No. 11-1428

IN THE

Supreme Court of the United States

CHEVRON CORPORATION,
Petitioner,

v.

HUGO GERARDO CAMACHO NARANJO, JAVIER PIAGUAJE PAYAGUAJE, STEVEN R. DONZIGER, and THE LAW OFFICES OF STEVEN R. DONZIGER,
Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

ROBIN S. CONRAD
KATHRYN COMERFORD TODD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

PETER B. RUTLEDGE
Counsel of Record
215 Morton Avenue
Athens, GA 30605
(706) 850-5870
borut@uga.edu

Counsel for Amicus Curiae
The Chamber of Commerce of the
United States of America

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to this Court's Rule 37.2(b), the Chamber of Commerce of the United States of America ("Chamber") respectfully requests this Court's permission to file the attached brief *amicus curiae* in support of the petitioner. Timely notice of the intent to file this brief was provided to counsel for all parties. By a general letter of consent filed with the Clerk's office, Petitioner's counsel consented to the filing; one of Respondents' counsel refused consent, and another did not respond to requests for consent.

The petition for a writ of *certiorari* asks this Court to decide whether a party seeking relief under the Declaratory Judgment Act must point to an affirmative authorization under state law before it can obtain a declaration about the validity of a state-law defense. The question arises in the context of a multi-billion foreign judgment entered against an American company despite credible evidence that the judgment was procured by fraud.

On these matters, the Chamber's brief contains "relevant matter not already brought to the Court's attention by the parties." Sup. Ct. R. 37(1). First, the Chamber can offer a cross-industry perspective on the issues presented by this petition. As detailed in the brief, businesses in a variety of industries rely on the Declaratory Judgment Act to obtain clear guidance about their liabilities and obligations, even on pure state-law questions. Second, the Chamber can offer the Court its expertise on the growing phenomenon of parties seeking to enforce ill-gotten foreign judgments against multinational companies in United States courts and elsewhere. As detailed below, the pattern presented by this case is becoming

increasingly common and accentuates the importance of a declaratory judgment as an effective tool against ill-gotten foreign judgments. Third, the Chamber has regularly filed briefs before this Court on transnational matters affecting the business community and consequently can offer a helpful perspective on how this case fits within the broader realm of transnational litigation.

For the foregoing reasons, the Chamber respectfully requests that this Court grant leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

ROBIN S. CONRAD
KATHRYN COMERFORD TODD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

PETER B. RUTLEDGE
Counsel of Record
215 Morton Avenue
Athens, GA 30605
(706) 850-5870
borut@uga.edu

Counsel for Amicus Curiae
The Chamber of Commerce of the
United States of America

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QUESTION PRESENTED

Notwithstanding 75 years of precedent to the contrary from this Court and the other courts of appeals, was the Second Circuit correct that the Declaratory Judgment Act does not permit a party to assert a defense to a suit anticipatorily where the underlying substantive statute does not authorize declaratory relief?

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

Amicus Curiae the Chamber of Commerce of the United States of America ("Chamber"), submits this brief in support of the petition for a writ of *certiorari*.[1]

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amicus*, its counsel or its members made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner's counsel has consented to the filing of this brief, but Respondents' counsel has withheld consent. Consequently, *amicus* has filed a motion

INTEREST OF *AMICUS CURIAE*

The Chamber is the world's largest business federation. It represents three-hundred thousand direct members and indirectly represents an underlying membership of more than three million business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of national concern to the business community.

The Chamber and its members have a keen interest in the proper construction of the Declaratory Judgment Act, 28 U.S.C. §2201. In a variety of industries, such as technology, construction and insurance, businesses depend upon the Declaratory Judgment Act to obtain clear guidance about their legal rights and obligations, including instances where they have a potential defense to a claim in a coercive lawsuit. That guidance enables them to allocate capital for contingent liabilities, to make important investment choices and to set long-range business plans. Often, companies seek these declarations on matters of state law, and the Declaratory Judgment Act opens the federal courthouse door to applicants seeking this relief even when it is unavailable in state courts.

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for leave to file this brief. Counsel of record provided the required notice to the parties at least ten days before the filing deadline for this brief.

