Nos. 22-381, 22-383

IN THE
Supreme Court of the United States

CMB MONACO, FKA COMPAGNIE MONEGASQUE DE BANQUE

Petitioner,

v.

VITALY SMAGIN, ET AL.,

Respondents.

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

REPLY BRIEF

MICHAEL C. TU
Counsel of Record
PETER J. BRODY
COOLEY LLP
355 South Grand Avenue,
Suite 900
Los Angeles, CA 90071
(310) 883-6550
mctu@cooley.com

Counsel for Petitioner CMB Monaco

December 6, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

REPLY BRIEF

If there is one thing that the parties can agree upon, it is that the Circuits have fractured in the wake of this Court's decision in *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325 (2016). Smagin does not seriously contest that the Courts of Appeals are now divided both as to (i) the rule to apply to determine whether an injury to intangible property is "domestic" under *RJR Nabisco* (with *Armada (Singapore) PTE Limited v. Amcol International Corp.*, 885 F.3d 1090 (7th Cir. 2018) on one side and the decision below and *Humphrey v. GlaxoSmithKline PLC*, 905 F.3d 694 (3d Cir. 2018) on the other) and (ii) as to the application of that rule to the claimed injuries to court judgments (with *Armada* and *Cevdet Aksut Ve Ogullari Koll.Sti v. Cavusoglu*, 756 F. App'x 119 (3d Cir. 2018) on one side and the decision below on the other).

Instead, Smagin's opposition argues that this Court should leave the discord among the Circuits in place for three reasons: because the decision below is correct, this case is a poor vehicle, and further percolation is warranted. Each argument is without merit and should be rejected.

Smagin's stated desire for more percolation is unpersuasive because Smagin does not, and cannot, identify what purpose further percolation would achieve. The Courts of Appeals are intractably divided, and the Courts of Appeals and parties below have ably identified and presented the various rationales in favor of each potential rule. What's more, Smagin proposes no future rule that might harmonize the existing tests. Because there is no prospect that further delay will allow the federal

courts to coalesce on a consensus rule, this Court should address this important split.

Smagin's vehicle argument is that this Court should not intervene because other cases will involve other forms of intangible property. There is no good reason to think that separate rules are needed for these other forms of intangible property, or that this Court cannot fashion a broadly-applicable rule capable of application across contexts.

Finally, Smagin's defense of the decision below only confirms that *certiorari* is necessary and appropriate. By defending the Ninth Circuit's rule, Smagin makes clear that he thinks that at least one (if not two) other Circuits are applying the wrong methodology to determine the locus of RICO injury.

This Court should grant *certiorari*.

I. Smagin Cannot Undermine The Splits CMB Monaco Has Identified As To The Case-Dispositive Issue Of RICO Standing.

As CMB Monaco's petition explains, two circuit splits flow from the Ninth Circuit's decision below.[1]

---

[1] CMB Monaco analyzes the division among the circuits as two separate splits (a 2-1 circuit split as to the methodology to be applied and a second split as to the application of that methodology to the same facts), while Petitioner Ashot Yegiazaryan ("Yegiazaryan") characterizes the split as a 1-1-1 methodological split between three circuits. Yegiazaryan Pet. at 6-13. But any differences between the parties' framings of the split are of almost no moment: all parties agree that the Courts of Appeals that have considered the question presented have deeply divided.

First, the panel's opinion acknowledged, and deepened, a split in the circuits as to the methodology to be used to determine whether a RICO plaintiff's claimed injury to intangible property is foreign or domestic: on one hand, the Seventh Circuit applies a bright-line test, and on the other, the Third and Ninth Circuits follow a multifarious, case-specific inquiry. CMB Pet. at 12-14. *Second*, the panel below created a new split as to the application of the domestic-injury inquiry in the context of claimed injuries to court judgments. Before this case, the circuits were unanimous that such an injury is felt abroad (despite their methodological divisions). Now, the Courts of Appeals are divided, with the Ninth Circuit holding that a foreign plaintiff with no personal connection to the U.S. can essentially manufacture a claim of harm to U.S. property, and therefore to sweep defendants around the globe that have no other connection to the U.S. into a suit in U.S. court, simply by confirming a foreign judgment here. CMB Pet. at 14-16.

Smagin offers no persuasive response to these identified circuit splits.

1. Smagin does not dispute that the Seventh Circuit's bright-line *Armada* test is inconsistent with the Third Circuit's *Humphrey* test, which the decision below adopted. *Cf.* Opp'n at 16. Smagin concedes through his silence, that these tests cannot be reconciled: a bright line rule that a RICO plaintiff always suffers injury to its intangible property at its residence is in fact inconsistent with a multi-factor test that permits in some cases courts to separate the location where injury to intangible property is felt from a plaintiff's residence. And, Smagin does not argue – because he cannot – that the analytical

distinction between the two tests is of no practical import: indeed, this case establishes that the difference between *Armada* and *Humphrey* (as applied) can be the difference between dismissal and discovery. *Compare* App. 27a-31a (district court opinion dismissing this litigation under *Humphrey*) *with* App. 12a-13a (Ninth Circuit opinion allowing it to go forward). This case-dispositive methodological division among the Circuits alone warrants this court's review.

2. Smagin also admits that the decision below creates a new circuit split as to the application of law to the very facts presented by this case – that is, a suit by a foreign plaintiff resting on an injury to a U.S. court judgment. Opp'n at 18 (admitting that the "two other circuit decisions [that] have addressed RICO standing in the context of alleged injury to a domestic judgment in favor of a foreign plaintiff," *Armada* and *Cevdet*, found that the injury was felt abroad); *see also* CMB Pet. at 14-16 (explaining the division). Like the methodological split, this division in application is dispositive; under *Cevdet*, this litigation would have been dismissed.

