No. 14-826(L)

No. 14-832(CON)

In the United States Court of Appeals for the Second Circuit

CHEVRON CORPORATION,
Plaintiff-Appellee,

v.

HUGO GERARDO CAMACHO NARANJO, JAVIER PIAGUAJE PAYAGUAJE, STEVEN DONZIGER, THE LAW OFFICES OF SEVEN R. DONZIGER, DONZIGER & ASSOCIATES, PLLC,
Defendants-Appellants,
(caption continues on inside cover)

On Appeal from the United States District Court
for the Southern District of New York (The Honorable Lewis A. Kaplan)

DEFENDANTS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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September 16, 2016

STRATUS CONSULTING, INC., DOUGLAS BELTMAN, ANN MAEST,

Defendants-Counter-Claimants,

PABLO FAJARDO MENDOZA, LUIS YANZA, FRENTE DE DEFENSA DE LA AMAZONIA, AKA AMAZON DEFENSE FRONT, SELVA VIVA SELVIVA CIA, LTDA, MARIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRA AGUIN AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, CELIA IRENE VIVEROS CUSANGUA, FRANCISCO MATIAS ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, LORENZO JOSE ALVARADO YUMBO, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUI GREFA, FRANCISO VICTOR TRANGUIL GREFA, ROSA TERESA CHIMBO TANGUILA, JOSE GABRIEL REVELO LLORE, MARIA CLELIA REASCOS REVELO, MARIA MAGDALENA RODRI BARCENES, JOSE MIGUEL IPIALES CHICAIZA, HELEODORO PATARON GUARACA, LUISA DELIA TANGUILA NARVAEZ, LOURDES BEATRIZ CHIMBO TANGUIL, MARIA HORTENCIA VIVER CUSANGUA, SEGUNDO ANGEL AMANTA MILAN, OCTAVIO ISMAEL CORDOVA HUANCA, ELIA ROBERTO PIYAHUA PAYAHUAJE, DANIEL CARLOS LUSITAND YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, GUILLERMO VICENTE PAYAGUA LUSITANTE, DELFIN LEONIDAS PAYAGU PAYAGUAJE, ALFREDO DONALDO PAYAGUA PAYAGUAJE, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJ PAYAGUAJE, FERMIN PIAGUAJE PAYAGUAJE, REINALDO LUSITANDE YAIGUAJE, LUIS AGUSTIN PAYAGUA PIAGUAJE, EMILIO MARTIN LUSITAND YAIGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILFRIDO PIAGUA PAYAGUAJE, ANGEL JUSTINO PIAGUAG LUCITANT, KEMPERI BAIHUA HUANI, AHUA BAIHUA CAIGA, PENTIBO BAIHUA MIIPO, DABOTA TEGA HUANI, AHUAME HUANI BAIHUA, APARA QUEMPERI YATE, BAI BAIHUA MIIPO, BEBANCA TEGA HUANI, COMITA HUANI YATE, COPE TEGA HUANI, EHUENGUINTO TEGA, GAWARE TEGA HUANI, MARTIN BAIHUA MIIPO, MENCAY BAIHUA TEGA, MENEMO HUANI BAIHUA, MIIPO YATEHUE KEMPERI, MINIHUA HUANI YATE, NAMA BAIHUA HUANI, NAMO HUANI YATE, OMARI APICA HUANI, OMENE BAIHUA HUANI, YEHUA TEGA HUANI, WAGUI COBA HUANI, WEICA APICA HUANI, TEPAA QUIMONTARI WAIWA, NENQUIMO VENANCIO NIHUA, COMPA GUIQUITA, CONTA NENQUIMO QUIMONTARI, DANIEL EHUENGEI, NANTOQUI NENQUIMO, OKATA QUIPA NIHUA, CAI BAIHUA QUEMPERI, OMAYIHUE BAIHUA, TAPARE AHUA YETE, TEWEYENE LUCIANA NAM TEGA, ABAMO OMENE, ONENCA ENOMENGA, PEGO ENOMENGA, WANE IMA, WINA ENOMENGA, CAHUIYA OMACA, MIMA YETI,

