No. 13-16920

United States Court of Appeals For the Ninth Circuit

CHEVRON CORPORATION, PLAINTIFF-APPELLEE

v.

STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, DONZIGER & ASSOCIATES, PLLC, JAVIER PIAGUAJE PAYAGUAJED, HUGO GERARDO CAMACHO, DEFENDANTS

v.

JOHN DOE, JOHN RODGERS, LAURA BELANGER, MOVANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CASE NO. 12-MC-80237, MAGISTRATE JUDGE NATHANEAL M. COUSINS

MOTION FOR LEAVE TO FILE BRIEF FOR THE REPUBLIC OF ECUADOR AS *AMICUS CURIAE*

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Pursuant to Fed. R. App. P. 29, the Republic of Ecuador hereby moves the Court for leave to file a brief as *amicus curiae* supporting the Appellants in favor of reversal. Consistent with Circuit Rule 29-3, the Republic endeavored to obtain the consent of all parties to the filing of the accompanying *amicus* brief prior to filing this motion. The Appellants consent to the Republic's request. The Republic has not received a response regarding consent from Appellee Chevron Corporation.

The Court should grant this motion for the following reasons:

1. The Republic has a significant interest in the outcome of this appeal, which has enormous importance to Latin American countries and their citizens. *See* Fed. R. App. P. 29(b)(1). The Republic, like many other Latin American countries, is a constitutional democracy that guarantees the fundamental rights of its citizens to free expression and data privacy. Without regard for those rights, the court below upheld two extraordinarily overbroad subpoenas by Chevron to reveal the identities and track the precise movements—over the course of seven years—of 39 anonymous non-parties who have spoken out against Chevron's environmental destruction of the Ecuadorian Amazon. That decision impacts the rights and expressive activities of political activists and investigative journalists in Ecuador as well as the broader Latin American community.

2. Accordingly, an *amicus* brief is desirable in this appeal because the district court's ruling reaches far beyond the Appellants and adversely affects the

privacy rights and interests of Latin Americans, including Ecuadorians. *See* Fed. R. App. P. 29(b)(2). Indeed, the information requested by Chevron's subpoenas—including when and where each of 39 anonymous non-parties logged into their email accounts over the last seven years—is not only irrelevant to the underlying litigation, but would allow Chevron to deduce the non-parties' most intimate habits, associations, and personal relationships. If companies like Chevron are allowed to discover such minute details about the private lives of their critics, important speech on matters of public concern will be chilled worldwide, including in Ecuador and the United States.

3. The accompanying brief will also assist the Court in its review of the decision below by addressing matters directly relevant to the disposition of this case. *See* Fed. R. App. P. 29(b)(2). Some of those matters have not been fully developed by the Appellants' counsel, who are understandably and correctly focused on obtaining relief for their clients, and less focused on the impact of the district court's decision on Latin American countries and their citizens. For example, one major contribution of the *amicus* brief is to elucidate how the district court's erroneous decision will chill speech and expressive association in Latin America—violating the First Amendment rights of the Appellants, among others, to receive information and ideas from abroad.

4. The *amicus* brief also shows how the subpoenas will cause severe damage to the rights and interests of Latin Americans, who value data privacy very highly. Indeed, most Latin American constitutions, including Ecuador's, guarantee robust data privacy protections as fundamental rights that either do not exist or are not as highly valued under U.S. law. As explained in the *amicus* brief, this Court should consider the subpoenas' impacts on the fundamental rights of Latin Americans under principles of international comity and respect.

5. Because the accompanying *amicus* brief is timely filed within 7 days after the Appellants filed their principal brief, Chevron has ample time to consider and respond to the arguments made in the *amicus* brief. *See* Fed. R. App. P. 29(e). Accordingly, Chevron will not be prejudiced by this Court granting leave for the Republic to participate in this appeal as *amicus curiae*.

For these reasons, and because the accompanying brief satisfies all the requirements for *amicus* briefs in the Federal Rules of Appellate Procedure and this Circuit's Rules, the Court should grant this motion for leave and permit the Republic to file the accompanying brief.

Respectfully submitted,

NOVEMBER 29, 2013

/s/ Gene C. Schaerr

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 29, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

NOVEMBER 29, 2013

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INTEREST OF *AMICUS*[*]

This is a case of tremendous importance to Latin American nations and their citizens. That is why the Republic of Ecuador, a constitutional democracy in Latin America that recognizes data privacy as a fundamental right, seeks to participate. The Republic is not alone: Almost all Latin American countries today guarantee robust privacy protections in their constitutions and, as civil law jurisdictions, do not permit the type of broad discovery by private parties that is at issue in this case.

While the Republic has no interest in the underlying racketeering and environmental litigations that led to this appeal, it does have a legitimate sovereign interest in promoting free expression—both within and flowing across its borders—and in ensuring that the privacy rights of its citizens and residents are respected.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises from two unprecedented subpoenas by Chevron Corporation that trample on those very rights. With its subpoenas, Chevron seeks to reveal the identities of 39 anonymous non-parties and track their precise movements over the course of nearly a decade. The non-parties include environmental activists,

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[*] The Republic of Ecuador seeks leave of the Court to file this brief pursuant to Fed. R. App. P. 29(a). No counsel for a party authored this brief in whole or in part and no party or its counsel made a monetary contribution intended to fund this brief's preparation or submission. No person or entity other than the Republic or its counsel made a monetary contribution to this brief's preparation or submission.

public service attorneys, bloggers, and investigative journalists in Latin America who have spoken out against Chevron's environmental destruction of the Amazon.

