No. 21-1153

In the Supreme Court of the United States

WALEED KHALID ABU AL-WALEED AL HOOD AL-QARQANI; AHMED KHALID ABU AL-WALEED AL HOOD AL-QARQANI; SHAHA KHALID ABU AL-WALEED AL HOOD AL-QARQANI; NAOUM AL-DOHA KHALID ABU AL-WALEED AL HOOD AL-QARQANI; AND NISREEN MUSTAFA JAWAD ZIKRI,

Petitioners,

v.

CHEVRON CORPORATION (*INCLUDING ALL PREDECESSORS AND RELATED ENTITIES*), A DELAWARE CORPORATION WITH ITS HEADQUARTERS IN SAN RAMON, CALIFORNIA AND CHEVRON U.S.A., A PENNSYLVANIA CORPORATION WITH ITS HEADQUARTERS IN SAN RAMON, CALIFORNIA,

Respondents.

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

REPLY BRIEF OF PETITIONERS TO CHEVRON'S OPPOSITION BRIEF

EDWARD C. CHUNG
COUNSEL OF RECORD
CHUNG, MALHAS & MANTEL, PLLC
1037 NE 65TH STREET, SUITE 80171
SEATTLE, WA 98115
(206) 264-8999
ECHUNG@CMMLAWFIRM.COM

MAY 31, 2022 *COUNSEL FOR PETITIONERS*

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INTRODUCTION

The grounds for granting Petitioners' Writ of Certiorari are both compelling and straightforward. First, United States' courts that preside over the Treaty on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") have both a judicial and constitutional duty to recognize and comply with the express terms of an international treaty that the U.S. is a signatory member of. Second, the legal framework of our judicial branch mandates that U.S. circuit and district courts apply the doctrine of *stare decisis* and do not ignore and effectively create conflict with U.S. Supreme Court precedent or resurrect new circuit conflict of resolved legal issues. Third, it is of paramount importance that our Article III courts maintain judicial impartiality and public confidence following a 28 U.S.C. § 455 denial of a motion for judicial disqualification. No court may be deemed honorable if it dishonorably fails to recognize its own prejudices and deprives a party due process under the law. The Ninth Circuit has failed to abide by these judicial tenets and for these reasons, Petitioners have respectfully called upon this Court to exercise its "supervisory power" to grant certiorari under U.S. Supreme Court Rule 10(a) and 10(d).

ARGUMENT

I. EXPOSING THE ART OF DECEPTION AND FOCUSING ON THE COMPELLING LEGAL GROUNDS FOR GRANTING PETITIONERS' WRIT OF CERTIORARI.

The legal issues that Petitioners seek certiorari on *are purely legal questions of law, not factual*. While the blueprint of Chevron's Opposition Brief is to shift the spotlight from its own perpetration of fraud and intransigence upon U.S. courts by discrediting the merits of Petitioners' case through the art of deception, none of these factual assertions are relevant nor even competent grounds for denying Petitioners' writ of certiorari. Why? Because neither the circuit court's merits decision nor the district court's subject matter jurisdictional dismissal rely on these factual assertions of fraud as a basis for their ruling. Regrettably for Chevron, the constant banging of the drum of purported fraud as factual arguments for denying certiorari have been "forfeited" as the record on appeal clearly shows that, once again, Chevron failed to timely file a FRCP 52 (b) motion to amend the district court findings, failed to file a FRAP 4(a)(3) cross appeal, or a U.S. Supreme Court cross-petition for certiorari in accord with U.S. Supreme Court Rule 12.

