20–1940

United States Court of Appeals

for the

Second Circuit

IN RE: STEVEN DONZIGER,

Petitioner-Appellant,

*On Petition for a Writ of Mandamus from the United States District Court for the Southern District of New York (*11-CV-691 AND 19-CR-561)

BRIEF OF *AMICI CURIAE* INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS ("IADL") AND NATIONAL LAWYERS GUILD ("NLG") IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR A WRIT OF MANDAMUS

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* **International Association of Democratic Lawyers**, hereby certifies that it is a not-for-profit corporation and thus, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* **National Lawyers Guild**, hereby certifies that it is a not-for-profit corporation, and thus, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are two organizations of lawyers and jurists throughout the United States and the world with ample expertise concerning international human rights norms and the rule of law. Amici submit this brief to explain how the district court proceedings ran afoul of these norms and support the Petitioner's request for a Writ of Mandamus.

Amici file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and all of the parties have consented to the filing of this brief.[1]

The International Association of Democratic Lawyers ("IADL") is an international organization of lawyers and jurists with member associations and individual members in over 90 countries. IADL was founded in 1946 by a large group of lawyers, many of whom served as prosecutors at the Nuremberg trials. Shortly thereafter, the IADL, through its first President, the French jurist Rene Cassin, helped author the Universal Declaration of Human Rights (UDHR). IADL has consultative status in the United Nations, at Economic and Social Council of the United Nations (ECOSOC), the United Nations Educational Scientific and Cultural Organizations (UNESCO), and the United Nations Children's Emergency Fund (UNICEF).

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[1] *Amici* hereby certify that no party or person other than *amici* and their counsel authored this brief in whole or in part, or contributed money intended to fund the preparation or submission of this brief.

The National Lawyers Guild ("NLG") is a progressive public interest association of lawyers, law students, paralegals, and others founded in 1937 dedicated to the need for basic and progressive change for the furtherance of human rights. NLG was the first racially integrated bar association and has been involved in key social justice struggles throughout its history to ensure the protection of human rights and equality, particularly in the areas of criminal defense of political dissidents and human rights defenders. The National Lawyers Guild is also dedicated to promoting human rights and advancing social justice struggles against entrenched inequalities throughout the globe and has a long trajectory of legal support in indigenous communities and Latin America.

INTRODUCTION

Amici curiae file this brief to urge this Court to grant Defendant-Appellant's petition for a writ of mandamus. Mandamus is reserved for extraordinary cases, such as this one, where the right to relief is "clear and indisputable." *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.,* 460 U.S. 1, 18 (1983). In this case, the improper appointment of a private firm to prosecute Mr. Donziger and failure to disqualify that same firm once information became available that they had an attorney-client relationship with Chevron—Mr. Donziger's decades-long adversary in the underlying case—along with judicial partiality displayed throughout the underlying proceedings by Judge Kaplan, gives rise to an immediate remedy of the sort only mandamus can cure. In reaching its decision, this Court should consider the principles of impartiality and due process ensconced in the laws of the United States and international human rights treaties that are incorporated into domestic law by virtue of Article VI, section 2 of the Constitution.

The impartiality principle is universally accepted and enshrined in the Sixth Amendment, which provides defendants with the right to have their cases heard by an impartial jury. This principle is also contained in numerous international instruments, many of which are binding upon the United States. Impartiality and independence of the judiciary are understood to safeguard the objectivity and

fairness of judicial proceedings and are essential elements in a system governed by the rule of law.

Although the universe of facts in this matter extends well beyond those recited here, the factual issues giving rise to impartiality and due process concerns are centered on Judge Kaplan's action availing himself of Rule 42 of the Federal Rules of Criminal Procedure to appoint a private firm, Seward & Kissel LLP ("Seward") with known ties to Chevron and Chevron-related entities, to prosecute Mr. Donziger. This came shortly after the United States Attorney declined Judge Kaplan's request to prosecute Mr. Donziger for criminal contempt for allegedly violating orders issued for the benefit of the Chevron Corporation ("Chevron") – Mr. Donziger's adversary in decades of litigation underlying this matter. Judge Kaplan also by-passed the court's random assignment process for a criminal case and hand-picked Judge Loretta Preska to preside over the proceedings.

In March 2020, eight months after the case against Mr. Donziger began, Seward finally disclosed the Seward-Chevron attorney-client relationship, but only after Mr. Donziger had moved for Seward's disqualification and proffered an opinion by a legal expert in prosecutorial ethics, which opined Seward should be disqualified solely based on Seward's ties to Chevron and industry partners. Judge Preska denied Mr. Donziger's motion for disqualification and to date, Seward continues as the prosecutor of record.