They moved to quash Chevron's subpoenas, which seek their names, billing information, and email usage histories—including the date, time, and location of each log-in to their email accounts—as overbroad and a violation of their constitutional rights to anonymous speech, association, and privacy. The district court denied their motion, holding that there is "no reasonable expectation of privacy" in email usage records, which "are not speech." ER31, 11. Further, while it agreed to limit the scope of the subpoenas slightly, the court held that Chevron's request for seven years of data is "not overbroad." ER33.

The district court's decision should be reversed for three reasons. *First*, the non-parties' identities and email usage records are not relevant to Chevron's lawsuit. That suit alleges that plaintiffs in Ecuador and their attorneys fraudulently obtained a judgment against Chevron for its predecessor's pollution of the Amazon. But as the district court acknowledged, the non-parties were neither plaintiffs nor attorneys in the Ecuadorian litigation. And Chevron, which has repeatedly argued that it knows exactly who the non-parties are, has never sought to add them as defendants in the racketeering case it filed two years ago, in which trial is already over. Nor could it, since the non-parties' media activities criticizing Chevron had nothing to do with the alleged fraud.

Even if some information about how the non-parties used their email accounts were relevant, Chevron failed to "present[] … the facts necessary" to show that it needs *seven years* of data. ER32-33. Indeed, despite holding that the subpoenas are "not overbroad," the district court "suspect[ed]" that they could "be more closely tailored." *Id*. And since Chevron has already obtained all the emails of the Ecuadorian plaintiffs and their attorneys—including any they exchanged with the non-parties—any more discovery about those emails (let alone unrelated emails) is needlessly cumulative. At a minimum, Chevron could easily limit its subpoenas to the particular days or weeks surrounding any purportedly relevant emails—a simple task the district court never requested.

Second, even assuming that the subpoenas satisfy ordinary discovery rules, Chevron cannot meet the heightened standard for requests that chill First Amendment speech and association. Indeed, while Chevron cannot use the non-parties' identities and email usage records to support its racketeering claims, it *can* use those records to retaliate against the non-parties for supporting the Amazonian plaintiffs and for exposing its environmental crimes. Armed with an itinerary of everywhere the non-parties have been for seven years, Chevron will be able to deduce their most intimate habits, associations, and personal relationships—information that, if disclosed, will chill protected expression.

Unless this Court intervenes, parties like Chevron will continue to use this type of abusive discovery to silence their opponents in the United States and abroad. Like the non-parties, political advocates and journalists worldwide will be discouraged from criticizing powerful corporations if they know that their identities and email histories can be so easily discovered. And because so much of that critical speech is published internationally and online, a global audience that includes Ecuadorian as well as U.S. audiences will be deprived of its benefits. Thus, Chevron's subpoenas would violate not only the First Amendment right to create speech, but the right to receive it—a right that applies equally to foreign speech.

Third, the subpoenas infringe data privacy rights that are recognized as fundamental in Latin America. Today, the constitutions of nearly all Latin American countries, including Ecuador, guarantee the confidentiality of personal data and provide private causes of action to protect it—rights that are not recognized or not as highly valued under U.S. law. These constitutional provisions reflect a deep-seated cultural commitment to privacy in Latin America that results both from civil law traditions (which do not allow discovery by private parties) and the region's 20th-century transition to democracy.

To be sure, this Court is not bound by Latin American laws, but it should prevent court-ordered discovery from encroaching upon the values they reflect. Indeed, it would be manifestly unfair to deny Latin Americans their privacy rights

merely because their data are stored in the United States, where nearly all companies that operate email services are based. This Court's intervention is badly needed to prevent that injustice.

BACKGROUND

A proper understanding of the issues presented in this appeal requires some familiarity with (a) the underlying case and Chevron's history of abusive discovery; (b) its subpoenas to the non-parties; and (c) the robust privacy protections in Latin America, where many of the non-parties live and work.

A. Chevron's environmental liability and its retaliatory tactics

This case arises "in the context of three decades of oil exploration and extraction in Ecuador by Texaco …, which became a wholly-owned subsidiary of Chevron in 2001." *Chevron Corp. v. Berlinger*, 629 F.3d 297, 300 (2d Cir. 2011). In 1993, "residents of the Oriente region of Ecuador brought a class action suit" in the Southern District of New York seeking damages for Chevron's (then-Texaco's) "pollut[ion] [of] the rain forests and rivers in Ecuador" and to "redress contamination of [its] water supplies and environment." *Id.* at 301 (citation omitted).

That pollution is largely undisputed: "Chevron's own representatives conceded" that its predecessor "spilt oil, dumped 'produced water,' and operated dangerous unlined pits," releasing "harmful substances into the environment of Ecuador." Kendal Payne, Aguinda v. Chevron: *The Potential Rise and Fall of Mass*

Toxic Tort Claims Against U.S. Companies, 46 Int'l Law. 1067, 1071-73 (2012). Indeed, Chevron not only "does not deny 'the presence of pollution'" in the Amazon, but admits "'that there were impacts'" of that pollution on the health of the Amazonian inhabitants.[1]

Rather than litigate its liability for that pollution and the resulting health impacts in the United States, however, Chevron "worked in earnest to transfer" the suit "to the courts of Ecuador," "tout[ing] the ability of the Ecuadorian courts to 'provide a fair and alternative forum' for the plaintiffs' claims." *Berlinger*, 629 F.3d at 301. Chevron's efforts succeeded, and the plaintiffs re-filed their suit in Lago Agrio, Ecuador, in 2003. *Id.* at 302.

After eight years of litigation, "in a 188-page opinion containing extensive findings of fact and detailed conclusions of law," the Ecuadorian court found "that Chevron was liable for widespread environmental degradation of the Lago Agrio region" of the Amazon. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 237 (2d Cir. 2012). Although it reduced Chevron's damages from approximately $19 billion to $9.5 billion, Ecuador's highest court recently upheld the judgment on liability.