Perhaps the reason for Chevron's procedural lapse in time management for preserving its fabricated claims of fraud on appeal is that Petitioners have verifiably exposed this fraud on the court record. While Chevron's opposition brief tap dances around the legal spotlight of its own intransigence by citing to supplemental excerpts of paid experts, it neglects to address:

(1) Article V of the Convention does not recognize fraud as defense; (2) On July 4, 2021 Chevron's attempt to vacate the arbitral award based on purported fraud was denied in the arbitral seat as untimely and *res judicata* [COA-ECF-75-1 at 11]; (3) On May 30, 2017 Chevron's civil and criminal complaints against the arbitrators and Petitioners were dismissed by an Egyptian Court and Chevron sanctioned [COA-ECF-46-9][1]; (4) On May 31, 2017 Egyptian Public Prosecutors voluntarily dismissed the criminal complaint it alleged against arbitrators and Petitioners findings "no probable cause" and that the arbitrators were acting within their authority [COA-ECF-46-10 at 25]; (5) The only deed of ownership in the record, reveals Petitioners as owners; (6) Only one "panel" award [COA-ER-0208]; (7) There is no Saudi Court Order of a purported Saudi Court proceedings; and finally; (8) Article 32 of the Concession prohibited Chevron from assigning its liability to any successor [COA-ECF-75-1 at 8].

As is evident from the record on appeal, Chevron repeatedly parrots those infamously charged words, "sham award" for the disingenuous purposes of directing the court's attention away from an adverse published decision worthy of certiorari and the blackletter law that it conflicts with. Chevron's counsel's apparent *modus operandi* is smoke and mirrors and it does this in this case by planting the seed of doubt as to the validity of the arbitral award it failed to timely vacate,

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[1] On August 8, 2018, within 3 days of Chevron's Response to Petitioners' Petition for Enforcement, an internal Egyptian Prosecutor Memo reveals that the Saudi Embassy, a client of Gibson Dunn, requested the re-prosecution of arbitrators on behalf of Chevron despite their case was previously dismissed for lack of probable cause and time barred [COA ECF 46-13].

questioning the propriety of the arbitration panel that ruled against it, and maintaining procedural irregularities in the underlying arbitral proceedings that Petitioners exposed was caused by Chevron's own unclean hands.

While the Latin and biblical phrase, *vēritās vōs līberābit* means the truth shall set you free, in the case at bar it is the law, not the facts, that provides compelling grounds for granting certiorari. As such neither this Court nor any of its Justices must choose sides in any finger pointing between the parties as Chevron's allegations that this is a "sham award", although verifiably untrue, is both *factually and legally irrelevant*.

The first step in the right direction is to focus on the letter of the law. Here, Chevron openly admits that it failed to timely file a motion to vacate the foreign arbitral award within the arbitral seat. Vis-à-vis, this *procedurally* makes the foreign arbitral award both here and abroad *res judicata*. Moreover, because Chevron failed to timely vacate the award in the arbitral seat, it automatically triggers Article III of the Convention, which in turn, mandates that all member nations and their respective confirming courts treat a foreign arbitral award on equal footing as domestic arbitral awards. *Ergo*, upon Petitioners filing for confirmation of the award in the U.S. district court for the Northern District of California, the district court had the duty to treat Petitioners' foreign arbitral award in the same manner as it treats domestic arbitral award that have not been timely vacated.

In the U.S. District Court for the Northern District of California, the controlling authority on this issue is, *Carpenters 46 v. Meddles*, 535 F.Supp.775 (N.D. Cal. 1981). In *Carpenter*, the district court held

that an award-debtor is prohibited from asserting Article V defenses at the confirmation stage if it fails to timely challenge an arbitral award. The Ninth Circuit adopted this holding and published its own precedent in *Brotherhood of Teamsters v. Celotex Corp.*, 708 F.2d 488 (9th Cir.1983). In *Celotex,* the Ninth Circuit reaffirmed that, "a party's failure to petition to vacate an unfavorable award within the applicable statutory period bars the party from asserting affirmative defenses in a subsequent proceeding to confirm the award." It goes on to state that the failure of a party to previously move to set aside an arbitral award *precludes an appellate court considering the merits*. Concerningly, both the circuit and district courts ignore Article III of the Convention, as well as their own legal precedent and that of other circuits courts.[2]

II. NEITHER THE RECORD ON APPEAL NOR CONTROLLING CASE LAW SUPPORTS CHEVRON'S ARGUMENT THAT PETITIONERS' GROUNDS FOR GRANTING CERTIORARI WAS FORFEITED.

