Nos. 22-381 and 22-383

In the Supreme Court of the United States

ASHOT YEGIAZARYAN, AKA ASHOT EGIAZARYAN,
Petitioner,

v.

VITALY IVANOVICH SMAGIN, ET AL.,
Respondents.

CMB MONACO, FKA COMPAGNIE MONEGASQUE DE BANQUE,
Petitioner,

v.

VITALY IVANOVICH SMAGIN, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT BRIEF ON THE MERITS FOR VITALY SMAGIN

ALEXANDER D. BURCH
Counsel of Record
BAKER & MCKENZIE LLP
800 Capitol Street
Suite 2100
Houston, Texas 77002
(713) 427-5038
alexander.burch@
bakermckenzie.com

NICHOLAS O. KENNEDY
BAKER & MCKENZIE LLP
1900 N. Pearl Street
Suite 1500
Dallas, Texas 75201
(214) 978-3081
nicholas.kennedy@
bakermckenzie.com

Counsel for Respondent Vitaly Smagin

QUESTION PRESENTED

Does a foreign plaintiff state a cognizable civil RICO claim when it suffers an injury to a U.S. judgment, and if so, under what circumstances?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Statutes

TABLE OF AUTHORITIES—Continued

Other Authorities

TABLE OF AUTHORITIES—Continued

INTRODUCTION

Congress did not preclude foreign plaintiffs from asserting civil RICO claims under 18 U.S.C. § 1964(c). Nor did this Court do so in *RJR Nabisco v. European Community*, 579 U.S. 325 (2016). Petitioners now ask this Court to judicially legislate such a bar by mistakenly focusing on where the economic injury is felt, rather than the location of the conduct that gives rise to the injury.

Petitioners' argument contradicts RICO's plain text. Section 1964(c) permits "*[a]ny person* injured in his business or property" by a RICO violation to sue. 18 U.S.C. § 1964(c) (emphasis added). "Person" is defined broadly to "include any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). Neither provision excludes foreign persons. When Congress intends to limit a private right of action to U.S. residents, it expressly does so. *See, e.g.*, 42 U.S.C. § 1983 (limiting claims to "citizen[s] of the United States or other person[s] within the jurisdiction thereof"). Congress chose not to so limit the RICO Act. This Court should respect that choice.

If this Court were to rewrite § 1964(c) to bar foreign plaintiffs as Petitioners urge, the rewritten statute would lead to absurd results. Entirely U.S. conduct targeting entirely U.S. business or property could not be redressed under RICO if the plaintiff lived abroad. At the same time, entirely foreign conduct targeting purely foreign property or business could be redressed under RICO if brought by a U.S. resident. Prospective foreign plaintiffs should not have to move

to the U.S. or transfer property to a U.S. resident before suing for the harmful conduct that Congress sought to deter in the RICO Act. Nor should the private right of action apply to purely foreign conduct causing purely foreign injuries—just as this Court confirmed in *RJR Nabisco*. *See* 579 U.S. at 346. Petitioners' residency rule is inconsistent with Congress' intent as set forth in § 1964(c) and results in the unequal treatment of the same domestic conduct targeting the same domestic property solely based on the location of the plaintiff. This Court should not adopt Petitioners' rule to impose a limitation that Congress did not.

RICO was enacted to deter certain conduct by permitting criminal and civil actions. 18 U.S.C. §§ 1962, 1964(c). Any debate regarding the scope of the civil RICO action should be left to Congress. This Court did not rewrite § 1964(c) by imposing a domestic-injury requirement as suggested by Petitioners. Instead, the Court applied the presumption against extraterritoriality—a judicial construction canon—to the statute that presumes § 1964(c) does not apply to foreign conduct because Congress did not clearly say that it should. *See RJR Nabisco*, 579 U.S. at 346–47. No evidence suggests Congress sought to curb only those racketeering activities that injure U.S. residents.

The domestic-injury requirement makes the location of the conduct relevant to avoid "international friction" by guarding against the impermissible application of U.S. law to foreign conduct. *Id.* A focus on the plaintiff's residency, rather than the harmful conduct, ignores these concerns.

Here, the application of RICO to protect a foreign plaintiff who is the victim of domestic conduct relating to a domestic judgment issued against a domestic resident does not result in the international friction this Court sought to avoid in *RJR Nabisco*. Petitioner and international fugitive Ashot Yegiazaryan lives in Beverly Hills. (J.A. at 35a–38a and 183a–84a.) He is a judgment debtor under a California judgment. (J.A. at 81a–82a.) He has been held in contempt of a California court for numerous efforts devised, directed, and deployed from California to avoid paying that judgment. (*Id.*) This case centers on Yegiazaryan's collusion with numerous others in carrying out RICO schemes that include alleged conduct in or targeted at California causing injury to Respondent Smagin's California property, i.e., the California judgment. (J.A. at 67a, 91a–93a.) The judgment, issued by a California court, exists and may be enforced only in California against California assets and the California judgment debtor. Regardless of where the judgment's owner resides, it is California property.

Accordingly, there is a sufficient domestic nexus in this case to satisfy this Court's domestic-injury requirement under § 1964(c). The Ninth Circuit's opinion that Smagin's well-pleaded complaint pleads a domestic injury should be affirmed.

STATEMENT OF THE CASE

Respondent Vitaly Smagin holds a judgment entered by a district court sitting in California. That California judgment is against California resident and convicted felon Petitioner Ashot Yegiazaryan. Yegiazaryan concocted and carried out a RICO scheme centered in California to prevent Smagin from enforcing his California judgment. Petitioners argue

they should be absolved from liability for this California-focused conduct merely because Smagin lives abroad.

Yegiazaryan's alleged co-conspirators include his cousin and brother Suren and Artem, also living in California. They also include Ratnikov Evgeny Nikolaevich—who lives in Russia but fraudulently filed a Chapter 15 bankruptcy case in California to take control of the California judgment—as well as a handful of other parties, directed and/or controlled by Yegiazaryan in California. Working in collusion with Yegiazaryan, Petitioner CMB Monaco accepted a deposit of nearly $200 million from Yegiazaryan to hide it from Smagin. Yegiazaryan needed CMB Monaco for this part of the scheme because no U.S. bank would accept a deposit of Yegiazaryan's money due to his criminal past.

In the present action, Smagin alleges the Petitioners and other defendants engaged in illegal racketeering activity after entry of the 2016 California judgment that has caused Smagin's alleged injury. The conduct giving rise to the alleged RICO injuries occurred after the California enforcement action was filed and primarily after the California judgment was issued. Nevertheless, some pre-judgment background is provided for context and to explain why Smagin has been forced to file his enforcement action and this subsequent RICO action in the United States.

I. Smagin Obtains The California Judgment And A Worldwide Injunction In The Enforcement Action And Yegiazaryan Colludes With Others To Frustrate Enforcement Of The California Judgment.

From 2003 to 2009, Yegiazaryan committed fraud against Smagin and stole shares in a joint real estate project worth more than $84 million. (J.A. at 51a.) In 2010, Yegiazaryan and his accomplices, Artem Yegiazaryan and Vitaly Gogokhia, were criminally indicted in Russia for this fraud against Smagin. (*Id.* at 52a.) All three fled Russia to avoid criminal prosecution. (*Id.*) All three were later convicted in Russia for their crimes against Smagin and sentenced to prison. (*Id.*) Yegiazaryan and Artem now reside in Beverly Hills with their cousin Suren. Yegiazaryan has conducted his schemes from Beverly Hills for nearly a decade. (*Id.*)

Nearly a decade ago, Smagin obtained an arbitration award against Yegiazaryan for $84,290,064.20. (*Id.* at 51a–52a.) A U.S. district court in California, where Yegiazaryan resides, confirmed this arbitration award and entered the California judgment in favor of Smagin and against Yegiazaryan for $92 million plus interest. (J.A. at 62a.) Before that judgment was entered in 2016, the district court also issued an injunction prohibiting Yegiazaryan from concealing or dissipating his assets, including "the amounts received or to be received by Respondent Yegiazaryan, his agents or any person or entity acting under his direction and control in payment or satisfaction of an arbitration award from Suleyman Kerimov ... ." (*Id.* at 54a.)