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[1] Frank Bajak, *Amazon Pollution Case May Cost Billions*, Boston Globe (Associated Press) (Dec. 21, 2008), *available at* http://www.boston.com/news/world/latinamerica/articles/2008/12/21/amazon_pollution_case_may_cost_billions/.

Instead of paying any damages, Chevron filed a complaint in the Southern District of New York in February 2011, alleging that the judgment in Ecuador resulted from a conspiracy by the Lago Agrio plaintiffs and their lawyers, including Steven Donziger, to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968. *Id.* at 237-38. As summarized by the court below, Chevron's allegations against the RICO defendants involve:

1. "the alleged bribery of an Ecuadorian judge and the writing of the judgment and other judicial documents in the Lago Agrio case;
2. "the Lago Agrio Plaintiffs' writing of the expert reports regarding judicial inspection … ;
3. "the circumstances under which the Lago Agrio court terminated the judicial inspection process;
4. "the selection and appointment of [the plaintiffs' choice] as a global expert, preparation and submission of his report to the Lago Agrio court, and its representation as his independent work; and
5. "the submission of deceptive accounts of the Lago Agrio Plaintiffs' and [their consultants'] relationship with [that expert] in [U.S. courts]."

ER14.[2]

Even before the Ecuadorian judgment had issued, however, Chevron began "an aggressive lobbying and public relations campaign" to attack anyone who sup-

[2] Chevron sought a worldwide injunction against enforcement of the Ecuadorian judgment based on the same allegations—a request the Second Circuit dismissed as legally baseless. *Naranjo*, 667 F.3d at 247.

ported the Lago Agrio plaintiffs.[3] Since then, Chevron has "launched dozens of discovery proceedings" in "an effort … aptly characterized as 'unique in the annals of American judicial history.'" *Naranjo*, 667 F.3d at 236 (citation omitted). Among other tactics, Chevron has used subpoenas that courts have held to be overbroad and abusive. *E.g.*, *Chevron Corp. v. Salazar*, 2011 WL 7112979, at *3 (D. Or. Nov. 30, 2011) ("Chevron's subpoena … was, at least in part, meant to harass") (ordering sanctions under Fed. R. Civ. P. 45(c)).

For example, Chevron served a subpoena on Amazon Watch, an environmental advocacy group that had been "critical of Chevron's former operations in the Ecuadorian Amazon" and "use[d] media coverage … to educate and lobby for social and environmental accountability." *Chevron Corp. v. Donziger*, 2013 WL 1402727, at *1 (N.D. Cal. Apr. 5, 2013). Chevron argued that "the RICO defendants used Amazon Watch as a mouthpiece for pressure and smear campaigns … against Chevron, in furtherance of their conspiracy to defraud Chevron." *Id.* In quashing that subpoena, however, the district court held that "none of th[e] five in-

[3] Kenneth P. Vogel, *Chevron's Lobbying Campaign Backfires*, Politico (Nov. 16, 2009), *available at* http://www.politico.com/news/stories/1109/29560.html. Among others who worked with the Lago Agrio plaintiffs, Chevron has attacked their experts at Stratus Consulting, which it publicly accused of fraud in a letter-writing campaign and on at least 15 different websites. *See Chevron Corp. v. Donziger*, No. 11-cv-691, Dkt. 694-1, 694-4, 1002 (S.D.N.Y.).

stances" of fraud alleged by Chevron in the RICO action "had anything to do with the alleged pressure campaign." *Id.* at *4.[4]

B. Chevron's subpoenas for non-parties' identities and email data

This case involves similar subpoenas—two of three served on Google, Microsoft, and Yahoo!, which together seek non-public personal information associated with dozens of email addresses that Chevron found on Mr. Donziger's computer hard drive. ER31. In addition to the identities of the individuals who opened those email accounts, the subpoenas seek "the usage of the … email addresses, including but not limited to documents that provide IP logs, IP address information at time of registration and subsequent usage, computer usage logs, or other means of recording information concerning the email or Internet usage of the email address." ER16.

The term "IP address" refers to the "numeric value used to identify the network location" of a device that is connected to the Internet, such as a notebook computer, tablet, or smartphone. ER121. When that device "moves from an Internet connection on one network … to an Internet connection on another network," its IP address "changes to reflect that the device" is in a new location. ER122.

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[4] Chevron even served a subpoena on one of its own shareholders that had "questioned how Chevron has handled" the Lago Agrio matter. Gretchen Morgenson, *Chevron Aims at Activist Shareholder*, N.Y. Times (Dec. 8, 2012), *available at* http://www.nytimes.com/2012/12/09/business/chevron-takes-aim-at-an-activist-shareholder.html?pagewanted=1&_r=0.

"Many host computers of websites, including popular web-based email services" like those operated by Google, Microsoft, and Yahoo!, maintain "IP logs," which "list the IP address of visitors along with … the date and time of log-in and the duration of time the user visited the website." ER123.

"A large amount of data accumulated over a lengthy period of time that includes IP addresses and dates and times of usage sessions can readily present a detailed picture of a person's movements." *Id*. Further, by "reveal[ing] a person's physical proximity" to others who "share the same IP address," "[t]his information could be used to map a person's associates" and discover "intensely personal details" about "work habits [and] personal relationships." ER125.

This appeal concerns the subpoenas to Google and Yahoo! as they relate to 39 email accounts belonging to persons who are not parties to the underlying litigation, many of whom live and work in Latin America.