Defendants,

ANDREW WOODS, LAURA J. GARR, H5,

Respondents

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INTRODUCTION

The panel's opinion marks the first time in history that a U.S. court has allowed a party that lost a money judgment in a foreign country to preemptively attack that judgment here. In authorizing that new cause of action under RICO and the common law—opening this Court's doors to disgruntled litigants from every corner on earth—the panel: (a) created multiple circuit splits; (b) contravened a prior panel's opinion in this very litigation; (c) disagreed with a foreign sovereign's supreme court as to *its own law*; and (d) put the courts of a second foreign sovereign (Canada) in the unenviable position of having to choose between competing foreign judgments.

Along the way, the panel endorsed a proceeding that included an eleventh-hour waiver of billions of dollars in damages to avoid a jury, and an extraordinary *post-trial* addition of a new claim dreamt up by the district judge. Worse, the panel opinion condones (and thus invites) eye-popping payments for the testimony of the key fact witness at trial—a man who radically and repeatedly changed his story to match emerging facts, admitted to making offers to "fix" the case for Chevron, and in later testimony (in an ongoing arbitration) admitted that he had lied on the stand at trial.

The panel's lawless opinion can only be explained by its mistaken belief that appellant Steven Donziger has not challenged the facts, bringing to mind the adage that bad facts make bad law. But facts are not the same as fact *findings*. The district court erected a fortress of hundreds of pages of alternative findings and drive-by credibility determinations, many embedded in one of nearly 2,000 footnotes, so that

they could not be challenged on appeal. But make no mistake: Mr. Donziger has consistently, vigorously denied the allegations against him—including the outrageous, shifting tale of bribery and ghostwriting by the star witness made rich by Chevron.

Of necessity, Mr. Donziger has focused his appeal on the glaring legal defects in Chevron's case (which turn on *no* findings), and respectfully asks this Court to set the law right. If the panel opinion is allowed to stand, well-heeled litigants will have a template for attacking judgments holding them accountable for wrongdoing abroad. Rehearing is warranted to ensure that this Circuit does not become a magnet for such litigation, forcing it to sit as transnational arbiter of the world's judicial systems.

BACKGROUND

A. During the 1970s and 80s, Chevron (formerly Texaco) drilled for oil in a huge swath of the Ecuadorian rainforest. It dug hundreds of unlined waste pits into the jungle floor and filled them with billions of gallons of toxic waste, against industry practice. In 1993, just after the company fled Ecuador, the affected communities sued Chevron in New York. For the next nine years, Chevron fought vigorously to have the case dismissed on *forum non conveniens* grounds, praising Ecuador's judiciary. It eventually succeeded, but only after this Court required that it submit to jurisdiction in Ecuador. Chevron also agreed that "the sole reserved route" for any "challenge" to a "final judgment" was "New York's Recognition of Foreign Country Money Judgments Act." *Republic of Ecuador v. Chevron*, 638 F.3d 384, 389, 399 (2d Cir. 2011).

After the plaintiffs refiled suit in Ecuador, Chevron immediately challenged

jurisdiction and began a sustained campaign to delay or corrupt the proceedings by manipulating testing sites, falsifying military reports to forestall inspection of the pits, clogging the courts with reams of repetitive filings, and forcing the recusal of judges who were either unable to keep up with Chevron's document dumps or were falsely accused by Chevron of accepting bribes. *See* Donziger Br. 11–19. One false bribery story backfired so spectacularly that—after secret recordings implicating Chevron in misconduct—the company paid off the fake informant with millions of dollars, prompting him to remark: "crime does pay." *Id.* at 19.