In the specific context of this case, the Chamber has a special interest in the relationship between the Declaratory Judgment Act and state foreign judgment enforcement statutes. In the global marketplace, businesses with assets around the world, including in the United States, are routinely named defendants in the courts of foreign countries. This is to be expected as there is a strong presumption favoring resolution of disputes in the country where the underlying conduct occurred. Similarly, it is routine in the transnational context, as it is in the domestic context, for the plaintiff in the original suit, if it is victorious and becomes a "judgment creditor," to seek to enforce that judgment in other jurisdictions where the defendant to the original suit, the "judgment debtor," holds assets. That is, the judgment creditor may seek to satisfy the judgment by enforcing it elsewhere, and thereby gaining access to the judgment debtor's assets through the courts in that second jurisdiction. Courts in the United States, as throughout the world, have standards and processes through which a foreign judgment creditor may seek to enforce a foreign judgment.

Not all foreign judgments, however, are routine. Sometimes the judgments obtained in foreign courts either are rendered by a judicial system lacking due process or are procured by fraud. Generally the judgment creditor's work under these circumstances is not finished when the ill-gotten judgment is rendered. Their next step is to attempt to enforce that judgment wherever the judgment debtor's assets are available, either as an end in itself or as a means of procuring a lucrative settlement. It is for this reason that courts in the United States, as throughout the world, do not blindly enforce foreign judgments. They offer judgment debtors a variety of defenses

and tools to ensure that such ill-gotten judgments are not given the imprimatur of enforceability within the U.S. legal system. This case is about one such means of protection from ill-gotten foreign judgments – the ability of a transnational business with assets in the United States, here the American company Chevron, to obtain a declaration of rights without waiting for the foreign judgment creditor to file an enforcement action.

To ensure that the Declaratory Judgment Act remains an effective tool for the business community in this and other contexts, the Chamber files this brief *amicus curiae* in support of the petition.

REASONS FOR GRANTING THE PETITION

The stakes of this case alone justify this Court's intervention. As the petition explains, this case concerns an $18 billion foreign judgment entered against an American company. Pretrial discovery unearthed substantial evidence suggesting that this judgment resulted from widespread fraud, including plaintiffs' counsel ghost-writing reports for an allegedly "neutral" court-appointed expert. Pet. App. 8a-9a. Discovery also led to revelations that plaintiffs have a carefully crafted scheme to tie up the assets of Chevron's corporate affiliates in pre-enforcement asset freeze actions. Pet. App. 10a. Indeed, plaintiffs already have begun to hatch this plan and commenced their first enforcement action—this one in Canada—just days after Chevron filed its petition for a writ of *certiorari*. *See* Statement of Claim in *Luisitande v. Chevron Corp et al.*, Ontario Superior Court of Justice (May 30, 2012) *available at* http://www.docstoc.com/docs/121729548/Chevron-Ecuador-Ontario-Superior-Court-Filing ("*Canadian Enforcement Statement*"). A matter of this magnitude, in-

volving a major American company operating in a strategically significant sector, warrants this Court's attention.

Apart from the sheer stakes, this petition warrants this Court's attention for a second, independent reason, which is the focus of this brief. The Second Circuit has construed the Declaratory Judgment Act in a manner utterly at odds with one of its underlying purposes: to provide a remedy for parties seeking immediate clarity about their rights and legal obligations, including a prompt determination of whether they have a valid defense in a coercive action. This Court has long recognized this purpose of the Act, and its remedy has become vitally important to the business community. The Act enables companies to make important capital allocation and investment decisions based upon clear, enforceable declarations about the extent (and limits) of their legal obligations, even when they concern relationships between purely private parties governed by state law. The Second Circuit's decision threatens to undo these substantial benefits of this important federal law by tying the availability of its innovative remedy to an affirmative authorization under state law. This Court has never held that such affirmative state authorization is a prerequisite to the availability of a federal declaratory judgment. Nor would it make sense to do so when the Declaratory Judgment Act was designed precisely to expand the range of remedies beyond those available in an ordinary coercive action. At a broad level, the Second Circuit's decision injects uncertainty into the meaning of the Declaratory Judgment Act where none previously existed.

