UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 11-1150-cv (L), 11-1264 (con) Caption [use short title]

Motion for: to File a Reply Brief as Amici Curiae Chevron Corporation v. Donziger

Set forth below precise, complete statement of relief sought:

amici be granted permission by the Court
to file a short, targeted reply brief to address
new issues raised by the Brief of BUSINESS
ROUNDTABLE AND INTERNATIONAL LAW SCHOLARS
AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE
(Alford-Ku Brief) and the BRIEF FOR PLANTIFF-APPELLEE CHEVRON CORPORATION

MOVING PARTY: International Law Professors Amici Curiae **OPPOSING PARTY:** Chevron Corporation

☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Donald K. Anton **OPPOSING ATTORNEY:** Randy Mastro

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: The Honorable Lewis A. Kaplan

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
s/ Donald K. Anton **Date:** 7/14/11

Has service been effected? ☑ Yes ☐ No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080

11-1150-cv(L),
11-1264-cv(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHEVRON CORPORATION,

Plaintiff-Appellee,

—against—

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

Defendants-Appellants,

(*complete caption and list of amici inside*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (NEW YORK CITY)

MOTION FOR LEAVE TO FILE A REPLY BRIEF OF INTERNATIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND DISSOLVING THE PRELIMINARY INJUNCTION AND DISMISSING THE ACTION

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PABLO FAJARDO MENDOZA, LUIS YANZA, FRENTE DE DEFENSA DE LA AMAZONIA, AKA AMAZON DEFENSE FRONT, SELVA VIVA SELVIVA CIA, LTDA, STRATUS CONSULTING, INC., DOUGLAS BELTMAN, ANN MAEST, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREGA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRA AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, CLIDE RAMIRO AGUINDA AGUNIDA, BEATRIZ MERCEDES GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUNIDA, CELIA IRENE VIVEROS CUSANGUA, FRANCISCO MATIAS ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, LORENZO JOSÉ ALVARADO YUMBO, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUI GREFA, FRANCISO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, JOSÉ GABRIEL REVELO LLORE, MARÍA CLELIA REASCOS REVELO, MARÍA MAGDALENA RODRIGUEZ, JOSÉ MIGUEL IPIALES CHICAIZA, HELEODORO PATARON GUARACA, LUISA DELIA TANGUILA NARVÁEZ, LOURDES BEATRIZ CHIMBO TANGUILA, MARÍA HORTENCIA VIVEROS CUSANGUA, SEGUNDO ÁNGEL AMANTA MILÁN, OCTAVIO ISMAEL CÓRDOVA HUANCA, ELÍAS ROBERTO PIYAHUAJE PAYAHUAJE, DANIEL CARLOS LUSITANDE YAIGUAJE, VENANCIO FREDDY CHIMBO GREFA, GUILLERMO VICENTE PAYAGUAJE LUSITANDE, DELFÍN LEONIDAS PAYAGUAJE, ALFREDO DONALDO PAYAGUAJE, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, FERMÍN PIAGUAJE, REINALDO LUSITANDE YAIGUAJE, LUIS AGUSTÍN PAYAGUAJE PIAGUAJE, EMILIO MARTÍN LUSITANDE YAIGUAJE, SIMÓN LUSITANDE YAIGUAJE, ARMANDO WILMER PIAGUAJE PAYAGUAJE, ÁNGEL JUSTINO PIAGUAJE LUCITANDE,

Defendants.

Pursuant to Federal Rule of Appellate Procedure 29(f), counsel for International Law Professors as *Amici Curiae* in Support of Defendants-Appellants and Dissolving the Preliminary Injunction and Dismissing the Action (*amici*) moves that *amici* be granted permission by the Court to file a short, targeted reply brief to address new issues raised by the BRIEF OF BUSINESS ROUNDTABLE AND INTERNATIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE (Alford-Ku Brief) and the BRIEF FOR PLANTIFF-APPELLEE CHEVRON CORPORATION at footnote 9 (Chevron Brief).