As evidence of its willful pollution mounted, Chevron shifted gears, adopting a strategy to collaterally attack the litigation wherever (and however) possible. Its message: "We can't let little countries screw around with big companies like this." Keefe, *Reversal of Fortune*, New Yorker, Jan. 9, 2012. "We're going to fight this until hell freezes over," a spokesman declared. "And then we'll fight it out on the ice." *Id.*

Chevron's opening gambit was to file an arbitration against Ecuador and then offer to dismiss it in exchange for the government's "intervention" in the litigation. After that failed, Chevron then initiated another arbitration against Ecuador, this time under the U.S.-Ecuador Bilateral Investment Treaty (BIT), seeking a declaration that any prospective judgment is unenforceable, plus an award of fees, costs, and damages. *Republic of Ecuador*, 638 F.3d at 390. This BIT proceeding is ongoing, and Chevron is pressing the same allegations it has made in this case.

Around this time, Chevron also began to train its focus on Steven Donziger—

an American lawyer who had emerged over time as a lead spokesman for the affected communities. In the mid-to-late 2000s, hoping to bring attention to their plight, he gave an acclaimed American filmmaker substantial behind-the-scenes access to make a documentary about the case. When Chevron saw the footage, it sensed an opportunity. It would now (in its words) "demonize Donziger." Drawing on its bottomless war chest, Chevron redirected the focus from its own wrongdoing in the Amazon to trumped-up allegations of corruption against Donziger and other advocates, the Ecuadorian trial judge, and every branch of Ecuador's government.

In pursuing this effort, Chevron initiated "an extraordinary series of at least 25 requests to obtain discovery from at least 30 different parties" in over a dozen federal courts, *In re Chevron*, 633 F.3d 153, 159 (3d Cir. 2011)—"an effort the Third Circuit aptly characterized as 'unique in the annals of American judicial history,'" *Chevron v. Naranjo*, 667 F.3d 232, 236 (2d Cir. 2012). Two of these proceedings—against the filmmaker and Donziger—together gave Chevron hundreds of hours of raw documentary footage, two decades' worth of litigation files, and Donziger's personal diary. Judge Kaplan presided over both. *See* Donziger Br. 26–29.

In February 2011—after eight years of litigation and a 215,000-page court record—the Ecuadorian trial court entered a provisional judgment against Chevron. The court declined to consider two reports from the plaintiffs' experts that Chevron claimed were improperly prepared, and instead relied on test results by Chevron's own experts—and Chevron's own admissions—to support its conclusions. The court

calculated the actual damages at $8.646 billion and assessed the same amount in punitive damages—not one cent of which Chevron has ever paid.

At this point, Chevron had two options in Ecuador: It could seek "*de novo* review" of "questions of both fact and of law" on appeal. *Naranjo*, 667 F.3d at 237. Or it could file a separate action under the Collusion Prosecution Act within five years (*i.e.*, by February 2016) seeking to nullify the provisional judgment as tainted by fraud. Chevron deliberately chose to never avail itself of this second option.

Chevron opted only to appeal. In January 2012, a three-judge appellate court issued a modified, substitute judgment based on its assessment of the record "as a whole." A-464. After "evaluating the evidence collectively," the court found that it amply supported the judgment. *Id.* The court declined to "make a pronouncement on the interminable and reciprocal accusations" of misconduct because they "could not affect the final result of the lawsuit." A-492.

Chevron then sought review from Ecuador's highest non-constitutional court, which affirmed the judgment but vacated the punitive-damages award in late 2013. A-3449. It explained that Chevron's allegations of fraud in the trial court did not affect the appeal. It found that the intermediate court had undertaken "a correct weighing of the evidence in accordance with legal standards," so the "decision sought to be annulled here is the one rendered by" *that* court—"not the one issued by a trial court." A-3548, 3605. The high court also explained that it could not consider Chevron's fraud claim because the exclusive remedy lay "under the Collusion

Prosecution Act." A-3543. The case is now before the Constitutional Tribunal of Ecuador, which is considering Chevron's due-process arguments.

B. Rather than exhausting its remedies in Ecuador or awaiting the completion of the BIT arbitration, Chevron filed this case in early 2011 seeking to thwart enforcement of the not-yet-entered judgment. It asserted claims under RICO, New York common law, and the Declaratory Judgment Act (DJA). Judge Kaplan accepted the case as related, and almost immediately entered an injunction to nullify the judgment and block any attempt to enforce it outside Ecuador. *Chevron v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011).