Much of the factual and legal excrement that Chevron plants as red herring arguments in its opposition brief is perversely counterintuitive to denying certiorari and in fact provides fertile grounds for compelling our highest court to be more fully informed. That being said, before highlighting these compelling grounds, Petitioners are tasked with first addressing Chevron's

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[2] *See*, *Service Employees International Union v. Office Center Services, Inc.*, 670 F.2d 404 (3rd Cir.1982); *Chauffeurs, Teamsters v. Jefferson Trucking Co.*, 628 F.2d 1023 (7th Cir.1980), *cert. denied*, 449 U.S. 1125 (1981); *Tokura Construction Co. v. Corporacion Raymond, S.A.*, 533 F.Supp. 1274 (S.D.Tex.1982).

assertions that the legal issues that Petitioners seek certiorari on have not been forfeited.

While Chevron's opposition brief offers to provide this Court, "an accurate recitation of the relevant legal background and facts as shown by the record and findings" it tiptoes around the procedural history of this case. Understandably, as the genesis of this appeal stems from a district court's subject matter jurisdiction dismissal of Petitioners' Petition for Recognition of a Foreign Arbitral Award; a violation of 9 U.S.C. § 203. The underlying appellate briefing provided arguments as to why the district court's subject matter jurisdictional dismissal was erroneous and how hypothetical findings may not be considered on appeal. *See*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). The Ninth Circuit decision relabeled the dismissal as a denial on the merits, adopted hypothetical findings, and without taking supplemental appellate briefing, provided alternative legal grounds for denying Petitioners' case on the merits.

Contrary to what Chevron represents in its opposition brief, Petitioners, both prior to [COA-ECF# 70] and following the August 21, 2021 decision [COA-ECF# 75] addressed Article III and the Separability Doctrine with the circuit court. Petitioners addressed Article III and *res judicata* applicability on the court record at COA-ER-0212, COA-ER-0214, COA-ER-0224, COA-ER-0226, COA-ER-0311, COA-ER-0316. Issues related to the validity of the agreement to arbitrate under the Separability Doctrine are contained at COA-ER-0315 and COA-ER-0317 and Third-Party Beneficiaries at COA-ER-0310-0311.

Even if this court were to accept Chevron's position that Petitioners did not raise the foregoing arguments in the lower court, this Court has held in *Singleton v. Wulff*, 428 U.S. 106 (1976); that there is "no general rule" on whether an appellate court should consider an issue raised first on appeal. One exception when a legal issue may be heard for the first time on appeal is if there has been a change in law during the appeal. *See*, *Patterson v. Alabama*, 294 U.S. 600, 607 (1935). Here, on June 8, 2020, during the pendency of this appeal, this Court ruled on *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 590 U.S.___, (2020) and in 2021, *Setty v. Shrinivas Sugandhalaya* LLP. Both cases overruled the district court's application of the Ninth Circuit Court's precedent in *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir.2017).

Because there is a change in law on appeal that raises new arguments as opposed to new claims, this Court has also held that it may consider new legal arguments for the first time on appeal in *Kamen v. Kemper Financial Services*, 500 U.S. 90 (1991). Moreover, because the decision amounts to plain error, this too allows consideration for the first time on appeal. *See*, *Wiborg v. United States*, 163 U.S. 632 (1896). Finally, and most importantly in this case is that there are no finding of facts in this case. *Hypothetical findings* following the district court's subject matter jurisdiction dismissal, as briefed by Petitioners, is impermissible on appeal. Ergo, there are only *purely legal issues* brought before this Court on certiorari. New issues that constitute purely legal questions may be brought before this court at any time. *See*, *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416 (D.C.

Cir.1992); *Fehlhaber v. Fehlhaber*, 681 F.2d 1015 (5th Cir.1982); *See also*, *United States v. Flores-Payon*, 942 F.2d 556 (9th Cir.1991). Finally, because this Convention relates to constitutional limitations and deals with matters of "constitutional magnitude" this court may also consider this case for certiorari under *Nelson v. Adams*, 529 U.S. 460 (2000).

In consideration of the foregoing, Chevron's grounds for denying certiorari premised on forfeiture may be disregarded and disposed of along with the factual excrement it slings within its opposition brief.