Like the underlying case in Ecuador, the legal attacks on Mr. Donziger in this court are being closely watched by diverse environmental and human rights groups worldwide. Earlier this year, 29 Nobel Prize Laureates issued a statement of support, recognizing that the attacks on Mr. Donziger are inextricably linked to his career-long work in seeking justice against Chevron.[2] Mr. Donziger was recently asked to testify at a hearing before the European Parliament and at a massive online conference of nearly 800,000 activists dedicated to addressing the climate crisis.[3] Human rights defender and lawyer watchdog groups in the United States and globally regularly report on developments in Mr. Donziger's case.[4] A recent

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[2] *See, e.g.,* Jonathan Watts, *Nobel laureates condemn 'judicial harassment' of environmental lawyer*, The Guardian (April 18, 2020), https://www.theguardian.com/world/2020/apr/18/nobel-laureates-condemn-judicial-harassment-of-environmental-lawyer.

[3] *See, e.g., Chevron vs. human rights — big consequences for the man who fought big oil*, We Don't Have Time, May 11, 2020, at https://medium.com/wedonthavetime/chevron-vs-human-rights-big-consequences-for-the-man-who-fought-big-oil-2a0b4b3b04ed.

[4] *See, e.g.,* Protect the Protest Task Force, *History of SLAPPs*, at https://www.protecttheprotest.org/history/ (examining Chevron's attacks on Mr. Donziger); *Etats-Unis : l'avocat Steven Donziger assigné à résidence depuis août 2019* [United States: lawyer Steven Donziger under house arrest since August 2019], International Observatory for Lawyers, at http://www.protect-lawyers.com/fr/avocat/steven-donziger/; *Avocat des autochtones, Steven Donziger est privé de liberté par le pétrolier Chevron* [Indigenous rights lawyer Steven Donziger is deprived of his liberty by oil major Chevron], La Releve et La Peste [Fr.], June 16, 2020, at https://lareleveetlapeste.fr/avocat-des-autochtones-steven-donziger-est-prive-de-liberte-par-le-petrolier-chevron/; *Entretien avec Steven Donziger, avocat harcelé par Chevron et assigné à résidence pour son combat*, Good Planet, May 25, 2020, https://www.goodplanet.info/2020/05/25/entretien-avec-steven-donziger-avocat-harcele-par-chevron-et-assigne-a-residence-pour-son-

letter of support for Mr. Donziger by lawyers, human rights organizations, and legal academics garnered over 475 signatures from countries including Ecuador, Canada, Mexico, Paraguay, Turkey, India, Germany, France, Portugal, Italy, Greece, Palestine, Brazil, Ireland, Cuba, Japan, Pakistan, Bangladesh, South Africa, and the UK, and individuals such as the President of the Paris Bar, the Secretary General of the European Association of Lawyers for Democracy and Human Rights, the forthcoming President of the European Federation of Bars, the Director of the Palestinian Centre for Human Rights, the President of the Asociación Americana de Juristas, the President of the National Association of Democratic Lawyers of South Africa, and many more.[5]

The impartiality required of the judiciary and prosecutors form part of the very foundation of our judiciary. They are also long-standing principles under international human rights law, which the United States—and thus its judiciary—are bound by. Federal judges not only have ethical obligations under the judicial

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combat/; Rocco Bellantone, *Chevron in Ecuador: 29 premi Nobel chiedono la liberazione dell'attivista Steven Donziger* [29 Nobel laureates call for the release of activist Steven Donziger], Nuova Ecologia [Ital.], April 17, 2020, https://www.lanuovaecologia.it/steven-donziger-attivista-29-premi-nobel-chiedono-liberazione/; *Steven Donziger, 25 Years Of Chevron Case*, TeleSUR Interview, Nov. 3, 2018, at https://www.youtube.com/watch?v=lCudgAmCX-k.

[5] Over 475 lawyers, legal organizations and human rights defenders support lawyer Steven Donziger, May 18, 2020, International Association of Democratic Lawyers, https://iadllaw.org/2020/05/over-475-lawyers-legal-organizations-and-human-rights-defenders-support-lawyer-steven-donziger/.

canons but have a duty to abide by international legal standards that shape the proceedings before them, the parties involved and their own conduct. Judge Kaplan's judicial conduct in adjudicating various proceedings concerning Mr. Donziger, and the refusal to disqualify Seward even after information on a clear conflict of interest, has systematically violated these principles.

ARGUMENT

Because of the extraordinary bias, impropriety, and lack of partiality displayed by both judicial actors and the assigned prosecutors in this matter, the Court should grant Petitioner's request to dismiss the criminal case against Mr. Donziger or in the alternative, disqualify Seward and remand the case to a new, randomly-assigned district judge. In deciding this matter, the Court should do so in a manner that is also consistent with the United States' obligations under international law.