Shortly after the injunction was issued and without notice to Smagin, Yegiazaryan received a settlement of $198 million in a separate arbitration proceeding against Suleymon Kerimov. (*Id.* at 55a.) To conceal the settlement funds from Smagin, Yegiazaryan created a structure consisting of a complex web of nominee entities centered around the "Alpha Trust" and its purported subisidiary "Savannah Advisors." (*Id.* at 56a–57a.) CMB Monaco assisted in this scheme. (*Id.*) With the Alpha Trust established and under Yegiazaryan's absolute control from Beverly Hills, Yegiazaryan directed his law firm to transfer $188,146,102.08 of the settlement funds for his benefit to Savannah Advisors' bank account at CMB Monaco. (*Id.*) Smagin alleges in this RICO action that CMB Monaco knew of Yegiazaryan's illegal conduct and his dispute with Smagin, including the California court order referenced above, but nevertheless aided Yegiazaryan to conceal the funds from Smagin. (*Id.*) Smagin alleges this to be a RICO violation conceived of and carried out by Yegiazaryan in California. (*Id.* at 91a–93a.)

On learning of Yegiazaryan's receipt of the settlement funds, Smagin obtained a worldwide preliminary injunction in California restraining Yegiazaryan and others working with him from concealing or dissipating these proceeds:

> The evidence demonstrates that Plaintiff Smagin will suffer irreparable harm if the current injunction is not expanded to encompass Defendant Yegiazaryan's worldwide reach ... Plaintiff Smagin has provided this Court with testimony from Defendant Yegiazaryan himself where

> he admits to using nominees and off-shore companies to conceal his assets.

(*Id.* at 60a.)

After entering the California judgment, the court entered another injunction. This one prohibited Yegiazaryan from disposing of *any* proceeds up to $115 million and enjoined Yegiazaryan from transferring his known settlement funds held by CMB Monaco without prior authorization from the court. (*Id.* at 62a–63a.)

Yegiazaryan's fraud against Smagin nevertheless continued. As alleged by Smagin, Yegiazaryan hatched from California numerous schemes to (1) place the assets of the Alpha Trust beyond Smagin's reach, (2) appoint false trustees and protectors of the Alpha Trust, (3) falsify Alpha Trust documents, (4) render himself insolvent, (*id.* at 66a–68a), or (5) declare Smagin insolvent so Yegiazaryan could gain control of the California judgment through a fraudulent Chapter 15 bankruptcy proceeding, *see, e.g.*, Order Granting Relief in Aid of Foreign Proceeding at 4 [Doc. 84], *In re Smagin*, No. 2:21-bk-15342-BB (C.D. Bankr.) (filed and entered Aug. 13, 2021) (providing that fraudulent Russian financial manager Ratnikov "shall administer and exercise all of [Smagin's] rights and powers concerning or relating to [the enforcement action]").[1]

---

[1] While this appeal has been pending, Ratnikov was dismissed as financial manager in the Russian bankruptcy proceedings and a new foreign representative was appointed in the Chapter 15 bankruptcy case because "Ratnikov acts upon the instructions of A.G. Yegiazaryan" and therefore "significant doubts about the integrity and independence of [Ratnikov]" existed. Exhibit C to

II. Smagin Pursues This RICO Action; The Defendants Challenge Smagin's Standing.

In December 2020, Smagin brought this civil RICO action alleging the defendants were all part of a collective enterprise directed from California for the improper purpose of hiding and protecting Yegiazaryan's ill-gotten gains to thwart Smagin's execution of the California judgment. (J.A. at 35a–38a.) Petitioners moved to dismiss the claims against them on various grounds, including the failure to allege a domestic injury. (C.A. E.R. 139, 244.) The district court granted Yegiazaryan's motion only, but dismissed Smagin's claims against all defendants based on the reasoning that "[b]ecause Smagin fails to adequately plead a domestic injury in support of his two RICO claims, Smagin lacks standing to sustain his claims." (J.A. at 31a.)

The Ninth Circuit reversed, holding that "Plaintiff's well-pleaded allegations include a domestic injury" because "for purposes of standing under RICO, the California Judgment exists as property in California." (*Id.* at 10a, 17a.) In doing so, the Ninth Circuit focused on the many California links alleged in the Complaint:

> The rights that the California Judgment provides to Plaintiff exist only in California, the place where he can obtain a writ

---

Supplemental Affidavit of Nicholas Kennedy in Support of Motion to Terminate Recognition of Foreign Proceedings at 19, 22, [Doc. 205-3], *In re Smagin*, No. 2:21-bk-15342-BB (C.D. Bankr.) (filed Sept. 12, 2022). The Court may take judicial notice of the publicly available proceedings in the bankruptcy court. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 157 (1969); *United States v. Pink*, 315 U.S. 203, 216 (1942); *accord* Fed. R. Evid. 201.

> of execution against or obtain discovery from Ashot. Indeed, Plaintiff obtained the judgment in California, and that is where Plaintiff desires to exercise the rights conferred by the California Judgment. It would make no sense to conclude that the California Judgment exists as property in Russia, because the judgment grants no rights whatsoever in Russia.

(*Id.* at 10a.)

Because this appeal focused solely on the adequacy of the pleadings for purposes of civil RICO standing, the Ninth Circuit expressed no views on the merits of the claims, including whether the district court had jurisdiction over all the parties or whether Smagin had sufficiently pleaded causation for each defendant. (*Id.* at 16a–17a.)

SUMMARY OF THE ARGUMENT

RICO's private right of action in § 1964(c) applies to "[a]ny person." 18 U.S.C. § 1964(c). This should mean what it says. The Court should not accept Petitioners' invitation to rewrite the statute to apply only to "domestic persons" or "U.S. citizens."

The domestic-injury inquiry turns on where the injury "arises," not solely on where it is felt as argued by Petitioners. Focus on where an injury arises allows a court to consider the facts before it as a whole. This includes the location of the business or property injured and the location of the injurious conduct. Review of these case-specific facts is necessary to remain faithful to the presumption against extraterritoriality

from which the domestic-injury rule arose. That presumption is intended to avoid international friction by ensuring U.S. law is not being applied to purely foreign conduct (absent a clear intent by Congress). Looking at the location of the conduct, rather than the location of the plaintiff, achieves that goal.

Petitioners' residency rule does not address the focus of the presumption against extraterritoriality. Instead, it creates a new limitation on standing that contradicts the text and purpose of § 1964(c). Indeed, Petitioners' residency rule would permit suits involving purely foreign conduct that injures purely foreign business or property, so long as the plaintiff happened to live in the U.S. That result would cause the very international friction *RJR Nabisco* sought to avoid. Such a rule is unsupported by Congress' intent, as reflected in the statute's text, or this Court's precedent.

