No. 16-1178

In the Supreme Court of the United States

STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, DONZIGER & ASSOCIATES, PLLC, and HUGO GERARDO CAMACHO NARANJO,
Petitioners,

v.

CHEVRON CORPORATION,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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This case presents two questions of exceptional importance. The first is whether a federal court has jurisdiction to entertain a preemptive collateral attack on a foreign country's money judgment—in the absence of any enforcement attempt in this country (and any collection of the judgment anywhere). The second is whether RICO authorizes courts to issue equitable relief to private parties. Both questions are certworthy, and nothing Chevron says undercuts the need for this Court's review.

1. On the first question, Chevron does not deny that, before this case, no U.S. appellate court had ever found jurisdiction to allow a preemptive collateral attack on a foreign money judgment. Nor does Chevron deny that, were a court to permit such an attack—for the first time in American history—it would dismantle the settled international enforcement framework, damage foreign relations, and demand not just review but reversal.

Instead, Chevron contends (at 17) that this case does not actually "involve any 'preemptive collateral attack' on a foreign judgment." But that is plainly wrong. The common-law claim—added by the district court after trial as an alternative basis for relief—is *called* a claim for "relief from a judgment." Pet. App. 125a; *see id.* at 500a-23a (using this nomenclature over a dozen times). So "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). And it acts like one too: All the relief that the court granted (and Chevron requested) concerns the judgment. The injunction blocks a hypothetical future U.S. enforcement attempt, while the constructive trust will redress an injury only if the judgment is both (a) upheld by the Constitutional Tribunal of Ecuador and (b) later enforced by a court in a different country. That the relief does not go further and purport to nullify the judgment, or block its

enforcement in other countries, does not somehow make this case something other than a collateral attack.

The First Circuit's decision in *Harrison v. Triplex Gold Mines* recognizes as much. After holding that U.S. courts lack "jurisdiction" to "declare null and void" foreign money judgments, the court held that the same is true for a collateral attack brought as an *in personam* proceeding, for that "is only another way of attempting to reach the same result." 33 F.2d 667, 672 (1st Cir. 1929). By arguing to the contrary—in an effort to avoid acknowledging the unprecedented nature of the Second Circuit's opinion—Chevron only points up the degree of divergence between the circuits.

Chevron also tries to distinguish *Harrison* on its facts, claiming (at 23) that the fraud allegations there "had 'been presented to' the Canadian courts, the judgment debtor there had 'a full and fair opportunity' to 'present every defense to the action,' and those defenses were 'contested and denied' by the Canadian courts." But *Harrison* did not turn on any of those facts. And Chevron is *currently* pressing its fraud allegations in the Constitutional Tribunal of Ecuador, and until recently had available to it the procedural path provided by Ecuadorian law: an action under the Collusion Prosecution Act. Chevron should not be rewarded for refusing to take it. *See* Republic of Ecuador (ROE) Br. 6-7, 14.

Unable to meaningfully distinguish *Harrison*, Chevron tries (at 22) to denigrate it based on its vintage and the fact that the First Circuit has had no occasion to cite the case since deciding it. But that's only because no one has brought another case like it—which says more about the novelty of Chevron's position than the continuing viability of *Harrison*.

Chevron's attempt to distinguish the Seventh Circuit's decision in *Basic v. Fitzroy Engineering* is equally

unpersuasive. Chevron emphasizes (at 23) that the plaintiff there sought broader relief than Chevron did here. Yet the Seventh Circuit still found that it lacked jurisdiction because it was being asked to issue an "advisory opinion[]"—not to redress an injury. 949 F. Supp. 1333, 1338 (N.D. Ill. 1996), *aff'd*, 132 F.3d 36 (7th Cir. 1997). Chevron's decision to request narrower relief (which is even less likely to redress an injury) does not distinguish the two cases; it just underscores their irreconcilability.