Even if the Second Circuit's erroneous interpretation of the Act is eventually limited to actions seeking declarations that foreign judgments are unenforceable, its decision still should be reviewed by this Court. The Act provides an increasingly important remedy to American companies (or potentially other companies with assets in the United States) that have had improper foreign court judgments entered against them, including where those judgments were procured by fraud. Yet the Second Circuit has announced a categorical rule denying the availability of this remedy unless a state's foreign judgment enforcement act authorizes it. Its ruling effectively closes the courthouse door of the nation's financial capital to businesses seeking prospective relief from ill-gotten foreign judgments.

I. Certiorari Should Be Granted To Resolve Important Questions About The Proper Construction Of The Declaratory Judgment Act, Particularly Its Availability To Preclude The Enforcement Of Foreign Judgments Procured By Fraud.

The Declaratory Judgment Act provides in relevant part:

> In a case of actual controversy within its jurisdiction, [subject to certain exceptions not relevant here], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. §2201(a). In the paradigmatic case, the Act enables the presumed defendant in a coercive lawsuit to obtain an affirmative declaration about its rights or liabilities. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 130 (2007). Often, the case is styled as a request to validate a defense such as, in actions against public officials, a declaration that a statute is unconstitutional, *see, e.g., Nashville C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 258 (1933), or, in actions between purely private parties, a declaration about a defense to a contractual or other legal obligation, *see, e.g., Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674-79 (1950). Thereby, the declaratory judgment action "relieves potential defendants 'from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure – or never.'" 10B Charles A. Wright *et al.*, Federal Practice and Procedure §2751 (Rev. ed. 2012) (quoting *Japan Gas Lighter Ass'n v. Ronson Corp.*, 257 F. Supp. 219, 237 (D.N.J. 1966)).

In this case, the Second Circuit has closed the courthouse door of the nation's financial capital to companies seeking relief from such "Damoclean threats." The court below apparently has announced a categorical rule that bars a party from invoking the Declaratory Judgment Act to obtain a ruling on a state-law defense unless state law affirmatively authorizes such relief. Pet. App. 27a. Whether this rule is applied broadly to all actions under the Declaratory Judgment Act or confined to actions seeking a declaration about the enforceability of a foreign judgment, the Second Circuit's erroneous decision sows substantial confusion in an important area of law and warrants this Court's immediate intervention.

A. The Declaratory Judgment Act enables companies to obtain essential guidance about their rights and obligations and, thereby, provides a stable backdrop against which they can make capital allocation and investment decisions.

For nearly a century, the Declaratory Judgment Act has supplied a valuable tool to the business community. *See* Donald L. Doenberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 U.C.L.A. L. Rev. 529, 561-69 (1989) (reviewing legislative history of the Declaratory Judgment Act). Declaratory judgments enable companies to make investment decisions, set business strategy and plan for contingent liabilities. *See* Edwin M. Borchard, *The Declaratory Judgment: A Needed Procedural Reform – Part I*, 28 Yale L.J. 1 (1918) (discussing history of declaratory judgments generally); Edwin M. Borchard, *The Supreme Court and the Declaratory Judgment*, 14 A.B.A. J. 633 (1928) (same).

For example, declaratory judgments about a patent's validity may enable a licensee (as well as the inventor) to make decisions about how to allocate their research and development resources in line with their (or their competitor's) property rights. *See, e.g., MedImmune*, 549 U.S. at 121-22. The Wright and Miller treatise explains the importance of declaratory relief in this setting:

> If declaratory relief were unavailable, a person accused of infringement would be in a difficult position. The patentee would be free to sue when

> and as the patentee liked and until suit was filed, the patentee could harm the alleged infringer's business by threatening suit against him and his customers

10B Wright & Miller, Federal Practice and Procedure §2761.