I. INTERNATIONAL HUMAN RIGHTS STANDARDS SUPPORT GRANTING PETITIONER'S REQUEST FOR A WRIT OF MANDAMUS.

Federal courts have a "longstanding practice" of looking to international law for interpretative guidance of constitutional and statutory provisions, as well as to ensure compliance with international legal obligations. *Graham v. Florida*, 560 U.S. 48, 80 (2010); *see also Roper v. Simmons*, 543 U.S. 551, 575 (2005) (noting international authority as "instructive for [the Court's] interpretation" of the Constitution); *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (citing a European Court of Human Rights decision and an expert committee report to the British Parliament in comparing certain norms across legal systems). It's wholly appropriate for courts to consider international law when addressing rights—such as due process—that implicate international legal obligations, *see* U.S. Const. art.

VI, cl. 2 ("The Supremacy Clause"), and courts have a long and rich tradition of doing so. *See Hilton v. Guyot*, 159 U.S. 113, 163 (1895) ("International law . . . is part of our law, and must be ascertained and administered by the courts of justice . . . ."). It is common for courts to look to widely accepted international legal standards, such as judicial independence and impartiality. The Court should render its decision for the Petitioner in such a way that is consistent with domestic law and the United States' obligations under international law.

II. IMPARTIALITY OF THE JUDICIARY IS PARAMOUNT TO THE ADMINISTRATION OF JUSTICE AND IS A UNIVERSALLY RECOGNIZED RIGHT.

The ability of judges to independently effectuate their role in adjudicating controversies before them without being subject to outside influences is a notion as old as the judiciary itself. In fact, judicial independence exists not only to protect judges but to protect *litigants* from abuse of power and discretion that is entrusted to judges. *See* Office of the High Commissioner on Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges*, Prosecutors and Lawyers 115 (2003 – 07), *available at* https://www.ohchr.org/Documents/Publications/training9add1.pdf.[6]

[6] "Consequently, the principle of independence of judges was not invented for the personal benefit of the judges themselves, but was created to protect human beings against abuses of power. It follows that judges cannot act arbitrarily in any way by deciding cases according to their own personal preferences, but that their duty is and remains to apply the law."

The absence of independence would otherwise render a system designed to administer justice totally arbitrary. Without impartial and unbiased judges, the public's confidence in the courts would plummet and the system itself would be rendered meaningless, resembling more the propped up courts of a dictatorship that are plagued with accusations of corruption and political influence rather than a democracy.

The independence of the judiciary is a related concept to the principle of impartiality; both are basic tenets of a credible system of tribunals and are fundamental to the notion of separation of powers and due process. The impartiality principle is enshrined in numerous international instruments, starting with the Universal Declaration of Human Rights ("UDHR"), an instrument binding on all member states of the United Nations. The UDHR states that, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal . . ." UN General Assembly, Universal Declaration of Human Rights, Art. 10, 217 A (III) (10 December 1948). This principle is also embodied in the International Covenant for Civil and Political Rights ("ICCPR"), which states that, "[a]ll persons shall be equal before the courts and tribunals . . . everyone shall be entitled to a fair and public hearing by a competent, *independent and impartial*

tribunal established by law."[7] The ICCPR is an authoritative human rights treaty that lays out, among other rights, due process protections, and has been signed and ratified by the United States.

The Human Rights Committee, which monitors compliance of signatories to the ICCPR and is the definitive body that interprets the treaty,[8] has unambiguously held that "the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception." *M. Gonzalez del Río v. Perú*, Communication No. 263/1987, UN doc. GAOR, A/48/40 (vol. II), p. 20, ¶ 5.2 (views adopted on 28 October 1992). That independence is not only institutional, but individual as well; independence "does not mean that judges can decide cases according to their personal preferences."[9] It is not enough that the judiciary remain free from interference by other branches of government or outside interests, but each individual judge in the professional exercise of their responsibilities must be free of bias as to avoid deciding "cases on the basis of their own whims or

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[7] International Covenant on Civil and Political Rights, art. 14, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter "ICCPR"] (*emphasis added*).

[8] The United Stated signed the Convention on October 5, 1977 and ratified the treaty on June 8, 1992.

[9] International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (2009), p. 24, *available at* https://www.icj.org/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Procecutors-No.1-Practitioners-Guide-2009-Eng.pdf.

preferences." *Human Rights in the Administration of Justice*, at 123; *see also* United Nations Basic Principles on the Independence of the Judiciary, *adopted by* the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and *endorsed by* General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 [hereinafter, "UN Basic Principles"].[10] Behavior like that of Judge Kaplan calls into question long-standing norms that are primary to our court system and those of courts worldwide.

Regional instruments are also definitive, such as the American Declaration of Human Rights ("American Declaration"), which is binding on all member states of the Organization of American States (of which the United States is a member and host of).[11] The American Declaration states, "[e]very person accused of an

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[10] Regional bodies have adopted similar provisions. *See, e.g.,* Council of Europe, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 13 October 1994, Principle 2 (b); Resolution on the respect and strengthening of the independence of the judiciary, *adopted in* April 1996 at 19th Session of the African Commission on Human and People's Rights; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, *adopted by* the Chief Justices of the LAWASIA region in 1995 and *adopted by* the LAWASIA Council in 2001, ¶ 3.a; Universal Charter of the Judge, *approved by* the International Association of Judges (IAJ) on 17 November 1999, Art. 1 (IAJ is not a multilateral political or judicial body, but serves to safeguard the independence of the judiciary as a critical aspect of ensuring the protection).

