

CONCLUSION

For the foregoing reasons, amici curiae urge this Court to grant petitioner's writ of certiorari and reverse.

Respectfully submitted.

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