As a result, this Court should reject Petitioners' novel, residency-based rule in favor of a rule that focuses on whether the particular case before the court calls for a permissible domestic application of § 1964(c). This necessarily includes a review of the alleged conduct that is the focus of the statute, as well as the specific business or property of the plaintiff that is at issue. This approach is most faithful to the statute's text and prior precedent. It is also most aligned with the Court's presumption against extraterritoriality framework that the domestic-injury requirement was created to serve. And a rule focused on conduct would avoid the absurd results created by Petitioners' residency rule, which ignores both conduct and the location of the property or business targeted.

ARGUMENT

I. Congress Did Not Bar Foreign Plaintiffs From Asserting RICO Claims; *RJR Nabisco's* Domestic-Injury Requirement Focuses On Conduct.

A. Congress drafted Section 1964(c) to allow "[a]ny person" to bring a civil RICO claim; that choice must be respected.

The clear text of RICO precludes the limitation to domestic plaintiffs that Petitioners attempt to impose. 18 U.S.C. § 1964(c). A court construing an unambigious statute should start and end with the statutory language. *Arellano v. McDonugh*, 143 S. Ct. 543, 548, 550 (2023); *Culbertson v. Berryhill*, 139 S. Ct. 517, 521–22 (2019); *Millbrook v. United States*, 569 U.S. 50, 57 (2013). Here, § 1964(c)'s first two words preclude Petitioners' textual arguments and demonstrate that RICO's private right of action is not limited to domestic plaintiffs.

Section 1964(c) permits "*[a]ny* person" to sue if the person is injured in their business or property by reason of a RICO violation. 18 U.S.C. § 1964(c) (emphasis added). The RICO Act also broadly defines "person" to "include *any* individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (emphasis added). That is two separate uses of the term "any" to define the category of permissible RICO plaintiffs. Neither can be read as excluding foreign plaintiffs.

Although the term "any" in § 1964(c) does not rebut the presumption against application to extraterritorial conduct, Congress' use of the term "any" indicates an intent that the *category* of persons who may

sue under the statute be read broadly. *RJR Nabisco*, 579 U.S. at 349–50; *see, e.g., Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 220 (2008) ("Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind."). When Congress intends to exclude categories of plaintiffs from a statute, it generally does so by enumerating specific categories of plaintiffs that fall under the protections of the statute. *See, e.g.*, 42 U.S.C. § 1983 (providing only U.S. citizens or persons within U.S. jurisdiction may sue); *cf. Bread PAC v. Fed. Election Comm'n*, 455 U.S. 577, 580–81, 585 (1982) (upholding plain text of Federal Election Campaign Act of 1971 permitting only three categories of plaintiffs to invoke its special procedures). The only limitations Congress placed on "[a]ny person" in § 1964(c) is that such person be "injured in his business or property by reason of a violation of § 1962." 18 U.S.C. § 1964(c). Foreign persons are not categorically excluded by this limitation.

In sum, Congress knows how to exclude categories of plaintiffs, even foreign plaintiffs, but chose not to do so in § 1964(c). The Court should reject Petitioners' invitation to judicially amend the statute to do what Congress did not. *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 130 (2016) ("[O]ur constitutional structure does not permit this Court to 'rewrite the statute that Congress enacted.'").

B. *RJR Nabisco* established the domestic-injury requirement to limit claims based on extraterritorial conduct, not to deny RICO standing to foreign plaintiffs.

RJR Nabisco also does not bar foreign plaintiffs from asserting RICO claims. In *RJR Nabisco*, the Court concluded that the limitations on persons who may sue under § 1964(c) were not enough to overcome the judicial presumption against extraterritoriality. *RJR Nabisco*, 579 U.S. at 346–47. The Court therefore held that a plaintiff bringing a civil RICO action under § 1964(c) must plead and prove a "domestic injury" to overcome the presumption against extraterritoriality. *Id.*

The Court's analysis in *RJR Nabisco* demonstrates the propriety of focusing on conduct when assessing domestic injury. Analyzing extraterritoriality involves a two-step framework. *Id.* at 337. In the first step, a court asks "whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* (citations omitted). If no such indication is given, step two "determine[s] whether the case involves a domestic application of the statute … by looking to the statute's 'focus.'" *Id.* "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred solely in a foreign country, then the case involves an impermissible application regardless of any other conduct that occurred in U.S. territory."

Id. Neither of these steps considers the location of the plaintiff—only where the RICO violations occurred.

RJR Nabisco concluded that RICO's private right of action in § 1964(c) did not expressly rebut the presumption against extraterritoriality. *Id.* at 349–50 (finding first step not met because "[n]othing in § 1964(c) provides a clear indication that Congress intended to create a private right of action for injuries outside the United States"). The Court thus held that a plaintiff must demonstrate a domestic injury for a civil RICO claim. *Id.* at 350, 354–55.

The Court went no further, however, because the plaintiffs in *RJR Nabisco* stipulated they did not seek recovery for domestic injuries. *Id.* at 332–33. Thus, the Court held that the plaintiffs could not sue under § 1964(c) for their remaining alleged foreign injuries based on foreign actions—lost revenues to foreign state-owned businesses in Europe, lost tax revenues from those businesses, foreign currency instability, and increased costs for law enforcement abroad. *Id.* at 332–33, 354 ("Respondents' remaining RICO damages claims therefore rest entirely on injury suffered abroad and must be dismissed.").

The Court's domestic-injury requirement in § 1964(c) must be analyzed against this backdrop. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265–66 (2022) (analyzing quality of reasoning for judicial decisions); *Jannus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2479 (2018) (same). The domestic-injury rule at issue here arose in the context of extraterritoriality. It went no further than addressing that concern. The Court did not, for example, say that the RICO claim was improper because the plaintiffs were all foreign in *RJR Nabisco* (even though they were).

RJR Nabisco, 579 U.S. at 332. Had the Court intended to categorically bar foreign plaintiffs as Petitioners urge, the Court could have stated so. And had the Court done so, the domestic-injury inquiry would not have been necessary to resolve that case because all foreign plaintiffs would have been barred on that basis alone. *Id.*

Instead, this Court confirmed in *RJR Nabisco* that it did not intend to bar all foreign plaintiffs. Specifically, this Court stated that its analysis "does not mean that foreign plaintiffs may not sue under RICO." *Id.* at 353 n.12. Petitioners note correctly that the Court did not affirmatively state that foreign persons *can* sue under § 1964(c). (Joint Br. at 39.) But there would be no point in stating that foreign plaintiffs were not barred if, as Petitioners argue, the text of the statute bars all foreign plaintiffs. The Court had the chance in *RJR Nabisco* to declare that foreign plaintiffs cannot sue under RICO. And in fact, doing so would have been a much simpler way to resolve that case, providing the certainty and bright-line rule that Petitioners urge here. The Court chose not to make such a sweeping statutory amendment through judicial action. It should not do so here either.

The Court's choice not to bar foreign plaintiffs makes sense in light of the Court's extraterritoriality analytical framework. Specifically, the domestic-injury requirement was born out of the second step of the extraterritoriality analysis. It therefore requires consideration of whether the relevant conduct occurred in the United States. *RJR Nabisco*, 579 U.S. at 346 ("If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application … ."). After all,

"providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct." *Id.* at 346–47 (citations omitted). When the relevant conduct is domestic, however, no such concerns are present. A focus on conduct, therefore, provides the check on extraterritoriality intended by the domestic-injury requirement.