[11] The Inter-American Court on Human Rights is the definitive body that interprets the American Convention on Human Rights, however the Commission, as a quasi-judicial body with competence to investigate human rights violations of

offense has the right to be given an impartial and public hearing.[12] While the United States has not ratified the American Convention on the Rights and Duties of Man, the convention is "an authoritative expression" of the rights articulated in the American Declaration that can be used along with its jurisprudence in interpreting and applying the Declaration's provisions. *See In Case of Grand Chief Michael Mitchell v. Canada*, Case 12.435, 70 Inter-Am. Comm'n. H.R. 2, Report No. 61/08, OEA/Ser.L/V/II.118, Jul. 25, 2008, at ¶ 64. In addition, *lex specialis* instruments that expand upon the independence and impartiality required of key actors in any judicial system are considered part of customary international law because of their specific character. The Inter-American Commission on Human Rights has stated:

> The impartiality of a tribunal must be evaluated from both a subjective and objective perspective, to ensure the absence of actual prejudice on the part of a judge or tribunal as well as sufficient assurances to exclude any legitimate doubt in this respect. These requirements in turn require that a judge or tribunal not harbor any actual bias in a particular case, and that the judge or tribunal not reasonably be perceived as being tainted with any bias. [13]

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member states of the OAS, aids the Court in this responsibility in interpreting and applying the American Declaration.

[12] American Declaration on the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), *entered into force* 2 May 1948, Art. XXVI, § 2.

[13] *Report on Terrorism and Human Rights*, Inter-Am. Comm'n. H.R. OEA/Ser.L/V/II.116, ¶ 229 (Oct. 22, 2002); *see also Palamara Iribarne v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 135, at ¶¶ 145-47 (Nov. 22, 2005) ("the impartiality of a court implies that its members have no direct interest in, a pre-

The universality of the principle of an impartial judiciary is reflected in other regional human rights instruments and in customary international law, which looks to a judge's actual or perceived bias, neither of which is permitted.[14] The European Court on Human Rights has applied a similar test when assessing whether the impartiality principle has been violated under the European Convention on Human Rights,[15] namely in cases where judges have failed to recuse themselves from proceedings in which they've already adjudicated and/or shown bias.[16] In fact, the Court found that, "when (a judge who ruled over

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established viewpoint on, or a preference for one of the parties, and that they are not involved in the controversy").

[14] African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *adopted* 27 June 1981, *entered into force* 21 October 1986), Art. 7(1) ("every individual shall have the right to have his cause heard" and shall have "the right to be tried within a reasonable time by an impartial court or tribunal"); European Convention for the Protection of Human Rights and Fundamental Freedoms, *as amended by* Protocols Nos. 11 and 14 on 4 November 1950, ETS No. 5, *entered into force* 3 September 1953, Art. 6(1) ("in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law").

[15] The European Convention on Human Rights has been interpreted to include two requirements, one subjective and one objective**.** The subjective component requires that "no member of the tribunal should hold any personal prejudice or bias." *Case of Daktaras v. Lithuania*, 77 Eur. Ct. H.R., ¶ 30 (10 October 2000). The subjective test used by the Court "consists in seeking to determine the personal conviction of a particular judge in a given case." *Tierce and Others v. San Marino*, Eur. Ct. H.R., Series 2000-IX, ¶ 75 (25 July 2000).

[16] *Case of Oberschlick v. Austria (1)*, 204 Eur. Ct. H.R. 13, Series A, ¶¶ 15, 16, 22 (23 May 1991); *see also Case of Castillo Algar v. Spain*, Eur. Ct. H.R.

criminal proceedings) not only takes up the prosecution case but also, in addition to his organisational and managerial functions, constitutes the court, it cannot be said that, from an objective standpoint, there are sufficient guarantees to exclude any legitimate doubt as to the absence of inappropriate pressure."[17] Judge Kaplan's open hostility towards Mr. Donziger, regardless of its origin, renders a necessary conclusion that his impartiality—to the extent he has had any in the proceedings before him—has been eviscerated and as a result Mr. Donziger's procedural protections have been compromised.[18]

A. Judicial Duty to Recuse

1. Recusal is required when impartiality has been compromised.

The notion of impartiality is so central to the fair administration of justice that when it is compromised, a parallel duty arises for judges who must then recuse themselves from adjudicating a case where the appearance of impropriety is present. Before a litigant must resort to challenging bias, the judge should first

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3124, Reports 1998-VIII (28 October 1998); *Case of de Haan v. the Netherlands*, Eur. Ct. H.R. 1379, Reports 1997-IV (26 August 1997).