Similar goals animate the need for declaratory judgment actions in other industries: a software company may seek a declaration that its program does not violate federal copyright laws, *see, e.g., Veeck v. Southern Bldg. Code Congress Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (*en banc*); an insurance company may seek a declaration that it is not obligated to pay a claim, *see, e.g., New York Marine and General Ins. Co. v. Lafarge North America, Inc.*, 599 F.3d 102 (2d Cir. 2010); a bank may seek a declaration that federal banking law preempts state regulation, *see, e.g., Wells Fargo Bank of Texas v. James*, 321 F.3d 488 (5th Cir. 2003); sureties may seek declarations to determine their obligations following a breach of the underlying construction contract, *see, e.g., Fidelity and Guar. Ins. Co. v. Star Equipment Corp.*, 541 F.3d 1 (1st Cir. 2008); franchisors may seek declarations that franchises were properly terminated and that the termination did not violate state franchise protection laws, *see, e.g., General Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296 (3d Cir. 2001); carriers in the shipping industry may seek a declaration as to the scope of their liability, *see, e.g., Farrell Lines Inc. v. Ceres Terminals Inc.*, 161 F.3d 115 (2d Cir. 1998) (*per curiam*).

This remedy under the federal Declaratory Judgment Act remains available even when a party seeks a declaration solely on a question of state law. Indeed, state-law questions represent the sort of

"typical declaratory judgment cases" that Congress considered when it passed the Declaratory Judgment Act. Doenberg & Mushlin, 36 U.C.L.A. L. Rev. at 563 n. 159 Consistent with this Congressional vision, several of this Court's early cases construing the Act involved issues governed entirely by state law, such as actions by insurance companies seeking declarations that they were not obligated to indemnify or pay an insured. *See, e.g., Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 272-73 (1941); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-44 (1937). Despite the dominance of state-law questions to the declaratory-judgment requests in these cases, this Court consistently held that the actions were cognizable under the Declaratory Judgment Act.

These decisions make sense in light of the Declaratory Judgment Act's above-described purposes. In matters of state law, no less than matters of federal law, companies sometimes require a determination about their rights and liabilities in order to allocate capital and to execute business strategies. *See, e.g., Aetna*, 300 U.S. at 239 (noting that the declaration sought by an insurance company would determine its obligation to maintain financial reserves in the event insured filed a claim on the policy); Doenberg & Mushlin, 36 U.C.L.A. L. Rev. at 562 n. 154 ("The idea that the declaratory judgment would aid citizens by eliminating intolerable uncertainties in their legal and business relations is a major theme of the legislative history of the [Declaratory Judgment] Act.").

B. Read broadly, the Second Circuit's decision, tying the availability of federal declaratory relief to an affirmative authorization under state law, deprives companies of guidance about their obligations and injects needless uncertainty into this area of law.

The decision below repeatedly states that the Declaratory Judgment Act cannot supply the relief sought by Chevron because New York's foreign judgment enforcement statute does not affirmatively authorize such relief. *See* Pet. App. 27a ("Thus, where the Recognition Act does not provide the legal predicate, the DJA cannot expand the statute's authority by doing so."); *id.* 28a ("The argument for a declaratory judgment, which thus becomes limited to the claim that Chevron can petition a New York court to declare in advance that any effort to enforce the Ecuadorian judgment *in New York*, must fail.") (*sic*). Linking the availability of federal relief to an affirmative authorization under state law turns the entire goal of the Declaratory Judgment Act on its head and is in substantial tension with this Court's prior decisions interpreting the Act.

The entire purpose of the Declaratory Judgment Act was to *expand* available remedies beyond those ordinarily provided for in a coercive action (such as damages or an injunction). Prior to the Act's enactment, this Court had held in *Liberty Warehouse Co. v. Grannis* that state declaratory judgment statutes could not, through the federal Conformity Acts, be relied upon to obtain declaratory relief in federal court. 273 U.S. 70, 76 (1927). The Declaratory Judgment Act overcame the impediment identified in *Liberty Warehouse* and eliminated any dependency

between the new federal remedy and state law. *See* Doenberg & Mushlin, 36 U.C.L.A. L. Rev. at 562 n. 155. Thus, following passage of the Declaratory Judgment Act, in both *Aetna* and *Maryland Casualty*, this Court did not consider whether state law authorized the relief sought by the insurers before holding that the Declaratory Judgment Act allowed a federal court to determine the availability of their state-law defenses. Thereafter, in *Skelly Oil*, this Court made explicit what was implicit in *Aetna* and *Maryland Casualty*: "that the declaratory remedy which may be given to federal courts may not be available in state courts is immaterial." 339 U.S. at 674.[2] Indeed, even if New York law affirmatively authorized *precisely* the relief sought by Chevron, the availability of that state-law remedy would not preclude Chevron from seeking relief under the Declaratory Judgment Act, for "[t]he existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." Fed. R. Civ. P. 57.