III. PURSUANT TO U.S. SUPREME COURT RULE 10, THE AUGUST 21, 2021 PUBLISHED DECISION THAT NEITHER THE NEW YORK CONVENTION NOR THE FAA CONTAIN ANY IMPLEMENTING LANGUAGE FOR TREATING FOREIGN ARBITRAL AWARDS THE SAME AS DOMESTIC ARBITRAL AWARDS IS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS UNDER THE CONVENTION THAT CERTIORARI MUST BE GRANTED.

Chevron's Opposition Brief is silent on the obvious, which is, the Ninth Circuit Court of Appeals' *published* opinion in *Al-Qarqani v. Chevron Corp.*, 8 F.4th 1018 (9th Cir.2021) is so far departed from the accepted and usual course of judicial proceedings under the Convention that certiorari must be granted pursuant to Rule 10 (a). The decision that neither the New York Convention, as implemented into the Federal Arbitration Act ("FAA"), 9 U.S.C. § 201, nor the FAA contain *any* implementing rule for treating foreign arbitral awards the same as domestic arbitral awards is not only erroneous legal precedent, but also reckless and embarrassing on both a national and international scale.

Article III of the Convention clearly mandates that confirming courts shall recognize foreign arbitral awards as, "binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon". Article III of the Convention also provides that confirming courts shall not impose substantially more "onerous conditions" on foreign arbitral awards than are imposed on the confirmation of "domestic arbitral awards." Absent a surgical extraction of the black letter law, there is no rhyme or reason to allow such published authority to remain precedent.

IV. PURSUANT TO U.S. SUPREME COURT RULE 10, THE JUDICIAL PANEL'S AUGUST 21, 2021 PUBLISHED DECISION THAT PETITIONERS AS NON-SIGNATORIES DID NOT HAVE A "VALID" AGREEMENT TO ARBITRATE UNDER THE NEW YORK CONVENTION CONFLICTS WITH U.S. SUPREME COURT PRECEDENT AND WARRANTS THE GRANTING OF PETITIONER'S WRIT OF CERTIORARI.

The Ninth Circuit dives further into the rabbit hole when it states, "the heirs could not enforce the 1933 concession agreement against Chevron directly because the agreement was *signed by Saudi Arabia, not the heirs*". Aside from the fact that there is a photograph of the heirs' ancestor signing this historic agreement [COA-ER-0431], the holding that non-signatories lacked standing to invoke arbitration conflicts with *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009), *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 590 U.S. ___, (2020) *Setty v. Shrinivas Sugandhalaya LLP*, 2021 WL 2817005 [an order vacating the Ninth Circuit ruling

that non-signatories could not equitably estop arbitration].

Moreover, the Ninth Circuit's appellate relabeling of the district court's *subject matter jurisdictional dismissal* to a *merits decision dismissal*, based upon hypothetical findings of fact and new alternative legal grounds that were not the basis for either Petitioners nor Chevron's initial briefings, disregards that neither Petitioners nor Chevron contest the "*validity*" or existence of an agreement to arbitrate. As such, this published precedent, conflicts with the separability doctrine this Court articulated in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)), *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 299 (2010), and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

V. CIRCUIT COURT JUDGE ERIC D. MILLER'S JUDICIAL MISCONDUCT AND LACK OF IMPARTIALITY BOTH DURING AND FOLLOWING THE ISSUANCE OF A MANDATE CALLS FOR THIS COURT TO INVOKE ITS SUPERVISORY AUTHORITY UNDER U.S. SUPREME COURT RULE 10(A).

Ten months prior to the judicial panel's August 21, 2021 merits decision, Petitioners filed a 28 U.S.C. § 455 motion to disqualify Judge Miller from presiding over this appeal [COA-ECF 54] on the grounds that: (1) Chevron's counsel, Thomas Hungar, was his admitted friend and former supervisor; (2) Chevron, USA, Inc. was Judge Miller's former client, (3) Judge Miller co-counseled with Chevron's counsel Gibson Dunn. Petitioners also recently learned that during this appeal, Judge Miller's law clerk, Matthew C. Reagan, was offered a paid associate position with Chevron's counsel. This was never disclosed to Petitioners' counsel.