Counsel for *amici* has contacted counsels for Chevron and Defendants-Appellants seeking consent to this motion. Chevron does not consent to this motion. Defendants-Appellants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje do consent. Council for *amici* is uncertain about the consent of the remainder of Appellants-Defendants.

GROUNDS FOR THE GRANT OF PERMISSION

Amici international law professors respectfully ask for permission to explain erroneous ways in which their arguments have been mischaracterized and ignored by the Alford-Ku and Chevron Briefs. In particular, *amici* seek to explain:

1. how the Alford-Ku Brief mischaracterizes *amici's* local remedies argument; and

2. why the Chevron Brief and the Alford-Ku Brief ignore the fact that the exercise of equity jurisdiction in this case is futile;

Amici international law professors also respectfully seek to address errors of law contained in the Alford-Ku and Chevron Briefs that have an important bearing on the outcome of the instant appeal. In particular, *amici* international law professors seek to demonstrate:

1. how the Chevron and Alford-Ku Briefs offer inaccurate and inappropriately narrow conceptions of the principle of non-intervention;
2. how the Alford-Ku Brief errs when it claims that the Supreme Court's test of "reasonableness" has no persuasive application as a limit on the exercise of extraterritorial adjudicatory jurisdiction; and
3. why the host of anti-suit injunction cases from around the world cited by the Alford-Ku Brief is irrelevant to the public international law applicable in this case.

Granting this motion will provide the Court with additional insight into the application of public international law in this appeal. Moreover, since *amici* submitted their original Motion for Leave to File their *Amici Curiae* Brief in support of Defendants-Appellants, ten additional eminent

international law professors have joined *amici* and bring additional authority to the reply brief accompanying this motion.

For the foregoing reasons, the Court should grant *amici curiae* international law professors leave to file the accompanying reply brief.

July 14, 2011

Respectfully submitted,

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ADDENDUM

11-1150-cv(L),
11-1264-cv(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHEVRON CORPORATION,

Plaintiff-Appellee,

—against—

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

Defendants-Appellants,

(*complete caption and list of amici inside*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (NEW YORK CITY)

REPLY BRIEF OF INTERNATIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND DISSOLVING THE PRELIMINARY INJUNCTION AND DISMISSING THE ACTION

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Defendants.

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STATEMENT OF INTEREST[1]

International Law Professors as *Amici Curiae* in Support of Defendants-Appellants and dissolving the Preliminary Injunction and Dismissing the Action (*amici curiae* or *amici*) seek the Court's permission to file this reply brief pursuant to Federal Rule of Appellate Procedure 29(f).

Amici curiae adopt their original statement of interest *in toto* and highlight that their additional interest in submitting this reply brief is threefold. First, *amici* have an interest in correcting significant mischaracterizations of their argument by the Brief of Business Roundtable and International Law Scholars as *Amici Curiae* in support of Plaintiff-Appellee (the Alford-Ku Brief). Second, *amici* have an interest in bringing to the Court's attention significant errors of law in relation to the arguments contained in the Alford-Ku Brief and in Plantiff-Appellee's Brief (Chevron Brief). Third, *amici* has an interest in explaining to the Court why the Alford-Ku Brief and the Chevron Brief ignore argument by *amici* that requires dismissal of the case.

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[1] Pursuant to Fed. R. App. P. 29(c)(5) and Local Rule 29.1, *amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person other than *amici* contributed money intended to fund the preparation or submission of the brief.

In advancing these specific interests *amici* seek to advance their underlying fundamental interest in participating in this case -- to provide the Court with insight into the application of public international law in this important and novel appeal. In this connection, *amici* emphasize that their major interest is in providing the Court with responsive information in this short reply brief. *Amici* highlight that ten additional eminent international law professors have joined *amici* and bring additional authority to the reply made.

SUMMARY OF ARGUMENT

First, neither the Chevron Brief nor the Alford-Ku Brief challenge the argument by *amici* that the District Court's exercise of equity jurisdiction in this case is futile and compels dismissal. This is because no answer is possible and reliance is misplaced on inapposite anti-suit injunction jurisprudence.