This is not the first time the Court has been presented with a request to rewrite RICO through judicial decree. The Court in *Sedima* rejected an attempt to add a new "racketeering injury" requirement into the RICO statute that was absent from its text. *Sedima v. Imrex Co.*, 473 U.S. 479, 495 (1955) ("There is no room for statutory language for an additional, amorphous 'racketeering injury' requirement."). The Court should similarly refuse to judicially legislate a new "domestic plaintiff" requirement that is absent from RICO's text. Instead, the Court should reaffirm that the focus of the domestic-injury inquiry is on the conduct at issue and the property targeted, just as the Court instructed in *RJR Nabisco*.

C. Considering the conduct and the location of the property injured is consistent with this Court's precedent.

Other precedent from this Court confirms that the domestic-injury analysis requires a focus on the location of the conduct, rather than the location of the parties. First is *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, which is cited in *RJR Nabisco*. *See* 579 U.S. at 354 (citing *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158–59 (2004)). *Empagran* involved "vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the

United States and independently leading to higher vitamin prices in other countries such as Ecuador." *Empagran*, 542 U.S. at 158–59. This Court concluded that "a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm." *Id.* at 159. In other words, domestic harm was compensable, but foreign harm was not.

The reasoning for this distinction between domestic and foreign harm in *Empagran* is important here. Unlike RICO, "Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm." *Id.* at 166 (emphasis in original).[2] There is no

---

[2] The provision in the Sherman Act at issue in *Empagran* provided:

> Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations [i.e., domestic trade or commerce], or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States [i.e., on an American export competitor]; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

similar exception from the RICO private right of action. Rather, application of RICO is governed by the traditional extraterritoriality analysis laid out in *RJR Nabisco*. As discussed above, the second step of that analysis centers on conduct, not residency.

Empagran did not involve an application of the presumption against extraterritoriality. That case analyzed an explicit statutory bar on liability for foreign conduct (absent certain exceptions). *Id.* at 162 ("We ask here how this language [of the FTAIA] applies to price-fixing activity that is in significant part foreign, that has the requisite domestic effect, and that also has independent foreign effects giving rise to the plaintiff's claim."). In *RJR Nabisco*, this Court observed that such statutory language reflected Congress' decision to define precisely the statute's extraterritorial reach (or lack thereof). *RJR Nabisco*, 579 U.S. at 353–54. That inquiry, as is customary, focused on the anticompetitive conduct that is the statute's focus.

Notably despite its express desire to circumscribe the available remedies, Congress still did not exclude foreign persons from bringing antitrust claims. Instead, it focused only on excluding claims for conduct that has no domestic effects. This is no different than the focus of the judicial presumption against extraterritoriality on limiting the application of U.S. law to foreign conduct, rather than excluding foreign parties. *Id.* at 337. This consistent focus on conduct should

---

> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a.

similarly apply to a court's analysis of the domestic-injury requirement.

A more recent application of the presumption against extraterritoriality confirms the conduct-centric focus of the second step of this judicial inquiry. In *Nestlé v. Doe*, the Court held that "[t]o plead facts sufficient to support a domestic application of the [Alien Tort Statute], plaintiffs must allege more domestic *conduct* than general corporate activity." 141 S. Ct. 1931, 1937 (2021) (emphasis added). As the Court noted, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in this case." *Id.* (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010)) (emphasis in original). This holding, again focusing on conduct, is entirely consistent with measuring the domestic-injury requirement based on the location of the conduct rather than on the location of the plaintiff. Imposing a limitation on foreign plaintiffs does not resolve the concerns the Court's extraterritoriality jurisprudence was designed to address.

Similarly, in a case currently on review in this Court, the Tenth Circuit considered the extraterritorial reach of the Lanham Act for claims against foreign defendants involving foreign conduct. *See Hetronic Int'l, Inc. v. Hetronic Germany GmbH*, 10 F.4th 1016, 1024 (10th Cir. 2021), *cert. granted*, 143 S. Ct. 398 (Nov. 4, 2022).[3] It is noteworthy that all of

[3] On review in this Court, the issue presented by the petitioners is phrased in terms of foreign conduct and the effects on U.S. commerce: "Whether the court of appeals erred in applying the Lanham Act extraterritorially to petitioners' foreign sales, including purely foreign sales that never reached the United States

the extraterritoriality tests applied by the courts of appeals to the Lanham Act that are before this Court include a focus on the conduct of the foreign defendants, not the location of the plaintiff; the difference in the tests is predominately a matter of degree. *See id.* at 1034–38 (discussing the Eleventh and Federal Circuits' adoption of the *Bulova* test, the Fourth and Fifth Circuits' adoption of the *Vanity Fair* test, the Ninth Circuit's *Timberlane* test, and the First and Tenth Circuits' adoption of the *McBee* test). Again, this reinforces that this Court should look at conduct, not the plaintiff, when analyzing the application of RICO's domestic-injury requirement.

***

The domestic-injury requirement established in *RJR Nabisco* arose to address concerns regarding the extraterritorial application of U.S. law to foreign conduct. It had nothing to do with the plaintiff's residency. As a result, the domestic-injury rule does not categorically exclude foreign persons from bringing claims based on domestic conduct causing injury to domestic property. Instead, it excludes civil RICO claims relying primarily on foreign conduct targeting foreign business or property. As explained below, that is not the case here. The primary RICO conduct occurred in California. The property targeted was in California too. The civil RICO statute and *RJR Nabisco* do not require more.

---

or confused U.S. consumers." Brief for Petitioners at (i), *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, No. 21-1043, __ S. Ct. __ (filed Dec. 19, 2022).

II. This Case Involves A Permissible Domestic Application Of § 1964(c).

This case has California written all over it. It focuses on harm to California property, caused by a California resident, through acts that were designed and carried out in California. The fact that Respondent Smagin happens to live abroad does not preclude a U.S. court from providing redress for this domestic RICO scheme.

First, the target of the RICO scheme was property located in California. Smagin obtained recognition of his arbitration award in California because that is where the judgment debtor (Yegiazaryan) resides. He received a California judgment. This judgment exists and may be enforced only in Califonia. And a judgment is indisputably property. (J.A. at 9 (court of appeals' opinion below recognizing "[a] judgment is property" and holding the California judgment is domestic property (citations omitted).) The fact that this RICO scheme targeted property located exclusively in California supports a domestic injury finding.

Second, the rights incident to the California judgment exist only in California. This includes the right to take post-judgment discovery in California, the right to seize assets in California, and the right to seek other appropriate relief from a California court. *Id.* The RICO scheme prevented Smagin from exercising these domestic rights through, e.g., Yegiazaryan's creation of falsified documents, open defiance of U.S. court orders and collaboration with others to create fraudulent debts and hide his assets. (*Id.* at 79a–80a.) This is a further demonstration of concrete domestic injury occurring in and as a result of actions taken in

the United States. The foreign residence of Smagin does not change these facts.

Finally, the conduct that is the "focus" of the RICO statute occurred in California. *RJR Nabisco*, 579 U.S. at 337 ("[A]t the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's 'focus'."). Unlike *RJR Nabisco*, this is not a case where the primary wrongful conduct occurred abroad. Here, the RICO violations originated and were directed from California. (*E.g.*, J.A. at 67a, 91a–93a.) The Ninth Circuit recognized the centrality of California to the wrongful acts alleged here:

> Defendants corruptly and illegally prevented him from executing the judgment by, among other things, filing false documents in the California court; intimidating a witness who resides in California; and directing, from California, a scheme to funnel millions of dollars into the United States through various companies, including a U.S.-based company that Ashot effectively controlled. Plaintiff also alleges Ashot had associates file fraudulent claims against him in various jurisdictions in order to obtain sham judgments that were designed to compete with the California Judgment. Those alleged illegal acts were designed to subvert Plaintiff's rights that are executable in California. Accordingly, the alleged harm to Plaintiff's rights under the

> California Judgment constitutes a domestic injury.