[17] *Id*. The Inter-American system has applied a similar rule to arrive at the same conclusion. *See Herrera Ulloa v. Costa Rica,* Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 170 (Jul. 2, 2004) (judicial independence has both subjective level [whether the tribunal is actually partial or not] and the objective level ["whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality"]).

[18] *See Daktaras v. Lithuania*, ¶ 35 (finding that a judge violated the impartiality principle by "recommending that a particular decision be adopted or quashed, [in which he] necessarily becomes the defendant's ally or opponent").

comply with their duty to recuse themselves. *See* Bangalore Principles of Judicial Conduct, *adopted by* the Judicial Group on Strengthening Judicial Integrity, *as revised at* the Round Table Meeting of Chief Justices at The Hague (2002) (hereinafter referred to as the "Bangalore Principles"), *available at* https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf. Article 2.5 of the Bangalore Principles addresses a judge's responsibility for recusal, noting, "[a] judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially," further warning that "failure to act could lead to a serious miscarriage of justice." Recusal requirements are also reflected in regional human rights mechanisms that echo this principle as a tenet of judicial independence.[19]

2. Investigation or sanctions by an independent body are appropriate to address judicial misconduct and failure to recuse.

[19] *Palamara Iribarne*, at ¶¶ 145-47 (a judge "must withdraw from a case being heard thereby where there is some reason or doubt which is in detriment to the integrity of the court as an impartial body. For the sake of safeguarding the administration of justice, it must be ensured that the judge is free from any prejudices and that no doubts whatsoever may be cast on the exercise of jurisdictional functions."); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, *adopted as* part of the African Commission's activity report at 2nd Summit and Meeting of Heads of State of African Union, Maputo, 4 -12 July 2003, Principle A, ¶ 5.

Should judges violate the principles of independence and impartiality, investigation, disqualification and/or sanctions by an unbiased entity may all be warranted. *See* Basic Principles on the Independence of the Judiciary, Arts. 18 - 20. The Human Rights Committee has explicitly addressed this, noting that, a "trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14."[20]

Many concerned observers in the United States and the international community at large have noted with alarm the serious bias that Judge Kaplan has demonstrated in the proceedings involving Mr. Donziger. Because of his failure to recuse himself in proceedings in which he clearly demonstrated partiality and preference—even suggesting litigation strategy to Chevron—this Court should take appropriate measures to restore the judicial independence characteristic of this Circuit by addressing and investigating Judge Kaplan's judicial misconduct and remedying the harm to Mr. Donziger's constitutional and human rights.

III. LACK OF JUDICIAL IMPARTIALITY HAS VIOLATED PETITIONER'S DUE PROCESS RIGHTS.

[20] *Arvo O. Karttunen v. Finland*, Human Rights Committee, Com. 387/1989, ¶ 7.2.

The right to due process—of which judicial independence and impartiality are critical components—is a universally recognized right that encompasses a series of procedural guarantees and is enshrined in international law.

A. Impartiality is an integral part of due process guarantees.

The right to a fair, unbiased, and impartial trier of fact is a fundamental notion of due process. In fact, it is inherent to the principle of separation of powers in a constitutional democracy.[21] The UN Basic Principles state that "the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected." A key component of the presumption of innocence—fundamental to due process—requires authorities not "contribute to forming public opinion" on the guilt of the accused "while the criminal responsibility of that individual has not been proven." *Lori Berenson Mejía v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 119, ¶ 160 (Nov. 25, 2004); *Haarde v. Iceland*, Eur. Ct. H.R., No. 66847/12 (Nov. 23, 2017) ("the presumption of innocence . . . is one of the elements of a fair criminal trial required by Article 6 § 1. It will be violated if a statement of a public official

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[21] The inextricable relationship between due process and separation of powers has been detailed throughout human rights instruments. *See, e.g., Report of Special Rapporteurs on the situation of human rights in Nigeria*, UN doc. E/CN.4/1997/62/, ¶ 71;General Comment No. 29 - States of Emergency, Art. 4, Human Rights Committee, ¶ 16; *Aguirre Roca, Rey Terry and Revoredo Marsano v. Perú*, Inter-Am. Ct. H.R. (ser. C) No. 55, ¶ 73 (31 January 2001).

concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law."). An impartial tribunal is part of the guarantees of due process that all litigants are entitled to.[22]

The Human Rights Committee has found that the independence and impartiality of judges are an inherent part of the right to a fair trial and proceedings under Article 14 of the ICCPR, noting impartiality "implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties."[23] The Committee has also stated that an impartial tribunal is inherent to the accused's ability to mount an appropriate defense. *Barry Stephen Harward v. Norway*, Communication No. 451/1991, UN doc. CCPR/C/51/D/451/1991, ¶ 9.4; *see also Víctor Alfredo Polay Campos v. Peru*, Communication No. 577/1994, U.N. doc. CCPR/C/61/D/577/1994, ¶ 8.8 ("a cardinal aspect of a fair trial within the meaning