To tie the availability of federal declaratory relief to an affirmative authorization under state law would present additional problems. For one thing,

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[2] In *Aetna* and *Maryland Casualty*, as in this case, the federal court's subject-matter jurisdiction was unquestioned due to the complete diversity of the parties. Likewise in *Skelly Oil*, a decision involving multiple parties and often cited for the proposition that federal question jurisdiction does not lie in a Declaratory Judgment Act case where the only federal issue is an affirmative defense, the Court "reach[ed] the merits" of the declaratory judgment request involving completely diverse parties. 339 U.S. at 674. Just like those cases, complete diversity in this case is unquestioned, so the *power* of a federal court to issue the Declaratory Judgment sought by Chevron is unassailable.

interpretive issues would arise about how explicit a state law must be before federal declaratory relief is authorized. For another thing, the Second Circuit's rule would sow massive inconsistency. Identically situated companies seeking identical relief would have different access to the declaratory remedy depending simply on the state in which they filed suit.

At bottom, what Chevron seeks to do is absolutely no different from what countless companies have sought in the sorts of cases described above – namely obtain a declaration about the availability of a defense in order to obtain guidance about its obligations without having to live under the "Damoclean threat" of a coercive enforcement action, whenever (and in this case *wherever*) the plaintiffs may choose to file it. The Second Circuit's categorical refusal to entertain this action undermines this important purpose served by the Declaratory Judgment Act and injects an uncertainty into this area of the law where none previously existed.

C. Read narrowly, the Second Circuit's categorical refusal to entertain actions to declare foreign judgments unenforceable strips companies of an important tool to prevent the enforcement of unlawful foreign judgments.

Even if the Second Circuit's holding is cabined to the field of foreign judgment enforcement – and nothing in the decision clearly so states – that more limited holding still would be sufficiently important to warrant this Court's immediate review.

Cross-border business activity, coupled with a relaxation on jurisdictional rules, has increased the likelihood that multiple countries may claim com-

petence over a given dispute. Generally, there is a strong interest in resolving controversies locally, *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n. 6 (1981), and countries should eschew aggressive extra-territorial assertions of their regulatory authority, *see Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010). Accordingly, it was entirely appropriate to try in the first instance to resolve the underlying dispute in this case in Ecuador, where the alleged harm occurred. *See Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (*forum non conveniens* dismissal of litigation).

Unfortunately, foreign proceedings occasionally can become corrupted, sometimes by the very plaintiffs' counsel bringing the suit. As the Chamber's Institute for Legal Reform has documented, plaintiffs' lawyers have embarked on such a strategy in several cases against American companies. *See* Jonathan C. Drimmer, U.S. Chamber Institute for Legal Reform, *Think Globally, Sue Locally: Out-Of Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases* (June 2010). Tactics include lobbying political elites to enact favorable laws with retroactive effect, designing procedures not comporting with even rudimentary notions of due process and, in some instances, engaging in outright bribery. *Id.*

This case represents one particularly egregious example. In this case, the plaintiffs' claim rested upon a newly enacted law, the Environmental Management Act of 1999, for which the plaintiffs' legal representative allegedly lobbied and sought its retroactive application. *See Chevron Corp. v. Donziger*, 783 F. Supp. 2d 713 (S.D.N.Y. 2011). Plaintiffs' counsels' efforts to influence the outcome infected not

only the legislative process but the judicial one as well. Discovery suggested that the plaintiffs' counsel allegedly ghost-wrote a report of the court-appointed expert (who had previously assisted plaintiffs in other cases) and paid this supposedly "neutral" expert. Pet. App. 9a. All of this occurred in an environment where new political leadership, installed after the case had been dismissed from the United States courts, openly championed the plaintiffs' case against Chevron and allegedly urged the State Prosecutor to investigate Chevron personnel. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389 (2d Cir. 2011); *In re Chevron Corp.*, 749 F. Supp. 2d 141, 159 (S.D.N.Y. 2010).