This Court reversed. It explained that New York's "Recognition Act and the common-law principles it encapsulates are motivated by an effort to *provide for* the enforcement of foreign judgments, not to prevent them." *Naranjo*, 667 F.3d at 241. They allow a party who lost a foreign money judgment to raise "affirmative defenses" (including fraud) to an enforcement action, but "they do not create an affirmative cause of action to declare foreign judgments void and enjoin their enforcement." *Id.* at 240. The Court also emphasized the "grave[]" affront to international comity that would result from a contrary interpretation. *Id.* at 244. The Court vacated the "radical" injunction and ordered the district court to dismiss Chevron's DJA claim (the only claim over which it had jurisdiction) "in its entirety." *Id.* at 244, 247.

After *Naranjo*, Chevron pressed forward with its claims under RICO and New York common law, while Judge Kaplan excluded all evidence of environmental

contamination. On the eve of trial—faced with the prospect of having a jury evaluate its evidence—Chevron dropped its request for billions of dollars in damages.

Chevron's star witness at trial was Alberto Guerra, a former Ecuadorian judge who contacted Chevron in 2012 with "a story to tell" about "the drafting of the [trial-court] judgment." Donziger Br. 52. Guerra was then making $500 a month in Ecuador and had no savings. *Id.* Upon meeting Chevron's representatives, he said that he received $300,000 from the Ecuadorian plaintiffs' lawyers to help ghostwrite the trial judge's opinion. *Id.* at 53. He said his story was "worth a million dollars." *Id.*

When Chevron representatives next met with Guerra, they brought a bag filled with $20,000 in cash. *Id.* Although this was 40 times his monthly income, he was unimpressed, calling it "very little" and asking: "Couldn't you add a few zeros?" *Id.* Chevron ended up paying Guerra well over a million dollars. *Id.* at 53–55.

Once Chevron started paying him, Guerra admitted that he was not in fact promised $300,000 to write the judgment. He also changed his story of how he wrote the judgment after no corroborating evidence was found. *Id.* He said that he lied "to secure [himself] a better position." *Id.* at 55. Worried by these lies and inconsistencies, Chevron had its lawyers meet with him 53 times before trial to prepare his testimony.

After trial, the district court issued a 586-page decision ruling for Chevron across the board and crediting Guerra's bribery tale. The court also found that "the subsequent appellate rulings are not entitled to any recognition in consequence of the systemic deficiencies of the Ecuadorian legal system." SPA-326. The court determined

that the collateral attack was permissible under RICO and a New York common-law claim "for relief from a judgment" (a claim that the court added *sua sponte* after trial).[1] The court issued an injunction barring any enforcement action in the United States (which has never been brought) and ordering the defendants to pay Chevron in the event that they are able to collect on the judgment (which has not happened to date).

C. Since the district court's decision, there have been major developments in two parallel proceedings. *First*, in the BIT arbitration brought by Chevron two years before this case, Guerra admitted that he lied on the witness stand in New York and in his sworn witness statement. And additional evidence came to light that further disproves his bribery account, including contemporaneous exculpatory emails and computer forensics. ECF No. 461-1, at 6–10. In his arbitral testimony, Guerra also conceded the lack of evidence corroborating his bribery allegation: no draft judgment; no emails about the judgment on his computer (none of the lawyers are even listed as contacts in his email account); no written communication corroborating the story; no evidence of any payment to the judge regarding the judgment; no evidence that Guerra edited the judgment; no records showing communication between the plaintiffs' lawyers and Guerra; and no payments made to Guerra that substantiate his allegation of bribery or ghostwriting. *Id.* In addition, after weeks of hearings and

[1] The only common-law claim at trial was fraud based on third-party reliance. Judge Kaplan acknowledged this Court's multiple holdings that such claims are "not actionable in New York," but declined to follow them. *See Chevron v. Donziger*, 871 F. Supp. 2d 229, 256–57 (S.D.N.Y. 2012). Only after trial did the judge decline to allow this fraud claim—the only remaining common-law claim pled in the complaint.

witness testimony, the arbitral panel took the extraordinary step of traveling to four former Chevron sites to witness evidence of oil pollution and to document its effects. So that panel is poised to decide Chevron's fraud allegations on a much more developed record than in this case—a record that also includes the record here.