C. Data privacy protections and expectations in Latin America

Because many of the non-parties live in Latin America, it is also important to understand how U.S. discovery practices are perceived there, and how those practices may conflict with the laws of Latin American countries.

1. Latin America is made up exclusively of "civil law countries," where "evidence-gathering … [is] a sovereign act" and thus "private parties are not allowed to collect evidence on their own." Lauren Ann Ross, *A Comparative Cri-*

tique to U.S. Courts' Approach to e-Discovery in Foreign Trials, 11 Duke L. & Tech. Rev. 313, 318 (2012). This "huge difference[] … in the way discovery is conducted" results from "cultural differences in the way that privacy is viewed." Kersten Roehsler Kortbawi & Henal Patel, *Ethical Issues in e-Discovery, Social Media, and the Cloud* (Symposium), 39 Rutgers Computer & Tech. L.J. 125, 135 (2013). Indeed, civil law countries not only "do not have the breadth of discovery that [exists] in the United States," but their laws "are also much stricter regarding personal privacy." *Id.*

Citizens of civil law countries thus often "react to the notion of discovery, … American style, as an invasion of privacy by the court." Claude Reymond, *Civil and Common Law: Which is the Most Inquisitorial? A Civil Lawyer's Response*, 5 Arb. Int'l 357, 359 (1989). They have been particularly "appalled" when U.S. courts "purport to authorize or even order an investigative process that extends, vigilante-like, into other countries." Robert Hardaway, *e-Discovery's Threat to Civil Litigation: Reevaluation of Rule 26 for the Digital Age*, 63 Rutgers L. Rev. 521, 524 (2011).

2. Data privacy, in particular, is immensely important to Latin Americans. Nearly all Latin American constitutions today include data privacy protections as fundamental rights that either do not exist or are not as highly regarded under U.S. law. For example, Ecuador's Constitution guarantees the "secrecy of

… virtual correspondence" and "[t]he right to protection of personal data, which includes access and right of decision on information and data of this nature, and the corresponding protection." Add. 2, Constitution of the Republic of Ecuador, art. 66, nos. 19, 21 (Oct. 20, 2008). These rights, like all rights under Ecuador's Constitution, apply equally to citizens and "[f]oreigners who are in Ecuadorian territory." *Id.*, arts. 9, 11.

Latin American countries have also pioneered a "new type of privacy protection in the form of habeas data," a constitutional provision that "creates a private cause of action to insure compliance with constitutionally protected rights of 'privacy'" and "to assure that personal data is being responsibly maintained." Maxim Gakh, *Argentina's Protection of Data: Initiation and Response*, 2 I/S: J. L. & Pol'y for Info. Soc'y 781, 781-83 (2006). Habeas data provisions, which have their "roots" in "Europe's [famously strict] privacy notions," were "incorporated into the Constitutions of Argentina, Brazil, Paraguay, Peru, Ecuador, and Colombia during Latin America's post-Cold War democratization." *Id.* These protections apply equally to intrusions by private entities, which can be just as dangerous as overreaching governments. *E.g.*, Add. 2, Constitution of the Republic, *supra*, art. 92 (guaranteeing right of habeas data for "personal data files … held by public or private organizations").

Those privacy concerns are at their zenith when invasions implicate the freedoms of speech, association, and the press—freedoms that are protected in Ecuador's Constitution by "[t]he right to hold opinions of one's choice and to express them freely" and "[t]he right to associate, assemble, and protest on a free and voluntary basis." *Id.* at Add. 1, art. 66, nos. 6, 13. Further, Ecuador's Constitution "ensure[s] the … professional secrecy and confidentiality of sources who inform, give their opinions through the media or other forms of communication, or work in any communication activity." *Id.*, art. 20. Any "[e]vidence obtained or applied in violation of" these provisions, moreover, "will be null and void and without evidentiary effect" in Ecuadorian courts. *Id.* at Add. 2, art. 76, no. 4.

As in other countries with strong privacy traditions, most Latin Americans were shocked and outraged by recent revelations of spying and dragnet data collection by the U.S. government in a way that many U.S. citizens do not appreciate or understand.[5] Those sentiments reflect the privacy rights guaranteed in most Latin American countries, where such practices would be unthinkable.

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[5] *E.g.*, *Merkel Calls Obama to Complain About Surveillance*, NPR (AP) (Oct. 23, 2013) ("As details of National Security Agency spying programs have become public, citizens, activists and politicians in countries from Latin America to Europe have lined up to express shock and outrage at the scope of Washington's spying."), *available at* http://www.npr.org/templates/story/story.php?storyId=240213341; *see also NSA spying in Latin America: Snoops and Snubs*, Economist, 2013 WLNR 22130637 (Sept. 7, 2013).

D. The district court upholds Chevron's lawless subpoenas.

The proceedings below, by contrast, focused on protections under the U.S. Constitution, the California Constitution, and the Federal Rules of Civil Procedure.

1. In December 2012, the non-parties moved to quash Chevron's subpoenas to Google and Yahoo!, arguing that the subpoenas violate their First Amendment rights to anonymous speech and association and their right to privacy under California's Constitution. The non-parties also argued that the subpoenas are overbroad in that they seek irrelevant information and are needlessly cumulative.[6] To support their constitutional arguments, the non-parties submitted evidence that disclosing their identities and email usage data to Chevron would chill their speech on important matters of public concern.