Yet this case is not the only instance of an American company being subject to a dubious foreign proceeding. Similar tactics were used against American companies in a series of lawsuits in Nicaragua. There, plaintiffs' lawyers alleged injuries stemming from the use of certain pesticides on banana plantations in Nicaragua. *See generally Dow Chemical Co. v. Calderon*, 422 F.3d 827 (9th Cir. 2005) (summarizing history of the litigation). Plaintiffs initially filed suits across the United States, and those cases were correctly dismissed in favor of the foreign forum. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000). Thereafter, plaintiffs' lawyers lobbied the Nicaraguan Legislature to pass "Special Law 364" specifically to address these claims (not unlike the enactment of the Environmental Management Act in Ecuador). *See Mejia v. Dole Food Co.*, Nos. BC 340049 *et al.*, slip op. at ¶72 (Cal. Sup. Ct. June 17, 2009). Special Law 364 singled out major American companies that had previously been sued in the United States, like the Dow Chemical Company, the Shell Oil Company, the

Occidental Chemical Corporation and the Dole Food Company, for a special set of procedural rules never before employed in Nicaragua. *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1341-42 (S.D. Fla. 2009), *aff'd*, 635 F.3d 1277 (11th Cir. 2011) (*per curiam*). Among other things, Special Law 364

- Established an irrefutable presumption of causation between the plaintiffs' exposure to the pesticide and sterility;
- Legislatively predetermined that the defendant companies were aware of these effects;
- Retroactively eliminated the statute of limitations;
- Required defendants to post a multi-million dollar bond just to appear and defend in Nicaraguan courts (unless they chose not to argue that the United States was an inconvenient forum for the action);
- Adopted a "3-8-3" schedule, under which the defendants had three days to answer a complaint, the parties had eight days to engage in discovery; and the judge had three days to issue a judgment;
- Entitled individual plaintiffs to at least $100,000 in damages upon proof of liability;
- Limited the defendants' right to appeal and precluded any stay of execution on the judgment while appeal was pending.

Shell Oil Co. v. Franco, No. 03-8846 NM (PJWx), 2005 WL 6184247 (C.D. Cal. Nov. 10, 2005); *Osorio*, 665 F. Supp. 2d at 1314-16. Yet these efforts to fix the outcome did not end with the enactment of

a plaintiff-friendly law. As American judges later found, plaintiffs' lawyers and their agents

- Hired "captains" to seek out impoverished Nicaraguan citizens and help them concoct false claims under Special Law 364;
- Enlisted the aid of local Nicaraguan laboratories to generate false medical reports about putative claimants and then suppressed evidence unfavorable to the plaintiffs' case;
- Interfered with witnesses by threats and intimidation;
- In at least one case paid a Nicaraguan judge to "fix" judgments for subsequent enforcement in the United States.

Tellez v. Dole Food Co., Inc., No. BC 312852, slip op. at ¶27 (Cal. Sup. Ct. Mar. 11, 2011); *Mejia*, slip op. at ¶¶3-6, 9, 57, 80, 98-100, 102-08. *See also Osorio*, 665 F. Supp. 2d at 1313-14 (discussing California litigation). To date, over ten-thousand plaintiffs have brought over two-hundred actions under Special Law 364 and secured judgments in excess of two billion dollars against corporate defendants. *Osorio*, 665 F. Supp. 2d at 1312. Many of these judgments were issued without any participation by the American defendants, some of whom never even sold products to Nicaragua or directed any business activity there. *Calderon*, 422 F.3d at 830; *Osorio*, 665 F. Supp. 2d at 1312.