Second, Chevron's obligation to exhaust remedies in Ecuador (which it has not) applies under international law as a general principle of law recognized by civilized nations. The Alford-Ku Brief mischaracterizes *amici's* argument and its counter-arguments are, thus, entirely off point.

Third, the Alford-Ku Brief offers an inaccurate treatment of the principle of non-intervention. The principle clearly prohibits interventions that are less than threats or use of military force, including extraterritorial judicial intervention.

Fourth, the Alford-Ku Brief incorrectly dismisses the use of the "reasonableness" test for jurisdictional limits announced by the Supreme Court in *Hoffman-La Roche*. It clearly has strong persuasive value in analyzing the limits of extraterritorial adjudicatory jurisdiction over the Ecuadorian defendants.

Fifth, the surfeit of anti-suit injunction cases from around the world cited by the Alford-Ku Brief are irrelevant to the public international law applicable in this case. In those cases the courts had jurisdiction and could enforce their orders. Both elements are missing in this case in connection with the Ecuadorian defendants.

ARGUMENTS[2]

I. THE DISTRICT COURT'S EXERCISE OF EQUITY JURISDICTION IN THIS CASE IS FUTILE

Unsurprisingly, both the Chevron Brief and the Alford-Ku Brief ignore the elephant in the room. Because no response is possible, neither Brief takes issue with or addresses why the futility argument raised by *amici* should not require dissolution of the injunction. (Orig. Br. at 19-23).

The District Court's attempt to exercise jurisdiction over Ecuadorian defendants is futile. They are not present in the United States. They have no interests associated with the United States. They have no assets in the United States. And, they will not in any foreseeable future be present in the United States. It is clear that the Ecuadorian defendants cannot be compelled to obey the District Court's world-wide anti-suit injunction. The District Court's Order is thus unenforceable in any legal or practical way against the defendants.[3]

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[2] Pursuant to Fed. R. App. P. 28(i), *amici* again incorporate the Statement of the Facts in its entirety from the Brief for Ecuadorian defendant-appellants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje.

[3] *See, e.g.*, *Society of Lloyd's v White*, [2004] VCSA 101 (4 June 2004), available at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2004/101.html. (refusing to recognize an anti-suit injunction issued in England against a resident of Victoria, Australia with no interests or assets in England, even though the anti-suit injunction purported to enforce a contractual agreement between the parties assigning exclusive jurisdiction to English Courts).

Moreover, a United States District Court cannot preclude the courts in all other states of the world from making their own independent determinations about recognition and enforceability of the Ecuadorian verdict against Chevron. (Orig. Br. 21-22). Indeed, even Chevron agrees "absent a treaty, no court . . . has an obligation to recognize a foreign judgment." (Chevron Br. 48, n.9).

Thus, the District Court's injunction binds neither the Ecuadorian defendants who might seek to enforce a judgment against Chevron outside of the United States, nor the courts that might hear such a case. In short, the preliminary injunction is superfluous for these defendants. It is well settled that courts will not issue "vain or useless" injunctive relief.[4] A futile order undermines the authority, dignity, and prestige of the court from which it issues. Accordingly, the District Court's preliminary injunction against Ecuadorian defendants must be dissolved.

[4] *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 744 (1971) (Marshall, J., concurring) ("It is a traditional axiom of equity that a court of equity will not do a useless thing"); *Pennington v. Ziman*, 216 N.Y.S.2d 1, 2 (1st Dep't 1961) (equity does not suffer a vain order to be made); *Burke v. Kingsley Books, Inc.*, 167 N.Y.S.2d 615, 619 (N.Y. County 1957) ("That a court of equity will not do a useless or vain thing is an ancient maxim of hornbook learning and general recognition.") (internal quotation and citation omitted); 67A N.Y. Jur. 2d Injunctions § 38 (2005) ("A court will not stultify itself by issuing an injunction which obviously could not, for practical reasons, be enforced or accomplish anything. Even a preliminary injunction will be denied if it would be unenforceable or have no practical effect.").