(J.A. at 10a–11a; *accord* J.A. at 91a–99a.)

Smagin's RICO injury arises in California because California is the only jurisdiction in which the California judgment can be enforced. Similarly, as alleged in the Complaint, the injury arises in California because Petitioner Yegiazaryan conceived, directed, and carried out his plan in California. (*Id.* at 37a–38a.) On several different occasions, courts have concluded that Yegiazaryan controlled the assets of the Alpha Trust from California, including the rights as the protector of the trust to determine beneficiaries, delegate trustee rights, appoint or remove trustees, and even change provisions of the trust deed. (J.A. at 64a–66a and n.5.) In fact, Yegiazaryan attempted to exercise these powers in and from California by appointing new false trustees over the Alpha Trust for the purpose of preventing Smagin from collecting on his California judgment from the Alpha Trust. (*Id.*; *see also* C.A. E.R. 1221–27 (signed trustee appointment documents).)

Smagin also alleges that Yegiazaryan directed co-defendant Ratnikov Evgeny Nikolaevich to block Smagin from recovering under the California judgment by filing a fraudulent Chapter 15 bankruptcy proceeding in California. (J.A. at 67a.) Since this appeal has been pending, Ratnikov wrested control of the California judgment from Smagin in the Chapter 15 proceeding. *See, e.g.*, Order Granting Relief in Aid of Foreign Proceeding at 4 [Doc. 84], *In re Smagin*, No. 2:21-bk-15342-BB (C.D Bankr.) (filed and entered Aug. 13, 2021) (providing that fraudulent Russian fi-

nancial manager Ratnikov "shall administer and exercise all of [Smagin's] rights and powers concerning or relating to the [enforcement action]"). That has prevented Smagin from taking any action to enforce his California judgment against Yegiazaryan for nearly two years. *Id.*[4] Each of these are additional, demonstrable harms that occurred in California and target California property.[5]

Congress intended to allow "[a]ny person injured in his business or property" to pursue civil RICO remedies based on domestic conduct causing injury to domestic property. 18 U.S.C. § 1964(c). There is no statutory limitation on where the plaintiff who is the victim of such a scheme must reside. Because Smagin's complaint pleads that the injuries in his California judgment arose as a result of conduct centered in California, Smagin's complaint adequately pleads a domestic injury as required by *RJR Nabisco*.

---

[4] Smagin has recently succeeded in having Ratnikov removed as the Foreign Representative due to his collusion with Yegiazaryan but the case remains open and continues to impede Smagin's collection efforts. *See*, Smagin Motion to Terminate Recognition of Foreign Proceedings [Bankr. Doc. 190] at 7, *In re Smagin*, No. 2:21-bk-15342-BB (C.D. Bankr.) (filed Aug. 23, 2022); *see id.*, Order denying Foreign Debtor's Motion to Terminate Recognition of Foreign Proceedings at 2 [Doc. 218] (denying motion to terminate bankruptcy proceeding without prejudice since a successor to Ratnikov was retained as the foreign representative in the U.S. bankruptcy proceeding). The Court may take judicial notice of these publicly available proceedings in the bankruptcy court. Fed. R. Evid. 201.

[5] If Smagin's allegations of domestic injury are found lacking in this Court, Smagin should be permitted an opportunity to amend his complaint in the district court to allege these and other new California-focused facts.

III. Petitioners' Novel Textual Approach To § 1964(c) Is Flawed And Leads To Absurd Results That Contradict The Statute And This Court's Domestic-Injury Requirement.

Petitioners are wrong when they argue that the "plain text" of § 1964(c) shows that this statute "remedies solely economic injuries felt by the plaintiff" at his or her residence. (Joint Br. at 23.) They are similarly wrong when they conclude that "[t]he Court should simply look to where the plaintiff is domiciled" to determine standing under § 1964(c) and should not look to the location of the property injured or the wrongful conduct to determine whether a domestic injury is alleged. (*Id.* at 29.) As explained above, the domestic-injury requirement was created to avoid extraterritorial application of RICO—not to limit those who RICO could protect. Petitioners' single-minded focus on the plaintiff is inconsistent with the statutory text and congressional intent.

First, it is not clear that the statute remedies only economic injuries as Petitioners suggest. (Joint Br. at 23.) This Court left that issue undecided in *RJR Nabisco*. *See* 579 U.S. at 354 n.13. There is no need to decide it here as this case is still at the pleadings stage and Smagin seeks only damages, not equitable relief. (J.A. at 100a.) Morever, Petitioners do not explain why their contention that the statute remedies only economic injuries matters for purposes of this Court's domestic-injury inquiry. The question before this Court is whether Smagin alleges a domestic injury as required under *RJR Nabisco*, not whether Smagin alleges an economic injury (he does).

Setting aside this (non) issue, the primary problem with Petitioners' textual argument is that it ignores the clear text in § 1964(c) that allows a remedy to "*[a]ny person* injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c) (emphasis added). As explained above, the "domestic" requirement does not come from the statute's text, but rather from the judicial application of the presumption against extraterritoriality in *RJR Nabisco* more than 50 years after the statute was first enacted. Importantly, Smagin does not seek to apply U.S. law to conduct that is solely foreign. He seeks to remedy only alleged injuries in his California judgment caused by alleged violations of § 1962 that occurred, at least in substantial part, in the United States. Smagin's residency in Russia thus does not deprive him of civil RICO standing.

Petitioners' residency rule also leads to absurd results. For example, under Petitioners' novel rule, a U.S. resident could sue under § 1964(c) for purely foreign injuries in purely foreign business or property based on alleged RICO violations occurring entirely outside of the United States. But a foreign plaintiff could not sue even if their entirely U.S. business or property was destroyed by entirely domestic conduct. Nothing in the RICO statute or *RJR Nabisco* supports that result. As explained by the Third Circuit in *Humphrey*, that result makes no sense:

> It cannot be the case that the mere fact that a loss is economic means that foreign corporations are unable to avail themselves of the protections of civil RICO, even in cases where all of the actions causing the injury took place in the

> United States. There is no evidence that Congress meant to so preclude foreign corporations from the protections offered by § 1964(c) and doing so conflicts with the Supreme Court's recognition that 'Congress did not limit RICO to domestic enterprises.'

Humphrey v. GlaxoSmithKline, 805 F.3d 694, 709 (3d Cir. 2018) (internal citations omitted). *Humphrey* is not alone in this view, as another district court highlighted the "ludicrous" nature of the blanket rule Petitioners seek to create:

> It is ludicrous to think that a foreign individual could not sue under civil RICO for financial injuries incurred while they are working, traveling, or doing business in this country as the result of an American RICO operation.

Tatung Co. v. Shu Tze Hsu, 217 F. Supp. 3d 1138, 1155 (C.D. Cal. 2016) (finding foreign plaintiff suffered domestic injury where "defendants specifically targeted their conduct at California with the aim of thwarting [plaintiff's] rights in California" as "[i]t would be absurd to find that such activity did not result in a domestic injury to Plaintiff" (internal citations omitted).

Petitioners' attempt to bar foreign plaintiffs from bringing RICO claims based on domestic conduct targeting domestic property should be rejected.

A. A plaintiff's domestic injury in property centers on where the injury arose and where the property is located, not on the legal fiction of where the owner of that property may "feel" the harm.