In the face of these actions, companies need effective tools. Sometimes, they can await an enforcement action in the United States and then invoke a defense under the applicable foreign judgment enforcement law. *See, e.g., Osorio*, 635 F.3d at 1277. *See also*

Bridgeway Corp. v. Citibank, 201 F.3d 134 (2d Cir. 2000) (refusing to enforce foreign judgment rendered in Liberia amid findings of corrupt judiciary and civil war); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995) (refusing to enforce judgment rendered in Iran due to "highly politicized" nature of the judiciary and the consequent lack of impartial tribunals). In other cases, judgment debtors cannot await an enforcement action and require a prompt determination about the enforceability of the underlying foreign judgment. Much like the insurance companies and other businesses described in Subpart A of this brief, companies in their capacities as judgment debtors also must make capital allocation decisions and plan for contingent liabilities. *Cf. Franco*, 2005 WL 6184247 at *13 (granting declaratory judgment after judgment creditor unsuccessfully sought to enforce foreign judgment).

Indeed, the need for a prompt declaration can be even greater when the underlying claim is one to enforce a foreign judgment. Attorneys for the foreign judgment creditor may seek to exploit the pre-judgment asset freeze statutes of a foreign forum to tie up the assets of the multinational company or its subsidiaries. This case contains evidence of just such a strategy where discovery revealed a plan by plaintiffs' counsel to "pursue an aggressive worldwide enforcement strategy" in which plaintiffs would seize assets held by Chevron affiliates "simultaneously in multiple jurisdictions." Pet. App. 96a. For companies with subsidiaries around the world, the "Damoclean threat" posed by these sorts of enforcement actions is especially grave. Corporate subsidiaries of the judgment debtor, which have absolutely no connection to the underlying litigation,

can be swept up in enforcement proceedings and have their assets (and operations) put at risk.

For example, after Chevron filed its petition for a writ of *certiorari*, the plaintiffs commenced litigation in Canada against two Canada-based subsidiaries of Chevron in order to enforce the Ecuadorian judgment. *See Canadian Enforcement Statement* at 3. Among other things, they have requested the appointment of an equitable receiver to wrest control over the shares and assets of the subsidiaries in order to satisfy the judgment. *Id.* Even if Chevron eventually prevails in the Canadian action, its subsidiaries' operations can be jeopardized while those proceedings are pending. In the face of such tactics, the need for effective declaratory relief in the United States is unassailable.

The importance of such relief is not limited to cases of judgments procured by fraud or based on a set of procedures wholly lacking in due process. In several other high-profile cases, American media companies, internet service providers, journalists and, even, private citizens have been subject to claims in foreign courts relying on theories not recognized under American law. For example, a French court imposed a massive fine, accruing on a daily basis, against the American internet service provider, Yahoo!, based on claims that the alleged sale of neo-Nazi paraphernalia violated French law. *See Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (*en banc*). Similarly, English courts have periodically imposed significant libel judgments against American media companies based on stories unquestionably protected under United States constitutional law. *See, e.g., Dow Jones & Co. v. Harrod's Ltd.*, 346 F.3d 357 (2d Cir. 2003) (*per curiam*);

Telnikoff v. Matusevich, 702 A.2d 230 (Md. 1997). Here too, the corporate defendants sought declaratory judgments, rather than await coercive enforcement actions, in order to remove the cloud on their operations and reduce concerns about looming contingent liabilities. While the recently enacted SPEECH Act now grants a declaratory judgment remedy to the judgment debtor in some of these instances, *see* Securing Protection Of Our Enduring And Established Constitutional Heritage Act §3, Pub. L. No. 111-223, 134 Stat. 2480, 2483 *codified, at* 28 U.S.C. §4104, these cases illustrate how the issues raised by this petition are increasingly important and not limited to ill-gotten judgments such as the one at issue in this case.

In these many settings, whether transnational tort cases against multinational corporations or libel suits against media companies, declaratory judgments can be an effective antidote. First, declaratory judgments preclude enforcement in the issuing jurisdiction. *See* 28 U.S.C. §2201(a). That feature may be especially valuable in cases such as this one where the plaintiffs originally sought to bring the litigation in one jurisdiction (here New York) and the dismissal of that action contemplated later enforcement there (the *forum non conveniens* dismissal in this case provided that Texaco could resist enforcement on the grounds set forth in New York's foreign judgment enforcement statute). *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d at 389. Second, under the Full Faith and Credit Clause, the declaratory judgment bars enforcement actions in state and federal courts elsewhere in the United States. *See* Restatement (Second) of Judgments §33 (1982). *See generally* 10B, Wright & Miller, Federal Practice & Procedure §2771. Third, courts of other countries may choose to

recognize the declaratory judgment and credit its factual findings, such as a finding that the underlying foreign judgment was procured by fraud.