Second, in an enforcement action brought in Canada—which the Canadian Supreme Court has authorized to proceed—Chevron is now arguing that the enforcement court is "bound by the factual findings" of Judge Kaplan. This is exactly what troubled this Court in *Naranjo*, when it remarked that allowing judgment-debtors to affirmatively obtain a preemptive "advisory opinion" would "encourage efforts by parties to seek a res judicata advantage by litigating issues in New York in order to obtain advantage in connection with potential enforcement efforts in other countries," thus "provok[ing] extensive friction between legal systems." 667 F.3d at 246. A trial-type hearing on the enforceability of the judgment began earlier this week.

ARGUMENT

I. The panel's unprecedented authorization of a preemptive collateral attack on a foreign money judgment contravenes binding precedent and will "provoke extensive friction between legal systems" by turning this Circuit into a magnet for "disappointed litigants in foreign cases."

A. ***Common law.*** *Naranjo* held that New York's "Recognition Act and the common-law principles it encapsulates" exist "to *provide for* the enforcement of foreign [money] judgments, not to prevent them." 667 F.3d at 241. They allow courts to "decline to participate in the enforcement" of a foreign money judgment, but do not

create an *affirmative* "cause of action to challenge [such] judgments before enforcement of [them] is sought." *Id.* at 234, 242; *see Harrison v. Triplex Gold Mines*, 33 F.2d 667, 672 (1st Cir. 1929) ("We cannot lend ourselves to such a proceeding."). To allow such a "preemptive suit" would turn the "enforcement-facilitation framework" "on its head," raising "grave[]" international-comity concerns. *Naranjo*, 667 F.3d at 240–43. "If such an advisory opinion were available," then "any losing party in litigation anywhere in the world with assets in New York could [sue] in this jurisdiction," claiming that the judgment was the product of fraud, which "would unquestionably provoke extensive friction between legal systems by encouraging challenges to the legitimacy of foreign courts in cases in which the enforceability of the foreign judgment might otherwise never be presented in New York." *Id.* at 246. The "far better remedy," the Court held, is for the judgment-debtor to "present its defense" in an enforcement proceeding. *Id.*

Despite *Naranjo*, the panel here authorized a "common-law cause of action for relief from a [foreign money] judgment," and preemptively enjoined enforcement anywhere in the U.S. and collection anywhere in the world. Op. 108–09. That holding plainly conflicts with *Naranjo*, in violation of the rule that a prior panel's state-law holding is binding "absent a subsequent decision" by the state's highest court "cast[ing] doubt" on the holding. *Woodling v. Garrett*, 813 F.2d 543, 557 (2d Cir. 1987). But the panel cited no case in which *any* court permitted a preemptive claim for relief from a foreign money judgment. The closest it came are cases involving *divorce disputes*, *see* Op. 110–12, which are expressly *exempted* from the Act's scope. *See* N.Y. C.P.L.R.

§ 5301(b) (applying to "any judgment of a foreign state granting or denying recovery of a sum of money, *other than . . . a judgment for support in matrimonial or family matters*").

By nullifying *Naranjo*—and minting a brand-new affirmative cause of action to thwart the enforcement of foreign money judgments—the panel opinion will bring about the very consequences *Naranjo* sought to avoid. If left to stand, it will allow "any losing party in litigation anywhere in the world with assets in New York" to bring a preemptive attack in this Circuit alleging fraud. 667 F.3d at 246. *See* Barrett, *Chevron's Pollution Victory Opens Door for Companies to Shirk Foreign Verdicts*, Bloomberg, Aug. 9, 2016, http://bloom.bg/2bqsUXN. This Court should not permit that result.