Petitioners' parsing of the words "in" versus "to" takes the search for textual guidance too far. Petitioners cite an inapposite 1906 opinion to contend that the "key" is in § 1964(c)'s use of the phrase "injury *in* business or property" rather than "injury *to* business or property." (Joint Br. at 19–23 (citing *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 398–99 (1906).) None of the issues addressed in *Chattanooga* apply here.

In *Chattanooga*, the Court was faced with deciding which Tennessee limitations provision applied to an antitrust suit brought by a U.S. municipality for alleged overpayments relating to its purchase of iron water pipe from the defendants. *Chattanooga*, 203 U.S. at 395, 397. Among other issues, the Court considered the difference between the federal antitrust statute's reference to a party suffering injury "*in* its business or property" and a three-year state limitations statute applicable to claims for injury "*to* property." *Id.* at 395, 397–99. The Court held that the statutory phrases were different enough to permit the municipality to avoid the three-year limitations provision in favor of the longer ten-year catch all limitations provision because overpayments were more accurately considered an injury "in" property rather than an injury "to" property. *Id.* at 396–99.[6] The case here

[6] The Court construed the Tennessee three-year limitations provision as having "a narrower intent" than the federal statute

does not require a comparison of federal and state statutes. Nor does it implicate the statute of limitations and what claims may be covered. Moreover, Petitioners do not even argue that Smagin has not suffered an "injury in property" under § 1964(c). This case involves only the scope of inquiry to determine a domestic injury under § 1964(c). *Chattanooga* provides no help on this issue.

Moreover, Petitioners' attempt to distinguish the words "to" and "in" does not advance their case. Petitioners' distinction between "injury *in* property" and "injury *to* property" suggests that the former is more personal than the latter, such that a plaintiff feels or suffers an injury more when the word "in" is used as compared to the word "to." (Joint Br. at 22–23.) That distinction, if it is one, is irrelevant because the focus of the statute (and *RJR Nabisco*) is conduct, a concrete factor, not on the thought exercise of a plaintiff "feeling" an injury or the legal fiction regarding where economic injuries are "suffered."

At base, Petitioners' arguments rely on the assumption that this Court intended the domestic-injury inquiry in § 1964(c) to rest on where the injury is felt, rather than on where the injury arises.[7] But that

---

in light of Tennessee provision's "juxtaposition with detention and conversion." *Id.* at 398.

[7] The terms "arise" and "feel" have material different meanings in this context. To "arise" means and refers to where a thing originates from, stems from, or results from. *Arise*, BLACK'S LAW DICTIONARY (9th ed. 2009). And to "feel" means and refers to perceive by touch or any sensation other than sight, hearing, taste, or smell. *Feel*, Dictionary.com, https://www.dictionary.com/browse/feel (last visited Mar. 27, 2023). Although the ju-

assumption is faulty. Only a test based on where an injury arises is faithful to the conduct-focused presumption against extraterritoriality from which the domestic-injury rule is based. And only that focus on conduct avoids the absurd results occasioned by Petitioners' residency test, which ignores entirely the location of the conduct and property at issue.

Petitioners' keynote distinction between the phrases "injury in property" and "injury to property" does not mean Congress intended to lock the courthouse doors to foreign persons attempting to obtain a remedy under the RICO Act for injuries in their domestic business or property caused by domestic conduct. Nor does that distinction foreclose this Court from confirming that its domestic-injury requirement for § 1964(c) claims remains tethered to the presumption against extraterritoriality from which it arose and thus still focuses on the conduct that is the statute's focus. The Court should remain true to its prior precedent by focusing here on conduct, not residency.

B. State choice-of-law principles do not evidence Congress' intent regarding who may sue under § 1964(c).

Petitioners' reliance on choice-of-law principles of *lex loci delicti*, which gives weight to the place of injury, similarly does not support their argument that a foreign plaintiff can never suffer a domestic injury. (Joint Br. at 29–30, 37.) This case is about what RICO-violative conduct may be remedied, and by who. Choice of law is simply a different inquiry.

---

dicial economic-injury rule can artificially supplant where an injury is ultimately felt, that rule does not change where an injury arises.

But even in the choice-of-law context, Petitioners' argument fails. Petitioners do not offer any choice-of-law authority that supports the residency rule advocated by Petitioners: i.e., that a plaintiff's residence is dispositive of the court's analysis. For example, Petitioners cite to *Richards v. United States*, 369 U.S. 1 (1962), for the proposition that many states' conflict-of-law rules as of 1962 called for application of "the law of the place of injury to the substantive rights of the parties." (Joint Br. at 31.) *Richards* involved a wrongful-death claim under the Federal Tort Claims Act ("FTCA"), where the Court was faced with determining what state law to apply when an act of negligence occurs in one state, but results in an injury in another. *Richards*, 369 U.S. at 3–4. For its part, the FTCA waived immunity for certain civil actions caused by employees of the U.S., "if a private person, would be liable to the claimant in accordance with *the law of the place where the act or omission occurred*." *Id.* at 6 (emphasis added) (citing 28 U.S.C. § 1346(b)). In light of the plain language of the FTCA focusing on the place where the conduct occurred, the Court found that courts should first look to the place where the tortious conduct took place and apply the "whole" law of that state to the action, even choice-of-law rules. *Id.* at 10–12. This focus on where the conduct occurs is consistent with the conduct-focused extraterritoriality analysis dictated by *RJR Nabisco*.

Nothing in *Richards* demonstrates that a plaintiff must reside in a particular jurisdiction to allege a claim under the FTCA. Nor does that case suggest that Congress intended to incorporate state "place of injury" rules into § 1964(c). If anything, the FTCA's focus on the injury-causing conduct contradicts Petitioners' "place of injury" analogies. Moreover, the

Court did not opine on the correctness of the state choice-of-law rules in that case. The Court instead observed that states were already moving away from the rigid "place of injury" rule at that time. *Id.* at 12 ("Recently there has been a tendency on the part of some States to depart from the general conflicts rule … ."). Petitioners' reliance on this case proves only (if anything) that the location of the challenged conduct is highly relevant and cannot be ignored.

Petitioners also cite a partial quote in a footnote from a dissenting opinion for the proposition that the situs of the injury still holds sway in choice-of-law determinations. (Joint Br. at 31–32 (quoting *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 904 n.11 (2011) (Ginsburg, J., dissenting).) But the full quote confirms that the place of injury is not the sole consideration in choice-of-law determinations. *See McIntyre*, 564 U.S. at 904 n.11 ("Even as many jurisdictions have modified the traditional rule of *lex loci delicti*, the location of the injury continues to hold sway in choice-of-law analysis in tort cases.").[8] That case, too, thus confirms that location of the conduct is key to the analysis.

IV. Petitioners' Intangible-Property Arguments Lack Merit.

Petitioners' alternative argument that when the property is a judgment, award, or a debt, the economic injury to such property is suffered at the plaintiff's

[8] *See also* John F. Coyle, William S. Dodge, and Aaron D. Simowitz, *Choice of Law in the American Courts in 2021: Thirty-Fifth Annual Survey*, 70 Am. J. Comp. L. 318, 320 (Table 1) (2022) (demonstrating that only 7 states apply the traditional *lex loci delicti* doctrine for choice-of-law determinations while nearly all others apply the most significant relationship test or some variation of that test).

domicile should also fail. (Joint Br. at 40.) This is no more than a recasting of their novel primary position that domestic injury is suffered at the plaintiff's domicile. (Joint Br. at 46–47.) This argument lacks merit for the same reasons noted above.