And it shows why Chevron cannot demonstrate that its relief will likely redress an actual injury, as necessary for Article III standing. As for the injunction against hypothetical U.S. enforcement actions, Chevron says (at 21) that this will redress a threatened "future injury"—without making any effort "to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013). As for the constructive trust, this will redress an injury only if petitioners are able to successfully collect on the judgment, which requires Chevron to lose before two different foreign courts (one in Ecuador, and one elsewhere). Chevron does not even *assert* that this is likely to occur. And "[i]t is just not possible for a litigant to prove in advance that the judicial system"—much less multiple foreign judicial systems—"will lead to any particular result in [a given] case." *Id.* at 1150. Aware of this, Chevron tries to lower the bar, contending (at 22) that the constructive trust "reduces the risk" of future harm. But this attenuated risk-reduction theory is not substantiated by anything in the record, and finds no support in this Court's cases.

Nor does Chevron identify any purpose that would be served by interpreting Article III to permit preemptive collateral attacks on foreign money judgments. And while nothing "is to be gained" by allowing "such an advisory opinion," it is clear what is to be lost. *Chevron v.*

Naranjo, 667 F.3d 232, 246 (2d Cir. 2012). By gratuitously "disrespecting the legal system not only of [Ecuador], but also those of other countries"—"who are inherently assumed insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which the judgment emanates," *id.* at 244—the decision below "risks prompting retaliation and harming the United States' foreign relations," ROE Br. 12. This Court should grant certiorari to prevent that result.[1]

2. On the second question, Chevron concedes that there is a circuit split. It claims, however, that the split "does not warrant resolution," BIO 3, and that this case is a bad vehicle. Chevron is wrong on both points.

The split is worthy of resolution. This Court granted certiorari the only other time a court of appeals answered the question as the Second Circuit did (and reversed on other grounds). Nothing has happened that would make the issue less certworthy today. Although Chevron tries to portray the Ninth Circuit's decision in

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[1] Chevron asserts (at 1) that "Petitioners did not dispute the district court's factual findings." That is incorrect. The fact that petitioners chose to focus their appeal on the many glaring legal defects of Chevron's case—rather than undertake the Sisyphean task of disproving hundreds of pages of findings under the clear-error standard—does not mean that those findings are "unchallenged." BIO 20. To the contrary, petitioners have repeatedly made clear, every step along the way, that they vigorously challenge the findings, and continue to challenge them in the enforcement proceedings. And subsequent events have only further undermined the credibility of Chevron's fraud allegations. *See* Amazon Watch Br. 17-20. If Chevron were confident in the truth of those allegations, it should not have felt the need to bring this case. The "far better remedy"—and the one that is consistent with our Constitution—is for Chevron to raise its allegations in defense against an enforcement action, as it will have to do anyway. *Naranjo*, 667 F.3d at 246.

Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986), as some kind of outlier, its own law firm told the Second Circuit in 2013 (in separate litigation, illustrating the recurring nature of the issue) that the "weight of authority confirms that RICO does not authorize injunctive relief in private lawsuits." *See* Appellants Br. at 49 & n.8, *Sykes v. Harris & Assocs.*, 780 F.3d 70 (2d Cir. 2015) (No. 13-2742), 2013 WL 5502487. This "weight of authority" includes not only the Ninth Circuit's decision, but most district-court decisions, strongly worded dicta from "[a]t least two other courts of appeals," and the considered position of the Solicitor General. *Id.* at 50. There is simply no reason to think that the "disagreement will resolve itself." BIO 29.

Nor is there any problem with this case as a vehicle. The issue is purely legal, and (aside from the jurisdictional question) is cleanly teed up here. Although the district court grounded the relief in the common law as well as RICO, there can be no dispute that the issue is of considerable ongoing importance to the parties in this litigation. In fact, Chevron has taken the position, in its motion for attorney's fees under RICO, that *$32 million* hinges on the answer to the question. *See* Dist. Ct. Dkt. 1889-90 (arguing that fees are mandatory under RICO). That question is also of considerable importance to the litigation system as a whole, given the quasi-criminal nature of RICO and the risks posed by placing prosecutorial-like powers in private hands—risks that are all the more concerning when divorced from a claim for damages (and thus an assurance that a jury will determine culpability). As it did before, this Court should again grant certiorari to resolve this important question.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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