[22] The sources of international law where due process guarantees specifically reference the independence of the judiciary are numerous. *See, e.g.*, UDHR, Arts. 8 - 11; ICCPR, Art. 14; American Declaration, Art. XXVI, *First Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 1125 U.N.T.S. 3, *entered into force* June 8, 1977, Article 75 (4); Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, *adopted by* the Committee of Ministers at its 804th meeting (11 July 2002), H (2002) 4, Guideline IX; Charter of Fundamental Rights of the European Union, *entered into force* 26 October 2012, 2012/C 326/02, Article 47.

[23] *Arvo O. Karttunen v. Finland*, ¶ 7.2.

of article 14 of the Covenant [is] that the tribunal must be, and be seen to be, independent and impartial").

B. Procedural irregularities demonstrating the apparent bias of Judge Kaplan give rise to due process concerns.

The repeated avoidance of following protocols, procedures and due process considerations by Judge Kaplan in presiding over all proceedings related to Mr. Donziger over the years risk serious consequences to the credibility and integrity of the court. While some of the most egregious are cited in Petitioner's brief regarding Judge Kaplan's appointment of a Special Master, amici are concerned about other instances that violate international legal standards for impartiality and due process throughout the life of both the civil and criminal proceedings.

As of the time of this filing, Mr. Donziger has been under house arrest for contempt charges for nearly one year; a charge that only carries with it a maximum of *six* months. Mr. Donziger presented evidence of his family and work ties in New York and surrendered his passport, disputing allegations that he's a flight risk. He proposed alternative measures to allow him to continue to carry out his parental and family duties, which were unreasonably denied. As a human rights defender and officer of the court, the punitive measures lodged against him for the successful exercise of his duties is offensive to the most basic notions of justice and due process.

Judge Kaplan's appointment of a private prosecutor under Rule 42 of the Federal Rules of Criminal Procedure to prosecute Mr. Donziger for criminal contempt after the U.S. Attorney declined to do so raises concerns about his dispassionate interest in justice and instead speaks to a personal vendetta against a party before him, given the extraordinary tool that Rule 42 is and the very narrow instances in which it can, and should, be utilized. Judge Kaplan then hand selected Judge Loretta Preska to oversee the proceeding without recusing himself nor submitting to the court's long established process for random selection of judges which preserves the impartiality required of the court. To the extent that Mr. Donziger's due process rights have been compromised as a result of Judge Kaplan's biased behavior, this Court can and should provide him with a remedy.

IV. PROSECUTORIAL FAIRNESS AND IMPARTIALITY ARE ESSENTIAL TO SAFEGUARDING DUE PROCESS AND THE RULE OF LAW.

As set forth above, all general universal and regional human rights instruments guarantee the right to a fair hearing in civil and criminal proceedings before an independent and impartial tribunal. The need for strong, independent and impartial prosecutorial authorities form part of the effective maintenance of the rule of law. While European civil-law systems and United States common-law systems differ in some respects regarding prosecutorial discretion, the principle of

prosecutorial independence and impartiality is unquestioned in both civil and common-law systems.[24]

The U.N. Guidelines on the Role of Prosecutors, states: "prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect and compliance with… the principles of equality before the law… and the right to a fair and public hearing by an independent and impartial tribunal." Importantly, these guidelines indicate that in criminal proceedings, "the office of prosecutors shall be strictly separate from judicial functions" (Guideline 10), are duty-bound to act "in accordance with the law" (Guideline 12) and shall "carry out their functions impartially" (Guideline 15).[25]

These general principles are also part of the rules governing prosecutorial functions in the United States. The American Bar Association has created standards for prosecution that reiterate the importance of impartiality: "[t]he primary duty of the prosecutor is to seek justice within the bounds of the law, not

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[24] Micah S. Myers, *Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations,* 25 MICH. J. INTL'L L. 211, 236 (2003).

[25] United Nations Office of the High Commissioner, Guidelines on the Role of Prosecutors, which were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, *available at:* https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx.

merely to convict."[26] Additionally, Standard 3-14 of the ABA Criminal Justice Standards for the Prosecutorial Function indicates that a prosecutor has a "heightened duty of candor" which includes the duty to disclose all exculpatory evidence to the defense. Just as important, the standards detail ethical guidelines regarding conflicts of interest, indicating that "prosecutor[s] should not [be] affected by "personal, political, financial, professional, business, property, or other interests or relationships" and when "a conflict requiring recusal exists and is non-waivable" the prosecutor should recuse from further participation in the matter.[27] Likewise, the standards of conduct protect against improper bias ("[a] prosecutor should strive to eliminate implicit biases and mitigate any improper bias or prejudice").[28]

While under Federal Rule of Criminal Procedure 42(a)(2), a judge may appoint a private prosecutor to pursue criminal contempt charges if public prosecutors refuse to take the case, the rule is in conflict with the heart of prosecutorial discretion and overrides the decision of a prosecutor to make that call. The Supreme Court was concerned about this conflict and held in *Young v. United States ex rel Vuitton et Fils S.A.,* 481 U.S. 787 (1987), that private

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[26] A.B.A., CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTORIAL FUNCTION 3-1.2 (4th ed. 2017), *available at* https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.