B. ***RICO.*** The panel also green-lighted a preemptive collateral attack under RICO—a quasi-criminal federal statute that courts have narrowly interpreted to avoid even the "potential for international controversy." *RJR Nabisco v. European Cmty.*, 136 S. Ct. 2090, 2107 (2016). Just a few months ago, for example, the Supreme Court made clear that courts may not allow a "private civil remedy" under RICO in cases carrying the "potential for international friction" "without clear direction from Congress." *Id.* at 2106; *see AG of Canada* v. *RJR*, 268 F.3d 103, 128 (2d Cir. 2001) (adopting same clear-statement rule). The panel's authorization of a preemptive attack on a foreign judgment under RICO doesn't just create a *potential* for international friction—it will "*unquestionably* provoke *extensive* friction." *Naranjo*, 667 F.3d at 246.

Before the panel's opinion, no court had allowed RICO to be used as a tool to attack a foreign judgment (or *any* judgment, for that matter). *See, e.g.*, *Kamilewicz v. Bank*

of Boston, 92 F.3d 506, 511 (7th Cir. 1996) (affirming dismissal of case "'dressed up' as a claim for RICO damages" that "was, nevertheless, a collateral attack"). In *Gulf Petro v. Nigerian National Petroleum*, 512 F.3d 742, 749 (5th Cir. 2008), for example, an American oil company filed a complaint under RICO and the common law, arguing that bribery and corruption had tainted a foreign arbitral proceeding. The Fifth Circuit refused to allow RICO to be used in this way. Even though "the specific allegations of bribery and corruption" were "separate" from the underlying dispute, the court explained, the claims nevertheless constituted a collateral attack because the company's fundamental claim was "that wrongdoing had tainted" the proceedings. *Id.* at 750. The panel in this case concluded the opposite. It permitted Chevron's RICO claim even though "the ultimate significance of the conduct [it] complain[ed] of can only be found in the effect that it had" on the Ecuadorian judgment, and Chevron's "true objective in this suit" was to redress harm it would suffer in the future if the judgment were ever enforced. *Id.*

II. The panel opinion splits with multiple circuits on multiple issues.

Rehearing is warranted not only because the panel opinion is unprecedented and conflicts with binding precedent, but also because it creates multiple circuit splits.

A. The first split, which the panel acknowledged (at 103), is on whether RICO authorizes *any* injunctive relief in private actions—an obviously important question on which the Supreme Court has previously granted certiorari (while reversing the case on other grounds). *See Scheidler v. NOW*, 537 U.S. 393 (2003). Before the panel

opinion, two circuits had directly addressed this question and diverged, and several other circuits—including this Circuit—had "suggest[ed] that injunctive relief is not available to private plaintiffs." Rakoff, *RICO* § 7.02[2]. "It seems altogether likely," this Court wrote in *Sedima, S.P.R.L. v. Imrex*, "that [RICO] as it now stands was not intended to provide private parties injunctive relief." 741 F.2d 482, 489 n.20 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479 (1985); *see also Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28–29 (2d Cir. 1983) ("We have the same doubts as to the propriety of private party injunctive relief."). Yet the panel in this case held otherwise.

And it went even further still. Before the panel opinion, no court had permitted equitable relief under RICO in the *absence* of a claim for money damages—the only cause of action RICO authorizes. *See* 18 U.S.C. § 1964(c); *Motorola Credit v. Uzan*, 202 F. Supp. 239, 244 (S.D.N.Y. 2002), *rev'd on other grounds*, 322 F.3d 130 (2d Cir. 2003) (RICO provides "a private right of action *for damages*"). Even Judge Rakoff, one of the few judges who has said equitable relief is available to private parties, *id.*, has explained that RICO does not authorize injunctive relief without a claim for damages: "Civil RICO claims are *only* available where monetary relief is sought . . . . Thus, if the suit is in essence a claim . . . for injunctive relief, RICO will not be a suitable vehicle." Rakoff, *RICO* § 7.02[2]. The panel opinion, however, allows injunctive-relief-only private actions (thus allowing for juryless culpability determinations of a quasi-criminal statute)—and in fact makes them *easier* to bring than a typical civil RICO case by eliminating the requirements of "proof of concrete financial loss" and "clear and

definite" injury. Op. 108. This Court should not sanction that outlier approach.