To be sure, the United States is not a party to any bilateral or multilateral judgment enforcement convention. *See* Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 1079-81 (5th ed. 2011). Consequently, foreign courts are not *bound* to recognize the declaratory judgment of an American court. Nonetheless, under the foreign judgment enforcement laws of many countries, a fraudulently obtained judgment (as alleged here) is unenforceable, *see* Pet. App. 149a-150a & n. 381. In light of this shared standard, an American court's declaration that a foreign judgment is tainted by fraud can supply valuable information to a foreign court deciding how to apply its own "fraud" defense to an enforcement petition.

Notwithstanding the efficacy of a declaratory judgment in this context, the Second Circuit concluded that various factors counseled against it. The court below noted that the declaratory judgment would not be dispositive of the litigation due to the prospect of further enforcement proceedings in foreign courts not bound to recognize the American declaratory judgment. Pet. App. 29a-30a. Yet this prospect is universally true in any declaratory judgment action where another country's courts might claim jurisdiction over the mirror-image coercive action. Despite this prospect, American courts routinely entertain declaratory judgments in these circumstances. *See, e.g., Hyatt Int'l Corp. v. Coco*, 302 F.3d 707 (7th Cir. 2002); *Ingersoll Milling Machine Co. v. Granger*, 833 F.2d 680 (7th Cir. 1987); *In re Air Crash Near Nantucket Island, Massachusetts, on Oct.*

31, 1999, 392 F. Supp. 2d 461 (E.D.N.Y. 2005); *Johns Hopkins Health Sys. Corp. v. Al Reem General Trading & Company's Rep. Est.*, 374 F. Supp. 2d 465 (D. Md. 2005).

The court below also relied upon a district court decision refusing to declare a foreign judgment unenforceable. *See Basic v. Fitzroy Engineering, Ltd.*, 949 F. Supp. 1333 (N.D. Ill. 1996), *aff'd*, 1997 WL 753336 (7th Cir. Dec. 4, 1997). That decision is entirely inapposite. The district court in *Basic* declined to issue a declaratory judgment regarding the enforceability of a foreign judgment *while the foreign action was still pending*. By contrast, declaratory judgments sought after completion of the trial abroad (such as the one sought here) do not prejudge the integrity of the foreign proceeding.

Finally, the Second Circuit anticipated that a declaratory judgment action might "provoke extensive friction between legal systems." Pet. App. 29a. Yet the timing of Chevron's declaratory judgment action minimized the risk of any such friction. Chevron sought its declaratory judgment prior to the filing of an enforcement petition in a third country. This avoided any jurisdictional conflict or competition. Had Chevron waited, according to the "first filed" rule in some lower courts (though never formally embraced by this Court), the pendency of a previously filed foreign enforcement action might arguably have counseled against a declaratory judgment. *See* 10B Wright & Miller, Federal Practice and Procedure §2758 & n. 17.

In sum, the Second Circuit's decision leaves American companies (and other businesses with substantial assets in the United States) at the mercy of foreign judgment creditors. Where the judgment has

been procured by fraud or resulted from an adjudication utterly lacking in due process, American companies need effective tools to protect their assets, both at home and abroad. The Declaratory Judgment Act provides just such a tool to protect those assets and to prevent the enforcement of ill-gotten foreign judgments. The Second Circuit's categorical refusal to entertain such actions (absent affirmative state authorization) strips companies of this valuable tool and, as this case vividly illustrates, subjects them (and the foreign subsidiaries) to the "Damoclean threat" of an enforcement action whenever (and wherever) the judgment creditor may strike. This Court should therefore intervene and reject the Second Circuit's categorical rule.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

ROBIN S. CONRAD
KATHRYN COMERFORD TODD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

PETER B. RUTLEDGE
Counsel of Record
215 Morton Avenue
Athens, GA 30605
(706) 850-5870
borut@uga.edu

Counsel for Amicus Curiae
The Chamber of Commerce of the
United States of America