Notably, in presenting their alternative argument, Petitioners mischaracterize the alleged RICO injury at issue, conflate the California judgment with the original arbitration award and another foreign judgment, and marginalize the California judgment as a mere intangible collection right similar to any other debt or award. (Joint Br. at 40–41.) Petitioners' arguments are incorrect.

First this RICO case is not based on the underlying harm that gave rise to the original arbitration award. That award was based on different claims relating to different injuries suffered elsewhere as a result of different conduct that occurred elsewhere and at a different time (now more than 15 years ago). (J.A. at 51a–54a.) This present action involves alleged injury in the California judgment caused by specific alleged prohibited racketeering conduct conceived of and carried out in California to avoid collection of the California judgment. (J.A. at 91a–99a.) This necessarily occurred well after the facts giving rise to the original arbitration award and could have played no part in that award. (*Id.*)

Second, Petitioners' conflation of the California judgment with the arbitration award and another foreign judgment ignores the significance of the district court's legal recognition of a foreign arbitral award pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral

Awards, New York June 10, 1958. *See* 9 U.S.C. § 201.[9] Specifically, once a foreign arbitration award is confirmed under the New York Convention, "the judgment has the same force and effect of a judgment in a civil action and may be enforced by the means available to enforce any other judgment." (J.A. at 10a (quoting *Ministry of Def. & Support for the Armed Forces of the Islamic Rep. of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1094 n.1 (9th Cir. 2011).) In other words, the California judgment is a judgment, plain and simple. It matters not how or why it originally arose.

Moreover, unlike the arbitration award and foreign judgment, the California judgment is uniquely domestic and may not be enforced anywhere other than in California. Only the California judgment (*not* the arbitration award or some other foreign judgment) confers rights to Smagin within California, where Yegiazaryan resides. For example, Smagin may enforce the California judgment in California by writ of execution issued by the U.S. district court and "may obtain discovery from any person—including the judgment debtor." Fed. R. Civ. P. 69. Smagin may also enforce the judgment through a turnover order directing Yegiazaryan, a California resident, to turn over assets under his control anywhere in the world. (C.A. E.R.

---

[9] Article III of the New York Arbitration Convention provides that, in recognizing arbitral awards, the contracting state (i.e., the United States) "there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition of enforcement of arbitral awards to which this Convention applies than are imposed on the recognition of domestic arbitral awards." United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards at art. III., June 10, 1958, U.N.T.S. 38, as implemented by 9 U.S.C. §§ 201–08.

525–27.) Petitioners alleged collusive conduct in violation of the RICO Act to frustrate Smagin's enforcement of the California judgment forms the basis of Smagin's claims for domestic injury in this lawsuit. (C.A. E.R. 552, 554.)

Finally, Petitioners' marginalization of the California judgment as little more than an intangible property that carries with it certain intangible collection rights like any other debt is mistaken. The fact that the California judgment may be considered intangible property does not, as a matter of law, render the situs of the California judgment in Russia where Respondent Smagin resides. As several circuit courts have recognized, "attaching a situs to intangible property is necessarily a legal fiction; therefore, the selection of a situs for intangibles must be context-specific, embodying a 'common sense appraisal of the requirements of justice and convenience in particular conditions.'" *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 371 (5th Cir. 2004) (quoting *U.S. Indus., Inc. v. Gregg*, 540 F.2d 142, 151 n.5 (3d Cir. 1976)); *accord Office Depot, Inc. v. Zuccarini*, 596 F.3d 696, 702 (9th Cir. 2010). As the Ninth Circuit observed in this case, "[i]t would make no sense to conclude that the California Judgment exists as property in Russia, because the judgment grants no rights whatsoever to Plaintiff in Russia." (J.A. at 10a.) In fact, the California judgment is much more similar to the bank accounts targeted in *Bascunan* where the Second Circuit found domestic injury to be alleged than the intangible rights in the other cases cited by Petitioners. *See Bascunan v. Elsaca*, 927 F.3d 108, 117 (2d Cir. 2019) (holding that "[b]ecause the bank accounts were located *inside* the United States, the alleged theft of funds deposited in

those accounts was domestic conduct" notwithstanding the fact that account holder lived outside United States). The California judgment exists in, and was harmed by the RICO scheme, in California alone.

Petitioners' intangible property argument remains premised on the Seventh Circuit's residency test as stated in *Armada (Singapore) PTE Ltd. v. Amvol, Int'l Corp.,* 885 F.3d 1090, 1094 (7th Cir. 2018). The residency test in *Armada* focuses first on the characterization of the property injured. If the injured property is intangible, then the rule in *Armada* is that the residency of the plaintiff is determinative of whether the alleged injury is foreign or domestic. *Id.* (providing that "a party experiences or sustains injuries to its intangible property at its residence" and that all judgments are intangible assets). The *Armada* test was derived from the same general economic-injury rules Petitioners rely on for their textual approach to § 1964(c), i.e., economic injuries are felt at a person's residence. *See id.* at 1094–95 (citing *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 805 (7th Cir. 1997)); *CMACO Auto. Sys. Inc. v. Wanxiang Am. Corp.,* 589 F.3d 235, 246 (6th Cir. 2009); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 19 (1st Cir. 1979)). But the Seventh Circuit modified the general economic-injury rule to create an artificial distinction between economic injury to tangible property and economic injury to intangible property. In so doing, the *Armada* test "precludes all foreign plaintiffs alleging intangible injuries from recovering under § 1964(c) regardless of their alleged connection with the United States." *Humphrey*, 905 F.3d at 709. As the Ninth Circuit aptly observed, *Armada* is not supported by the RICO statute or this Court's opinion in *RJR Nabisco*:

> The Armada test strays from the Supreme Court's decision [in *RJR Nabisco*] in two ways. First, the test makes the location of the *plaintiff* dispositive when the Supreme Court stated that it is the location of the *injury* that is relevant to standing. *RJR Nabisco*, 579 U.S. at 346. Second, the Seventh Circuit's test effectively truncates the standing requirement set forth in *RJR Nabisco* if the harm is to intangible property. Rather than asking whether a plaintiff alleges 'a domestic injury to its business *or property*,' as the Supreme Court described, *id.* (emphasis omitted and added), the Seventh Circuit requires that a plaintiff allege a domestic injury to its business only, with the location of that business defined by the plaintiff's residence.

(J.A. at 16a (emphasis added).) Similarly, the Third Circuit recognized in *Humphrey* that the *Armada* test is too inflexible to be useful and conflicts with this Court's recognition in *RJR Nabisco* that RICO protections are not limited to domestic enterprises:

> [W]e think the *Armada* rule is too inflexible to be useful in resolving cases where the nature of the injured property interest is not self-evident.
>
> *Armada's* residency-based rule also effectively precludes all foreign plaintiffs alleging intangible injuries from recovering under § 1964(c) regardless of their alleged connection with the United States.

Humphrey, 805 F.3d at 709 (quoting *RJR Nabisco*, 579 U.S. at 354).

The *Armada* residency test is also based on a collection of unrelated appeals of lower court decisions involving forum non-conveniens and choice-of-law determinations. *See Armada*, 885 F.3d at 1094–95 (*citing Kamel*, 108 F.3d at 805 (balancing forum non-conveniens factors)); *CMACO Auto. Sys. Inc.,* 589 F.3d at 246 (reviewing Michigan borrowing statute to determine which state's limitations period applies); *Engine Specialties, Inc.*, 605 F.2d at 19 (conflict-of-law analysis applying most significant relationship test under Restatement Second of Conflict of Laws §§ 145, 146 (1971)).