[27] *Id.* at 3-1.6.

[28] *Id.* at 3-1.7.

prosecutors in criminal contempt actions must be disinterested, establishing the "categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment." *Id.* at 814. This essentially "prohibits a successful litigant in a civil action from prosecuting the opposing party for criminal contempt for violation of an injunction won in the underlying civil proceeding."[29]

The principles in *Vuitton* are fundamental because prosecutors have unreviewable discretion. Under *Vuitton*, a disinterested prosecutor is not confined to actual prosecutorial interest, but any interest that may undermine the attorney's disinteredness and the public's confidence in the integrity of the legal profession: "what is at stake is the public perception of the integrity of our criminal justice system - justice must satisfy the appearance of justice . . . and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite." *Id*. at 812.

Under these standards—both U.S. and international—Seward is not a disinterested entity. As Seward's own "Maritime Practice 2018 Year in Review" states: "we look forward and ponder what 2019 will hold for us and our clients, many of the questions we asked ourselves last year still seem salient . . . will oil prices recover enough to bring badly needed stability to the offshore drilling and services sectors." Seward, after being pressed to do so, disclosed after nearly eight

[29] Joan Meier, *The Right to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests,* 70 WASH. U. L. Q. 85 (1992).

months, that it had in fact done corporate work for Chevron in the past and claimed attorney-client confidentiality when asked further probing questions about the nature of that work. Despite this, Judge Preska believed that Seward's legal services for Chevron were not significant enough and ruled that any connection between Seward's work for Chevron and the case was "too far fetched to merit serious attention." *See* A139 of Appendix to Petition for Writ of Mandamus.

The fact that Seward has engaged and actively represents clients in the offshore drilling and services sectors—closely tied to big oil—is problematic because a prosecutor cannot serve two masters. In this and any other case, even an appointed private prosecutor must serve the public interest and not be bound by any financial ties or other relationships or even have such relationships that give an unequivocal rise to the appearance of impropriety, if not outright impropriety and prosecutorial misconduct. If this Court does not dismiss this case due to the myriad other issues herein present, Seward should recuse itself or be disqualified as the private prosecutor.

V. LAWYERS HAVE AN ETHICAL OBLIGATION TO RESIST UNJUST ORDERS AND HAVE A DUTY TO PROTECT THEIR CLIENT'S CONFIDENTIALITY.

Mr. Donziger is facing criminal contempt charges mainly for failing to produce privileged attorney-client communications between him and the Ecuadorean plaintiffs in the underlying civil case to Chevron, including access to

his emails, phone records, and other records of communication. Had Mr. Donziger complied with Judge Kaplan's order, the benefit to Chevron would have been not only access to information surrounding Ecuadorean Plaintiffs' efforts to collect on the $9 billion dollar judgment against Chevron that was confirmed by three different levels of Ecuadorean courts, but would also have provided Chevron with backdoor access to confidential attorney-client communications, including communications regarding legal strategy. In refusing to comply with Judge Kaplan's order, at all times Mr. Donziger was adhering to the ethical duties he owed his clients; thus, Mr. Donziger's refusal to comply with the court order was legally justified under international norms.

A. Mr. Donziger's refusal to comply with an unjust order to produce confidential attorney-client communications to Chevron was justified and in accordance with his ethical obligations.

The Basic Principles on the Role of Lawyers—known as the Havana Principles—sets out the duties and responsibilities of lawyers in broad terms. These include advising clients as to their legal rights and obligations, assisting clients by taking legal action to protect their interests, upholding human rights and fundamental freedoms, and includes the mandate that "lawyers shall always loyally respect the interests of their clients."[30]

[30] United Nations Basic Principles on the Role of Lawyers, Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, ¶¶ 13 - 15. It could be argued that

The ongoing duty of loyalty to the client and the protection of attorney-client confidentiality are the bedrock of United States ethical rules regulating the legal profession. In particular, lawyers have an ongoing duty to preserve client confidentiality and to refrain from any action that would be adverse to a client's interests, even after representation has ended. *See* ABA Model Rule of Professional Conduct 1.9 (Duties to Former Clients).[31] In this sense, the ABA Model Rules of Professional Conduct echo many of the same principles ensconced in the Havana Principles. In particular, Rule 1.6 states, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." Disclosure is only permitted under narrow circumstances and "a lawyer may reveal information relating to the representation of a client to the extent *the lawyer reasonably believes necessary*… to prevent reasonably certain death or substantial bodily harm, to prevent the client from committing a crime… [or] to comply with [a] court order." *Id.* (emphasis added).