II. THE OBLIGATION TO EXHAUST LOCAL REMEDIES APPLIES

The Alford-Ku Brief mischaracterizes *amici's* argument on the application of the doctrine of local remedies under international law *as a general principle of law recognized by civilized nations*. As *amici* made clear in their original brief, this claim in no way rests on the customary law of diplomatic protection (Orig. Br. 26). Thus the Alford-Ku Brief, which purports to refute claims made under the law of diplomatic protection, is completely off-point and unresponsive (Alford-Ku Br. 8-10). The rule of exhaustion has clear application in this case because the underlying Ecuadorian litigation is still being appealed by Chevron. (Orig. Br. 25-30).

Moreover, given the history of this case, and Chevron's vociferous insistence that Ecuador, not the United States, was the appropriate forum in which to adjudicate the Ecuadorian defendant's claims, it is rather astonishing that the Alford-Ku Brief characterizes New York as the "natural forum" for deciding anything about the case. (Alford-Ku Br. at 2, 14). Indeed, most of the cases, the Alford-Ku Brief relies on in their anti-suit injunction argument involve injunctions issued in response to refusals to dismiss cases on *forum non conveniens* grounds—the very argument Chevron used to move this case to Ecuador in the first instance.

III. THE DISTRICT COURT'S PRELIMINARY INJUNCTION CONTRAVENES THE PRINCIPLE OF NON-INTERVENTION

Chevron argues that the principle of non-intervention is a norm of public international law and thus does not apply in private international civil litigation. (Chevron Br.48, n.9). This argument is wrong. U.S. Courts have applied and used public international law to help resolve private disputes from their earliest days.[5]

Chevron also argues that there is no intervention "because the District Court did not 'interfere with Ecuador's adjudication of the underlying dispute . . . ." Whether or not the District Court interfered with Ecuador's adjudication of the underlying dispute is beside the point. The relevant analysis is whether the District Court's preliminary injunction interferes with internal and external affairs, which it clearly does.

The District Court's order purports to bar nationals of Ecuador from availing themselves of the courts of all countries (besides Ecuador) in enforcing the judgment. The order seeks to directly interfere in Ecuador's

[5] For a sapient recent account and collection of a host of cases contrary to Chevron's assertion, see DAVID SLOSS, MICHAEL D. RAMSEY, AND WILLIAM DODGE, EDS., INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (2011); David Sloss, *United States*, IN THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (DAVID SLOSS, ED., 2009).

domestic interest in, and its external relations with all other states regarding, the enforcement of a lawful judgment by an Ecuadorian Court. It is this *attempt* that constitutes the violation of the principle of non-intervention. As highlighted below, other unsuccessful *attempts* to project U.S. legal jurisdiction extraterritorially have also been protested as violations of the principle of non-intervention.

The Alford-Ku Brief offers an inaccurate conception of the principle of non-intervention (Alford-Ku Br. 5-8). The major thrust of their argument is that the principle applies only to prohibit the use of "military force or other physically coercive measures . . . ." The extreme narrowness of this position is inaccurate in contemporary international law, although *amici* agree that unlawful intervention has historically contained a forcible element. The formulation of the principle of non-intervention by the International Court of Justice[6] and authorities like Charles Cheney Hyde even in his classic treatment[7] do not impose the limitations for which the Alford-Ku Brief contend.

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[6] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), [1986] ICJ Rep. 14, at 106.

[7] CHARLES CHENEY HYDE, I INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES §69 at 116-118 (1922).

Moreover, international civil litigation under the Sherman Antitrust Act[8] provides, outside the United States, a paradigmatic *example*[9] of a widely-perceived and claimed violation of the principle of non-intervention falling well short of any use or threat of military force. It is well known that many states have long complained about the legality of the extraterritorial assertion of jurisdiction in U.S. antitrust proceedings on the basis of illegal intervention.[10] States protest that U.S. courts violate "the territorial sovereignty of other States . . . by purporting to exercise jurisdiction in respect of persons, matters or conduct outside the United States by reason of some alleged impact on business within the United States."[11] The attempt to intervene through antitrust law in other states has resulted in the enactment of retaliatory blocking legislation as a counter-measure by U.S. trading partners and an out right refusal to recognize and enforce U.S. antitrust judgments.[12]

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[8] See in particular, 15 U.S.C. §§ 1, 2 & 7.