In these cases cited in *Armada*, the courts reviewed the location where the injury is felt as part of just one factor among many and determined only that economic injuries are felt in a plaintiff's residence or principal place of business. *Kamel*, 108 F.3d at 803–05 (holding district court reasonably balanced private and public interests dismissing case on forum non-conveniens ground and stating that Saudi Arabia had "most significant connection" to the case under Indiana choice-of-law rules); *CMACO Auto. Sys.*, 589 F.3d at 246–47 (applying Michigan borrowing statute and the Michigan Court of Appeals' "economic impact" analysis and concluding the California limitations period applied because the "economic injury suffered by [California corporation] … was clearly felt at its corporate headquarters."). These non-RICO cases do not distinguish between economic injuries to tangible or intangible property. Nor do these non-RICO cases relate to extraterritorial conduct. And none suggest it is

appropriate to import their rules into the domestic-injury inquiry created to address extraterritoriality concerns.

The *Armada* test amounts to an artificial slicing of the general economic-injury rule based on the characterization of the alleged property injured as tangible or intangible. The problem with the rule is not that it finds a plaintiff's residence relevant to the inquiry, but that it makes the plaintiff's residence dispositive. The better approach to the domestic-injury inquiry is to focus on where the actual injury arises based on an analysis of the conduct at issue and the property targeted, rather than on the plaintiff's residence alone.

V. Petitioners' Parade Of Horribles Does Not Require A Bright-Line Rule That Conflicts With § 1964(c).

Petitioners urge that their bright-line residency rule should be adopted by this Court because it is easy to apply, will avoid litigation, and is consistent with the doctrine of prescriptive comity. (Joint Br. at 47–48.) They warn that the failure to adopt their residency rule will make the United States a "Shangri-La of [enforcement] litigation for lawyers representing those cheated" of payments due on foreign arbitration awards and judgments. (Joint Br. at 51–52.) Not so.

While bright-line rules are favored, this Court routinely rejects proposed bright-line rules where, as here, the proposed rule conflicts with the text of the applicable statute or otherwise distorts well-settled legal doctrines. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 136 (2014) (rejecting proposed competitor-test that provided a bright-line rule "because it does so at the expense of

distorting the statutory language"); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted…."); *Campbell v. Cuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994) (holding fair use doctrine "is not to be simplified with bright-line rules, for the statute, like the ... doctrine it recognizes, calls for case-by-case analysis"). While simplicity is desirable, it does not overcome fealty to the RICO statute. The bright-line rule should thus be rejected.

RICO's objective is to deter certain conduct. One of the ways it does so is through the private right of action in § 1964(c). Congress weighed the policy considerations between deterring criminal conduct and increased litigation when it enacted the private right of action. *See, e.g.*, *Sedima*, 473 U.S. at 487 (discussing legislative history, including the concerns that the treble-damages provision would be used for malicious harassment of competitors). Then, in 1995, Congress reconsidered the reach of § 1964(c) claims when it amended RICO to exclude claims arising from alleged securities fraud. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 107, 109 Stat. 737, Title I (1995).

Congress thus knows how to limit RICO if it wishes to do so. And Congress is free to again reconsider the reach of § 1964(c) and narrow RICO if it wishes to prevent claims by foreign plaintiffs. Congress has not yet chosen to do so. This Court should not make that choice in Congress' stead.

Petitioners also mistakenly contend their proffered residency test for § 1964(c) claims aligns with the doctrine of prescriptive comity. But Petitioners'

residency test does nothing to preclude actions by U.S. residents involving purely foreign conduct and purely foreign businesses or properties. To the contrary, Petitioners' residency test would sow more international discord, not less, because Petitioners' rule treats injuries to U.S. property or business differently depending on whether the owner is or is not a U.S. resident. And it also would allow any U.S. plaintiff to bring a RICO claim for exclusively foreign conduct. No fair reading of § 1964(c) or *RJR Nabisco* compels such a result.

Petitioners' reliance on *Empagran* is likewise mistaken. In *Empagran*, the Court focused on precluding the Sherman Act from reaching foreign conduct that causes independent foreign effects, e.g., higher prices abroad. *Empagran*, 542 U.S. at 166 ("Why is it reasonable to apply this law *to conduct* that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to plaintiff's claim?* We can find no good answer." (first emphasis added)). Petitioners' test is inconsistent with the conduct-focused rule adopted in *Empagran* because their residency test ignores conduct altogether.

Petitioners forum-shopping argument fares no better. First, U.S. courts cannot confirm just any arbitration award against just any award-debtor. The New York Convention only allows an enforcement action for a foreign arbitration award where, as here, the award-debtor is located in or has assets in the United States. *See, e.g.*, *Frontera Res. Azrbaijan Corp. v. State Oil Co. of the Azrbaijan Republic*, 582 F.3d 393, 397 (2d Cir. 2009) (citing *Telecordia Tech Inv. v. Telkom SA Ltd.*, 458 F.3d 172, 178–79 (3d Cir. 2006); *Glencore Grain Rotterdam B.V. v. Shivnath Rai*

Harnarain Co., 284 F.3d 1114, 1120–22 (9th Cir. 2002). A civil RICO plaintiff, like all other plaintiffs, must also establish personal jurisdiction over the defendants—providing a second check on the forum shopping Petitioners speculate could occur. *See, e.g.*, *Laurel Gardens, LLC v. McKenna*, 948 F.3d 105, 116–18 (3d Cir. 2020) (discussing personal jurisdiction and nationwide service under the RICO Act). And, as noted above, the extraterritoriality analysis requires domestic conduct that violates RICO, even if personal jurisdiction is established. *RJR Nabisco*, 547 U.S. at 349. These requirements will prevent the rush to U.S. courts Petitioners claim to fear. This Court need not impose another (extra-statutory) hurdle to a RICO claim.

Moreover, RICO's substantive requirements provide further protection against the parade of horribles Petitioners suggest. This is not a case of mere nonpayment. This case involves domestic conduct by Petitioners (and their co-conspirators) to injure and ultimately strip Smagin of his California judgment by engaging in one or more racketeering activities, including wire, mail fraud, obstruction of justice, and intimidating a witness. If Petitioners (or their *amici*) do not like the RICO Act's definition of "racketeering activity" or the breadth of claims on which a § 1964(c) action may be based, they should seek a change to the law through Congress. Any judicial erosion of the private right of action cuts against the purpose of the statute and Congress' decision-making authority. There is no need for a judicial amendment to § 1964(c) that results in picking winners and losers based on residency status, particularly where the application of the judicial presumption against extraterritoriality to

the facts of this case confirms that this action is a permissible domestic application of § 1964(c).

The Court should reject Petitioners' textually unsupported residency test because it is inconsistent with § 1964(c) and because it fails to address the extraterritoriality concerns giving rise to the domestic-injury requirement in *RJR Nabisco*. Instead, the Court should focus on the RICO conduct and the business or property injured when analyzing the domestic-injury requirement, as instructed by *RJR Nabisco*. Because the alleged RICO scheme in this case was developed and carried out from California, targeting California property, domestic injury was adequately pleaded.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

Alexander D. Burch
Counsel of Record
Baker & McKenzie LLP
800 Capitol Street, Ste. 2100
Houston, Texas 77002
Telephone: 713.427.5038
alexander.burch@
bakermckenzie.com

Nicholas O. Kennedy
Baker & McKenzie LLP
1900 N. Pearl Street, Ste. 1500
Dallas, Texas 75201
Telephone: 214.978.3081
nicholas.kennedy@
bakermckenzie.com

Counsel for Respondent
Vitaly Smagin