Under § 455, a U.S. judge presiding over an appellate proceeding "shall disqualify himself" in a matter when his "impartiality *might* reasonably be questioned." Judge Miller denied recusal stating a "friendly relationship" with counsel is not a sufficient reason for recusal; Petitioners' disagree as the record reveals a clear violation of Canon B of the Code governing federal judges.

It became evident Judge Miller's impartiality was compromised upon his denial of Petitioners' Motion to Strike Falsified Evidence as "moot". Petitioners had attached 15 exhibits to their motion that exposed Judge Miller's friend and former client of possible witness tampering, threatening of award-creditors and concocting a fabricated Egyptian Prosecutor Report. Upon verifying the report with a translation service and sending it to three Arabic linguist, what Chevron's counsels filed with the court was wholly fabricated. *See* Reply.App.1a. An excerpt of Chevron's 106-page falsified Egyptian Prosecutor Report is attached hereto as Reply.App.2a.

Instead of addressing this intransigence, Judge Miller, issued a *sua sponte* Order to Show Cause why the court should not sanction Petitioners' counsel for filing a FRAP 27-1 motion that sought *permission* to file a supplemental demonstrative exhibit that Petitioners stated was *strictly* for demonstrative purposes. To date, Petitioners' counsel has not been informed of what specific rule he has violated for filing a motion that permits *any attorney* practicing before the Ninth Circuit to attach "*any paper*" to a FRAP 27-1 motion.

On November 29, 2022, the Ninth Circuit issued a mandate that effectively deprived itself of jurisdiction. To date, no mandate has been recalled. Nevertheless, Petitioners' counsel was ordered to appear on March

11, 2022 to appear at post-mandate sanctions hearing before a Special Master. Despite numerous requests for the revealing audio and video recording of these hearing, Petitioners' counsel has been denied access. That aside, the court invited Chevron's counsel to represent the court's *sua sponte* sanctions. Petitioners' counsel filed a motion to stay the Special Master proceedings because: (1) There been no recall of the mandate; (2) Supreme Court and Ninth Circuit Court authority limit appellate sanctions to FRAP 38; (3) Petitioners' counsel has not been informed of the specific rule he violated pursuant to FRAP 47(b); (4) He has been denied video and audio recordings of hearings.

Without reason, his motion was "DENIED", and his brief and witness list stricken for the scheduled hearing that identify Chevron and Judge Miller as witnesses. It is Petitioners' position that the actions taken against Petitioners' counsel for following the rules of procedure to "T" are retaliatory for whistle blowing on attorney and judicial misconduct. Certiorari should be granted under Rule 10 where this Court invokes its supervisory authority.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD C. CHUNG
COUNSEL OF RECORD
CHUNG, MALHAS & MANTEL, PLLC
1037 NE 65TH STREET, SUITE 80171
SEATTLE, WA 98115
(206) 264-8999
ECHUNG@CMMLAWFIRM.COM

COUNSEL FOR PETITIONERS

MAY 31, 2022

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REPLY APPENDIX I
ARABIC TRANSLATION SERVICE REPORT CONDUCTED BY A COURT CERTIFIED TRANSLATOR AND 3 ARABIC LINGUISTS CONFIRM CHEVRON'S COUNSELS EVIDENTIARY OFFERING OF PURPORTED ARABIC EGYPTIAN PROSECUTOR REPORT COULD NOT BE POSSIBLY TRANSLATED (DECEMBER 27, 2018)

ARABIC LANGUAGE SERVICE
Interpretation & Translation

Dear Dr. Malhas,

I am writing to notify you that I, and 3 of my other linguists have reviewed the attached document. We have all reached the same conclusion that this document is illegible and not possible to translate, hence; I would not feel comfortable to certify.

I am sorry for any inconvenience.

Ayad Kholaifat

12/27/2018

REPLY APPENDIX II
EXCERPT OF CHEVRON'S 106 PAGE FABRICATED EGYPTIAN PROSECUTOR REPORT CHEVRON'S COUNSELS FILED WITH THE U.S. DISTRICT COURT AND CONTAINED IN THE EVIDENTIARY RECORD ON APPEAL

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