B. Even beyond RICO, the panel opinion splits with two circuits—both of which refused to entertain preemptive attacks on foreign money judgments. The first is *Harrison*, 33 F.2d 667 (1st Cir.). There, as here, the plaintiffs lost a foreign money judgment and sued the judgment creditor in the U.S., "attempt[ing] to impeach collaterally [the] judgment[]," arguing that it "had been secured by fraud." *Id.* at 670. The "main object" of the suit was the same as Chevron's: "to prevent the defendants herein from receiving the benefit of the litigation so long contested" abroad. *Id.* at 672. The plaintiffs asked the U.S. court to declare the judgment "void" (as Chevron did in *Naranjo*) and to issue *in personam* relief against the judgment creditors in the form of an anti-enforcement injunction and damages (as Chevron did in this case, in the form of a U.S. anti-enforcement injunction and constructive trust). *Id.* at 668, 670.

Unlike the panel here, the First Circuit refused. It explained that the case was "distinguish[able] from cases cited by the plaintiffs" because "the successful litigants in the [foreign] action [we]re not seeking the aid of this court to enforce any rights or decrees obtained there." *Id.* at 672. As this Court did in *Naranjo*, the First Circuit observed that "[n]o cases have been cited and none have been found which would sustain the jurisdiction of this court to declare null and void the orders and decrees of a court of general jurisdiction in [a foreign country]." *Id.* Then, turning to the *in personam* relief sought against the defendants, the court easily disposed of that claim, explaining: "This is only another way of attempting to reach the same result as that

already discussed." *Id.* The court thus dismissed the case for lack of "jurisdiction," and made clear that it would not allow the plaintiffs to inject the U.S. courts into the fray, holding: "We cannot lend ourselves to such a proceeding." *Id.* The panel did just that.

The panel opinion also conflicts with *Basic v. Fitzroy Eng'g*, 949 F. Supp. 1333, 1338 (N.D. Ill. 1996), *aff'd*, 132 F.3d 36 (7th Cir. 1997), which dismissed a preemptive collateral attack on a New Zealand judgment for lack of jurisdiction, holding that "there is no immediate controversy between the parties since it is not certain that [Basic] will ever be compelled to pay any judgment [sought by Fitzroy in New Zealand]." As this Court explained in *Naranjo*: The court in *Basic* "instructed the plaintiff to pursue 'an obvious alternative remedy that [was] not only a 'better' approach, but still allow[ed] [the putative judgment-debtor] to argue the same points to an American judge, albeit at a later date.' That alternative, of course, was for the judgment-debtor to wait for the putative judgment-creditor to bring an enforcement action," and "then raise nonrecognition as an affirmative defense." 667 F.3d 245. In *Naranjo*, this Court expressly "agree[d] with the court in *Basic*." *Id.* at 246. It held that "a far better remedy is available," and refused to allow Chevron to seek an "advisory opinion" because an enforcement action "may never be presented in New York." *Id.* at 246. Again, the panel did the opposite. The full Court should step in.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

s/ Deepak Gupta

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the page limitation established by FRAP 35(b)(2) because it contains 15 pages, excluding the parts exempted by FRAP 32(a)(7)(B)(iii). This petition also complies with the typeface requirements of FRAP 32(a)(5) & (a)(6), as it has been prepared in Word 2007 using a proportionally spaced typeface.

s/ Deepak Gupta
Deepak Gupta

September 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, I electronically filed the foregoing Petition for Panel Rehearing and Rehearing En Banc with the Clerk of the Court of the U.S. Court of Appeals for the Second Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

s/ Deepak Gupta
Deepak Gupta

September 16, 2016