"John Doe #3," for example, explained that he is a professional journalist based in Latin America who has advocated on behalf of the Amazonian communities that were affected by Chevron's predecessor's pollution. ER109-10. As a journalist, Doe #3 has a professional need and duty to maintain the confidentiality of his sources. *Id*. And because he often works in places where security is lax and corruption is rampant, his personal security (as well as the security of his confidential sources) can depend on his anonymity. ER110. Doe #3 concluded that his ad-

[6] The RICO defendants also moved to quash the subpoenas. They, too, argued that the subpoenas are overbroad, but they have not appealed the denial of their motion.

vocacy and journalistic activities would be chilled if Chevron or other entities could discover his identity and email usage records. *Id*.

Similarly, "John Doe #4" is an activist based in Ecuador who has been involved in several human rights, environmental, and social justice campaigns. ER105. In particular, he is involved in a campaign to encourage Chevron to clean up its predecessor's pollution in the Amazon—a campaign that is unrelated to the Lago Agrio litigation. *Id*. Like Doe #3, he is "particularly concerned" that disclosing his identity and movements over many years would endanger his "personal safety and that of [his] family." *Id.* He, too, declared that disclosing this information would "intimidate … and deter" him from criticizing Chevron and other companies, much like "others … have limited their involvement" in activist campaigns "as a direct result of harassment" by Chevron and its allies. ER106.

In response, Chevron argued that the information requested by the subpoenas is relevant to its RICO claims because the non-parties allegedly "managed legal and public relations strategies" in support of the Lago Agrio plaintiffs. ER73. Chevron also insisted that the non-parties "are not anonymous," claiming to know each of their real names. ER74, ER85. It further argued, without elaboration, that "[e]ach of the individual email account owners … was intimately involved with the fraud alleged." ER73. In the ten months since Chevron made that statement, however, it has never sought to join the non-parties in its RICO action.

2. In August 2013, the district court issued a memorandum opinion granting in part and denying in part the motion to quash. The court began by noting that "none [of the Doe movants] is a named defendant in the underlying RICO action." ER17. It acknowledged evidence that, instead, they are "former interns, environmentalists, journalists, and bloggers who, at one point or another, have spoken out about the Ecuadorian rain forest and the alleged impact of Chevron's operations there." *Id.* Nevertheless, the court found that the subpoenas seek information that is relevant to "Chevron's claim in the underlying dispute against defendants … that defendants conspired to and succeeded in securing a[] … fraudulent judgment against Chevron in Ecuador." ER31.

The court agreed to limit the subpoenas slightly, however, quashing them with respect to some non-parties and finding that documents generated after the Ecuadorian court issued its judgment in 2011 are "unlikely to reveal relevant evidence of the alleged conspiracy." ER32. But even though it "suspect[ed] that the beginning date" of the subpoenas could also "be more closely tailored"—and Chevron failed to "present[] … the facts necessary" to show that it needs seven years of data—the court held that "subpoenas … for documents spanning from the filing of the Lago Agrio lawsuit to the judgment in that case [are] not overbroad." ER32-33.

The court also rejected the non-parties' First Amendment arguments because "IP logs are not speech," and they "cite[d] no case that analogizes IP addresses and logs or email addresses to protected speech." ER23-24. In other words, the court disregarded evidence that the subpoenas would chill speech and association because the non-parties had "not shown that they are engaging in any protected speech or expression by logging into their email accounts." ER16. The court also held that the non-parties could not assert infringement of associational rights because they "do not claim to form or be part of one group." ER27. Further, the court found that the non-parties had "significantly undercut[]" their First Amendment claims by arguing that Chevron "has cast such a wide net that it has ensnared … subscribers who are in no way affiliated with this litigation." *Id*.

Without discussing how Chevron could use the requested IP logs to map the non-parties' movements, the court also found that "the subpoena[s] will not implement any sort of tracking device" and that, in any event, "a protective order will ensure that this information does not 'fall into the wrong hands.'" ER37. But the court did not mention that the protective order in this case is not limited to outside counsel and would allow Chevron full access to the subpoenaed records.

Finally, the district court rejected the non-parties' claim to privacy under California's Constitution, holding that they have "no reasonable expectation of privacy in the routing and identifying information given to the ISPs to connect to and

relay messages on the internet" because, in the court's view, "the IP address and IP logs associated with their email accounts are … visible to the outside world." ER31.

3. After rejecting the non-parties' motion to quash the subpoenas, the district court granted Chevron's motion to compel production of the non-parties' identities and email usage data. In granting an emergency stay of that order, this Court found—for all but one of the non-parties who are represented by counsel—"a substantial question on the merits under the First Amendment." Dkt. 10 at 2. This Court also noted that "the record does not establish the involvement of these [email] addresses in any of the five areas as to which the trial court in New York found that Chevron had established probable cause to believe there was fraud or other criminal activity." *Id.*

ARGUMENT

The issue in this appeal is whether the district court erred in upholding two subpoenas that seek the identities and precise movements of 39 anonymous non-parties over a period of seven years, where there is no evidence that they were involved in the defendants' alleged fraud. As we show in Part I, most if not all of the information requested is irrelevant to those fraud claims, and the subpoenas are overbroad and needlessly cumulative. As we show in Part II, moreover, upholding the subpoenas and others like them would chill protected speech and association on

important issues of public concern in both the United States and Latin America—violating the non-parties' First Amendment rights. Finally, in Part III, we show how the subpoenas would infringe the privacy rights of Latin Americans—an outcome this Court should prevent out of comity and respect.

I. The subpoenas are well outside the scope of permissible discovery.

Federal Rule of Civil Procedure 26 limits discovery to "nonprivileged matter that is relevant" to a "party's claim or defense" and is "reasonably calculated to lead to the discovery of admissible evidence" (Fed. R. Civ. P. 26(b)(1))—a requirement that "should be firmly applied." *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351-52 (1978) (any other matter is "not within the scope" of discovery). As the district court acknowledged, "the party issuing [a] subpoena must demonstrate the discovery sought is relevant," and "[t]he court must limit the discovery sought if it is unreasonably duplicative, if it can be obtained from a source that is more convenient or less burdensome, or if the burden of producing it outweighs its likely benefit." ER19 (citing Fed. R. Civ. P. 26(b)(2)(C)).