Even under Rule 1.6, a lawyer has discretion in determining the appropriateness of revealing privileged information to comply with a court order. Such a right to refuse to obey an order made by a superior is grounded in historical context:

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this is precisely what Seward is doing as well, remaining loyal to their client Chevron while serving in the role of private prosecutor.

> The law has learned many bitter lessons, but none more bitter than whether to sanction defiance to established legal authority. The Nuremberg trials fixed capital criminal guilt on government officials who pleaded the defense of obedience to orders from higher legal authority. If the law can find them guilty for obeying orders, then the law must provide a defense of justification for disobedience to orders. They cannot be punished for both.

See People v. Lennon, 741, 454 N.Y.S.2d 621, 623 (City Ct. 1982). In the instant case, by refusing to comply with an invasive court order that would only benefit Chevron, his client's decades-long adversary, Mr. Donziger was acting within his duties to refuse to obey the court order.

B. The prosecution of Mr. Donziger for contempt runs afoul of the basic guarantees for the adequate functioning of lawyers, the principles of fairness and rule of law, and has a chilling effect for other attorneys engaged in human rights work.

Principle 16 of the Havana Principles states, "Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference… and (c) shall not suffer, or be threatened with, prosecution or administrative economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics." In addition, Principle 22 states, "Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."

In this case, neither Judge Kaplan nor Judge Preska in presiding over the criminal matter have dealt with Mr. Donziger in a way that would not be

considered harassment or intimidation. The judicial actions against Mr. Donziger—which give rise to the need for mandamus relief here—are of such nature that the notions of fairness, due process and the rule of law are at stake and run afoul of the guarantees outlined in the Havana Principles to safeguard the functioning of lawyers. Mr. Donziger has now "served" nearly a year in pre-trial home detention for a misdemeanor that carries a maximum sentence of six months.

The extraordinary nature of this case cannot be lost on this Court. The underlying case, where Mr. Donziger successfully vindicated the human rights of indigenous peoples and affected rural communities in the Ecuadorean Amazon against the environmental devastation caused by Chevron, has made this case one of the most important corporate accountability cases of our time. Yet, as observers have noted, "[t]hese days, when powerful corporations get caught breaking the law, polluting the Earth, violating human rights, or all of those crimes simultaneously, they don't pay the fine and make amends, like normal citizens. They attack."[32] In many countries, commitment to environmental activism such as Mr. Donziger's often results in death. A recent report by Front Line Defenders details the physical assault, defamation campaigns, security threats, judicial

[32] Rex Weyler, *Chevron's SLAPP suit against Ecuadorians: corporate intimidation,* Greenpeace (May 11, 2018), *available at* https://www.greenpeace.org/international/story/16448/chevrons-slapp-suit-against-ecuadorians-corporate-intimidation/.

harassment and attacks faced by human rights defenders across the world.[33] Chevron's nearly decade-long pursuit of Mr. Donziger in a "SLAPP" suit (strategic lawsuit against public participation), has always been intended to intimidate, silence, and burden Mr. Donziger, not only with a costly legal defense that is intended to bankrupt him, but also through a process made to break his resolve. Chevron's decision to aggressively engage in litigation against Mr. Donziger rather than pay for the damages caused in the Ecuadorean Amazon is a deliberate warning to other human rights and environmental rights lawyers engaged in this type of work around the world. Judge Kaplan's order to have Mr. Donziger turn-over privileged communications in contravention of his legal and ethical obligations to his clients sets a dangerous precedent and creates a chilling effect that is unbecoming of our nation's courts.

[33] *2019 Report on Human Rights Defenders*, Frontline Defenders, https://www.frontlinedefenders.org/sites/default/files/global_analysis_2019_web.pdf. The report shows that in 2019, over 300 human rights defenders were killed in 31 countries, with over two-thirds killed in Latin America, where impunity from prosecution is the norm. Forty percent of those killed fought for land rights, indigenous peoples, and environmental justice.

CONCLUSION

There is ample support under the law of the United States and international human rights law governing due process and the rule of law for the Court to grant the Defendant-Appellant's Petition for a Writ of Mandamus. This action is appropriate to avoid the miscarriage of justice and to refrain from setting a dangerous precedent for judges to be able to engage in judicial harassment and misconduct and appoint private prosecutors that are shielded from revealing a conflict of interest.

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New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Second Circuit Rules 29.1(c) and 32.1(a)(4) Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because this brief contains 6,851 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word 2011, in 14-point Times New Roman font, which is a proportionally spaced typeface, and is double-spaced with 10.5 characters per inch.

Dated: June 29, 2020
New York, New York

_s/_Natasha Bannan_____
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