[9] Another *example* is found in more recent international protests about illegal intervention related to the Helm-Burton Act, 22 U.S.C. §§ 6021–6091.

[10] Gary B. Born, International Civil Litigation in United States Court 584-586 (3rd ed., 1996). In recent years protests have become more muted, but the example remains.

[11] AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, ANTITRUST DEVELOPMENTS 1035-36 (4th ed., 1997)(examples of protests by Australia, Canada, the Philippines, South Africa, and the United Kingdom).

[12] *See* D. Senz & Hilary Charlesworth, *Building Blocks: Australia's Response to Foreign Extraterritorial Legislation*, 2 MELB.J.INT'L L. 69 (2001).

IV. THE DISTRICT COURT LACKS JURISDICTION OVER THE ECUADORIAN DEFENDANTS AT INTERNATIONAL LAW

The Alford-Ku Brief is incorrect and unpersuasive in its claim that it is not permissible to examine the Supreme Court's analysis of the "reasonableness" test in connection with the limits of the adjudicatory jurisdiction. It is entirely appropriate to look to *Hoffman-La Roche* and related cases as a guide to the application of "reasonable" limits on jurisdiction reflected in Section 421 of the Restatement. (Orig. Br. 16, n.38). Both deploy a similar reasonableness standard. Both address a form of extraterritorial jurisdiction. The desirability of this sort of cross-fertilization is confirmed by the Restatement itself, which explicitly cross-references standards for gauging the validity of the exercise of adjudicatory jurisdiction (Section 421) and the recognition and enforcement of foreign judgments and awards (Sections 481-488)(Orig. Br. 17, n.42).

Whatever may be said about other defendants in this case, it is certain that the defendants who comprise indigenous Ecuadorians and remote Ecuadorian farmers have had no internationally legally significant contact with the United States and it is entirely unreasonable for the District Court to assume jurisdiction over these defendants in this case. (Orig. Br. 17-19).

V. ANTI-SUIT INJUNCTIONS IN JURISDICTIONS OTHER THAN THE UNITED STATES HAVE NO BEARING ON THE APPLICABLE PUBLIC INTERNATIONAL LAW

The Alford-Ku Brief spends roughly half of its substantive space on the use of anti-suit injunctions in various states and legal systems around the world. (Alford-Ku Br. 15-29). This analysis, however, is irrelevant to the public international law applicable in this case. All of the authorities relied on in Alford-Ku Brief assume: i) that the court issuing the injunction has jurisdiction over the target of the injunction, and ii) that because it has jurisdiction the injunction can be enforced through contempt or other proceedings in the forum issuing the injunction. These assumptions clearly do not pertain in any way in the instant case. Here, the Ecuadorian defendants are not present in the United States and have not submitted to its jurisdiction. Moreover, as demonstrated, international legal limits preclude the District Court from exercising jurisdiction over these defendants. Finally, unlike the examples given in the Alford-Ku Brief, the preliminary injunction in this case cannot be enforced against the Ecuadorian defendants in reality or require the courts of other countries not to recognize or enforce the underlying judgment against Chevron.

For the foregoing reasons, the Court should order the dissolution of the District Court's preliminary injunction and the dismissal of the underlying action.

July 14, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for *amici curiae* International Law Professors and Scholars certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,357 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

DATED: July 14, 2011

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Counsel of Record and
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CERTIFICATE OF SERVICE

When All Case Participants Are Registered for the Appellate CM/ECF System

I hereby certify that on this 14th day of July, 2011, a true and correct copy of the foregoing REPLY BRIEF OF INTERNATIONAL LAW PROFESSORS AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND DISSOLVING THE PRELIMINARY INJUNCTION was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

DATED: July 14, 2011

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