Here, Chevron failed to meet its burden to show relevance, and the district court abdicated its gatekeeping role in a clear abuse of discretion.

A. The information requested by the subpoenas is irrelevant.

For starters, the identities of 39 non-parties and seven years of their email usage history is not relevant to any party's claim or defense and cannot lead to the discovery of admissible evidence. In the district court's words, "Chevron's claim in the underlying dispute against *defendants* is that *defendants* conspired to and succeeded in securing a[] … fraudulent judgment against Chevron in Ecuador." ER31 (emphasis added). But as the court acknowledged, "none" of the email addresses at issue belongs to "a named defendant in the underlying RICO action." ER17. And tellingly, while Chevron claims to know the non-parties' identities and their roles in alleged "pressure campaigns" against it (ER78-79), it has never sought to sue any of them in the two years since it filed its RICO claims.[7]

Nor could it. The pollution in the Amazon is an undisputed fact (*supra* at 5-6), and there is nothing "fraudulent" about exposing it to the public. Even assuming that a fraud can be perpetrated through a "pressure campaign"—a strategy Chevron itself has used in its war against anyone who supported the Lago Agrio plaintiffs—there is not a shred of evidence that the non-parties spoke out against Chevron with the "intent to deceive," which is "a necessary element of a fraud claim." *Funk v. Sperry Corp.*, 842 F.2d 1129, 1134 (9th Cir. 1988). The same is

[7] Nor has Chevron ever sought to expedite this appeal—even though trial is already over—belying its claim that it has any legitimate need for these records.

true for a conspiracy to violate the RICO, which requires "inten[t] to further an endeavor" to "satisfy all of the elements" of fraud or some other "substantive offense." *Salinas v. United States*, 522 U.S. 52, 65 (1997).

More importantly, neither Chevron nor the district court has ever articulated a rational connection between so-called "pressure campaigns" and the RICO defendants' alleged fraud. In fact, the court below previously rejected any connection between the two, holding that "none of th[e] five instances" of fraud asserted in the RICO case "had anything to do with the alleged pressure campaign." *Donziger*, 2013 WL 1402727, at *4 (quashing subpoena to Amazon Watch). Yet, faced with identical allegations, the court ignored its prior holding that "pressure campaigns" by non-parties are irrelevant.[8]

B. The subpoenas are overbroad and unreasonably cumulative.

Even if some limited portion of the subpoenaed information were relevant, *seven years*' worth of data for *thirty-nine* non-parties is plainly not. Again, the district court's own findings contradict its conclusion that "subpoenas … for documents spanning from the filing of the Lago Agrio lawsuit to the judgment in that case [are] not overbroad." ER33. In fact, the court "suspect[ed] that the beginning

[8] The RICO defendants' five alleged fraudulent acts are: (1) bribing the Ecuadorian judge and ghost-writing his opinion; (2) coercing him to appoint their choice for an "independent" expert; (3) writing that expert's report; (4) misrepresenting their relationship with the expert in a U.S. court; and (5) filing environmental inspection reports their own expert disagreed with. *Supra* at 7.

date" of Chevron's subpoenas could "be more closely tailored" to its allegations. ER32-33. Yet, the court refused "to so limit the subpoenas," even though Chevron failed to "present[] the Court with the facts necessary" to establish their relevance.[9]

The information sought by the subpoenas is also unreasonably cumulative. If, as Chevron claims, it knows exactly who owns the email addresses (ER78-79), then it has no need for their identifying information. And if any questions remain about their identities, answers "can be obtained from some other source that is more convenient"—either from Mr. Donziger (the party whose hard drive supplied the email addresses) or by simply contacting the addresses themselves. Fed. R. Civ. P. 26(b)(2)(C); *Haworth, Inc. v. Herman Miller, Inc.*, 998 F.2d 975, 978 (Fed. Cir. 1993) (a party should "seek discovery from its party opponent before burdening [a] nonparty").

Moreover, as the district court acknowledged, "Chevron has already conducted immense amounts of discovery in this litigation" (ER21), including the entire contents of Mr. Donziger's hard drive as well as his and the other RICO defendants' emails regarding the Ecuadorian litigation. Thus, even assuming there were any relevant emails to or from the non-parties, Chevron has likely already

[9] Remarkably, the district court used evidence that Chevron "has cast such a wide net" against the *non-parties*, holding that the subpoenas' extraordinary breadth "significantly undercuts" a First Amendment challenge. ER27.

discovered them—including their actual substantive content. *See* ER88-89 ("Chevron already has obtained thousands of emails sent to and from the RICO defendants and those associated with them, including the Does."). Chevron should thus have no problem narrowing its requests to the particular days or weeks surrounding those emails. Receiving another "data dump" to sift through, however, will do nothing to help Chevron's RICO case, where trial is already over.

II. The subpoenas and others like them will have devastating effects in both Latin America and the United States.

Stripped of any pretense that its subpoenas serve a legitimate purpose, Chevron's motive is laid bare: to harass, intimidate, and ultimately silence the activists, attorneys, bloggers, and journalists who stood up to Chevron and sympathized with the inhabitants of Lago Agrio. Indeed, Chevron admits that it seeks the identity and email history of anyone who participated in the "legal and public relations strategies" against it. ER73. But it is axiomatic that "discovery should be denied when a party's aim is to … harass" its opponents. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 353 n.17 (1978); *Hickman v. Taylor*, 329 U.S. 495, 507-08 (1947) ("ultimate and necessary boundaries" of discovery are crossed where it is "conducted in bad faith or in such a manner as to annoy, embarrass or oppress.").

Here, Chevron's harassment is especially dangerous because it infringes First Amendment rights.

A. The subpoenas will chill the non-parties' protected speech and expressive association.

Indeed, this Court has not hesitated to require a heightened showing of relevance for discovery "[w]here … [it] would have the practical effect of discouraging the exercise of First Amendment associational rights" and expression. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010). In particular, "[a]wareness" that someone "may be watching" one's movements "chills associational and expressive freedoms." *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring). An "unrestrained power to assemble data that reveal private aspects of identity" is thus highly "susceptible to abuse." *Id.*

That "unrestrained power" is exactly what Chevron seeks here. Contrary to the district court's finding that "the subpoena[s] will not implement any sort of tracking device" (ER36), undisputed evidence shows that Chevron's requests for "[a] large amount of data accumulated over a lengthy period of time that includes IP addresses and dates and times of usage sessions can readily present a detailed picture of a person's movements" and a "map [of] a person's associates." ER123-25. Indeed, as other courts have recognized, such "prolonged surveillance of a person's movements may reveal an intimate picture of his life," including, his "'associations—political, religious, amicable and amorous, to name only a few—and

… [his] professional and avocational pursuits.'" *United States v. Maynard*, 615 F.3d 544, 562-63 (D.C. Cir. 2010) (citation omitted).

The non-parties presented substantial evidence that disclosing such intimate details to Chevron will chill their speech and association on important issues of public concern (*supra* at 14-15)—evidence the district court ignored because "IP logs are not speech." ER23-24, ER28. But that reasoning is directly contrary to this Court's holding in *Perry* that First Amendment protection "turns ***not*** *on the type of information sought*, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities." 591 F.3d at 1162 (emphasis added). Here, the non-parties submitted "declarations from several individuals attesting to the impact" of Chevron's subpoenas—evidence sufficient to show "that important First Amendment interests are implicated by [Chevron's] discovery request[s]." *Id.* at 1163.[10]

The district court also found no infringement of the non-parties' associational rights because they "do not claim to form or be part of one group." ER27. But

[10] Apparently acknowledging their intrusiveness, the district court found that a "a protective order will ensure that this information does not 'fall into the wrong hands.'" ER37. But the protective order in this case is not limited to outside counsel and grants full access to Chevron—exactly the "wrong hands" most likely to retaliate against the non-parties for their speech. In any event, "[a] protective order limiting dissemination of this information … cannot eliminate the[] threatened harms" to First Amendment rights. *Perry*, 591 F.3d at 1164.

in *Perry*, this Court "did *not* hold that the [First Amendment right to association] is limited only to persons within a particular organization or entity." *Perry v. Schwarzenegger* ("*Perry II*"), 602 F.3d 976, 981 (9th Cir. 2010) (emphasis added). To the contrary, protection may "span[] more than one entity." *Id.* Indeed, it would be absurd for the First Amendment to protect a single organization, yet offer no defense from discovery that chills expression by *multiple* groups.

Here, Chevron's subpoenas would not only tend to silence Chevron's critics, but embolden others to use this type of abusive discovery to do the same—further chilling expression on vital issues in both Latin America and the United States. *See Lando*, 441 U.S. at 192 (Brennan, J., dissenting) (if "journalists … fear reprisals for information disclosed during discovery" sought by a "powerful political figure," the "chilling effect might particularly impact on the press' ability to perform its 'checking' function").

B. By chilling speech, the subpoenas infringe the First Amendment rights of U.S. citizens to receive information and ideas.

Allowing Latin American speech to be chilled, moreover, will harm not just Latin American speakers but U.S. audiences, which will be "deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citation omitted). In particular, the subpoenas' chilling effects would violate the First Amendment rights of U.S. citizens to "receive ideas," which "is a necessary predi-

cate to the … meaningful exercise of [their] own rights of speech, press and political freedom." *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982). Accordingly, the Appellants have standing to challenge Chevron's subpoenas not only for chilling their own speech, but the speech of other non-parties—speech they have a constitutional right to receive. *S.F. Cnty. Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 824 (9th Cir. 1987) (individuals have standing to challenge "infringement of their First Amendment right to listen") (emphasis omitted).

That right "to receive information and ideas" applies no less forcefully to speech by "non-resident alien[s]." *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). Courts must therefore guard against "deterrent effect[s]" on the receipt of speech that is "'printed or otherwise prepared in a foreign country,'" which contributes equally to the "'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment." *Lamont v. Postmaster Gen.*, 381 U.S. 301, 302, 305-07 (1965) (citations omitted); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (recognizing "the First Amendment rights of citizens to receive political publications sent from abroad").

Indeed, the geographic origin of expressive activity is increasingly irrelevant in a world where technology allows "speakers [to] engage in real-time interactions with audiences without regard to location." Timothy Zick, *Falsely Shouting Fire*

in a Global Theater: Emerging Complexities of Transborder Expression, 65 Vand. L. Rev. 125, 175 (2012). Speech disseminated via the Internet, for example, is "located in no particular geographical location but available to anyone, anywhere in the world." *Reno v. ACLU*, 521 U.S. 844, 851 (1997).

Such speech, moreover, can lead to important benefits, which will also be lost if deterred by abusive discovery. For example, there is no doubt that the advocacy efforts and investigative reporting about Chevron's pollution in Ecuador have increased awareness in the United States about environmental issues and the suffering of indigenous peoples. In turn, that awareness can spur social and political change, like environmental regulations and increased corporate accountability. Especially in an age dominated by international crises like global warming, the beneficial effect of speech in "the developing transborder marketplace of ideas" does not depend upon its place of origin. Zick, *supra*, 65 Vand. L. Rev. at 177.

III. The subpoenas should be quashed under principles of comity and respect for the privacy rights of Latin American countries and their citizens.

Failing to quash or even limit the scope of the subpoenas will also cause severe damage to the rights and interests of Latin American nations and their citizens, who value data privacy very highly. As civil law jurisdictions, Latin American countries do not permit discovery by private parties, let alone irrelevant or overbroad discovery that violates even U.S. rules. *See supra* at 10-11. Moreover,

most Latin American constitutions provide robust data privacy rights, which apply equally to intrusions by governments and by private entities. *Id.* at 11-12. Such rights are particularly important where invasions of privacy implicate the freedoms of speech, association, and the press. *Id.* at 13.

Although these laws are not binding in the United States, they deserve considerable weight and respect where, as here, the effects of court-ordered discovery extend beyond U.S. borders. Indeed, such "comity and parity concerns may be important as touchstones for a district court's exercise of discretion" in resolving discovery disputes. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 261 (2004). Thus, courts "should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 546 (1987) ("Objections to 'abusive' discovery that foreign litigants advance should therefore receive the most careful consideration.").

Here, Chevron's subpoenas squarely conflict with the laws and legal philosophies of Latin American countries, including Ecuador, where some of the non-parties live and work, and where most of the threatened speech and advocacy originated. As explained above, subpoenas to discover the identities and email histories of 39 non-parties unconnected to the underlying litigation fail even to meet

U.S. discovery standards, much less the stricter rules of civil law countries where discovery is not allowed and privacy is highly prized. *See supra* at 10-13.

Based on its erroneous assumption that IP logs are "visible to the outside world" (they are not), the district court found that the non-parties have "no reasonable expectation of privacy in the routing and identifying information … to connect to and relay messages on the internet." ER31. But that finding—even if it were true for most U.S. citizens—ignores the "reasonable expectations of privacy" of Latin Americans, which are far more demanding. It makes no sense to ignore their expectations merely because they do not live in the country where their electronic data are stored. That fact is entirely beyond their control, since the companies that operate and maintain the Internet are almost exclusively in the United States. It is thus critical to limit the scope of Chevron's subpoenas to ensure that "'they do not occasion a prejudice to the rights of … other governments, or their citizens.'" *Société Nationale*, 482 U.S. at 543 n.27 (citation omitted).

CONCLUSION

The district court's judgment should be reversed and the subpoenas to Google and Yahoo! quashed. Alternatively, the Court should order the district court to limit the scope of the subpoenas to relevant time periods and persons, if any exist.

Respectfully submitted,

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ADDENDUM

CONSTITUTION OF THE REPUBLIC OF ECUADOR 2008

Legislative Decree 0
Official Record 449 of October 20, 2008
Last modified: July 13, 2011
Status: Active

Art. 9 – Foreigners who are in Ecuadorian territory enjoy the same rights and duties as Ecuadorians, according to the Constitution.

Art. 11 – The exercise of the rights shall be governed by the following principles:

1. The rights can be exercised, demanded and enforced individually or collectively before the competent authorities; these authorities shall ensure compliance.

2. All persons are equal and enjoy the same rights, duties and opportunities.

No one shall be discriminated against on grounds of ethnicity, place of birth, age, sex, gender identity, cultural identity, marital status, language, religion, ideology, political affiliation, legal, socio-economic status, immigration status, sexual orientation, health, HIV carrier status, disability, physical difference, nor by any other distinction, personal or collective, temporary or permanent, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of rights. All forms of discrimination are punishable by law.

Art. 20 – The State shall ensure […] professional secrecy and confidentiality of sources who inform, give their opinions through the media or other forms of communication, or work in any communication activity.

Rights to freedom

Art. 66 – The following rights are recognized and guaranteed:

6. The right to hold opinions of one's choice and to express them freely.

13. The right to associate, assemble, and protest on a free and voluntary basis.

19. The right to protection of personal data, which includes access and right of decision on information and data of this nature, and the corresponding protection. The gathering, storing, processing, distribution or dissemination of such data or information shall require the authorization of the owner or the rule of law.

21. The right to inviolability and secrecy of physical and virtual correspondence; it may not be retained, opened or examined, except in cases provided by law, prior judicial intervention and the obligation to maintain confidentiality of matters other than the event causing consideration. It protects any type or form of communication.

Art. 76 – The right to due process will be assured in any proceedings in which rights and obligations of any kind are determined, including the following basic guarantees

4. Evidence obtained or applied in violation of the Constitution or the law will be null and void and without evidentiary effect.

Action of Habeas Data

Art. 92 – Everyone will be entitled, whether acting on his own behalf or as representatives authorized for that purpose, to ascertain the existence of and obtain access to documents, genetic data, personal data files or records and reports on them or their property, held by public or private organizations on any physical or electronic storage medium. They will also be entitled to ascertain the purpose of these and the uses to which they are put, the origin and destination of personal information and the time for which such data banks or files will be held.

Those in charge of personal data banks or archives may disclose the stored information with authorization from the owner of the data or the law.

Upon application to those holding the data, their owner may access them free of charge and have them updated, rectified, removed or deleted. In the case of sensitive data, which may only be held with the authorization of their owner or the law, the necessary security measures must be adopted. If the application is disregarded, the owner of the data may seek a court order. The person affected may sue for damages.

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- **CONSTITUCIÓN DE LA REPUBLICA DEL ECUADOR 2008**

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NOVEMBER 29, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 29, 2013.

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