Rather than denying the split, Smagin tries to downplay the division between the Third and Ninth Circuits by contesting CMB Monaco's argument that the decision below conflicts with *RJR Nabisco*. To that end, Smagin argues that the Ninth Circuit did not actually "impos[e] a 'defendant-centric' analysis to the domestic-injury inquiry." Opp'n at 17; *see also* CMB Pet. at 17-20. Smagin contends that the Ninth Circuit did not "focus" on the defendants' conduct, but only "bolstered" its conclusion by reference to the defendants' conduct. *Id.* This semantic distinction is

unpersuasive. It also confirms that the decision below *does in fact* contravene *RJR Nabisco*. Smagin admits that the Ninth Circuit "consider[ed] the defendant's [sic] conduct," which is exactly what *RJR Nabisco* instructed against when it centered the domestic injury inquiry on the location that plaintiff feels its injury. *See* CMB Pet. at 18.

Moreover, this argument is particularly flimsy because the Ninth Circuit reached the opposite conclusion from the Third Circuit (in *Cevdet*) under the same test on exactly the same facts. The only way the Ninth Circuit could have done so by centering different considerations in its inquiry, and here, those other considerations were the defendants' allegedly-unlawful actions. App. 12a-13a.

* * *

In short: this case presents two admitted circuit splits, both as to the methodology to be applied under *RJR Nabisco* and the application of that principle to recurring facts. This Court's review is necessary and appropriate to provide clarity as to the application of the *RJR Nabisco* framework in suits founded on injury to intangible property.

II. This Case Presents An Ideal Opportunity To Resolve These Important Circuit Splits.

Smagin asks this Court to leave the circuit splits identified by CMB Monaco open. Specifically, Smagin argues that further percolation is warranted, that this case is not an ideal vehicle to resolve the question presented, and that the decision below is correct. This is unsupported on each front.

A. Further Percolation Is Unnecessary.

Although the three Courts of Appeals to consider the question presented have hopelessly divided, Smagin asks this Court to deny *certiorari* to permit "ten other circuit courts . . . to take a swing at whether injury to a domestic judgment is domestic injury under RICO." The Court should decline this invitation to delay.

"Percolation – the independent evaluation of a legal issue by different courts . . . [–] allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule," and permits this court to have the "benefit of the experience of those lower courts." *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) (quotation marks omitted). Here, though, the benefits of percolation have been exhausted, and further percolation will achieve nothing. The Court should grant *certiorari*.

1. The Circuits have already developed the two possible tests to be applied to determine the locus of an injury to intangible property: a bright-line rule and an open-ended, multifarious standard that turns on the facts of each case. The existing rules are, as Smagin does not contest, irreconcilable with one another. And no other potential rule is coming on the horizon – CMB Monaco is unaware of one in the lower courts, and Smagin does not cite one.

Nor is this a case in which the circuits are trending towards substantial uniformity. Instead of (for example) coalescing into a split with a predominant rule and a single outlier circuit, the

Courts of Appeals are instead spinning into sharper disagreement – as demonstrated by the decision below, which applied the existing *Humphrey* test to find jurisdiction on the same facts as a prior case, *Cevdet*, in which a different circuit found no jurisdiction. As a result, another court's "taking a swing" at the question presented is unlikely to produce a different result.

2. The arguments for and against each rule are clear, and have been developed by the circuits already. *See* App. 14a-19a (weighing the various tests); *Humphrey*, 905 F.3d at 708-11. The background principles relevant to the decision to adopt or apply a particular test – that is, the general rule that economic injuries are felt at a party's residence and the justifications for distinguishing tangible from intangible property – are also long-established. *See* Opp'n at 11 (collecting cases for the "general economic-injury rule that provides that economic injuries are felt at a person's residence"). Smagin does not explain why the existing analysis of the various considerations is insufficient to support this Court in deciding the right rule to apply.

* * *

There is no need to permit the Circuits a further opportunity to divide and disagree – further percolation will not aid in this Court's review. This Court should intervene.

B. Smagin's Vehicle Arguments Are Unpersuasive.

Smagin tries to wave this Court away from the clear circuit split by arguing that this Court cannot use this case to set a rule for all claims founded in

injuries to intangible property, because "[t]he facts of this case are ill-equipped to inform the application of Petitioner's proposed residency test to other cases involving other types of intangible properties." Opp'n at 15-16. But Smagin's argument that this Court should not grant review because a future case might present different facts is unconvincing.

This Court can, and should, use this litigation to clarify the application of *RJR Nabisco* to all cases involving injuries to intangible property. The lower courts have already proven themselves capable of setting general rules for the treatment of all intangible property even when presented with cases involving claimed injuries to judgments, and this Court can do the same.

What's more, it is not the case that the Courts of Appeals created the methodological split presented only in the context of cases arising out of claimed injuries to judgments. *Humphrey* – the Third Circuit case that first created the split now in issue – involved injury to "prospective business ventures," not a court judgment. 905 F.3d at 701. And courts have repeatedly applied *Humphrey*, *Armada*, and *RJR Nabisco* to other forms of intangible property.[2] There

---

[2] *See, e.g.*, *Glob. Master Int'l Grp., Inc. v. Esmond Natural, Inc.*, 2021 WL 1324433, at *3 (C.D. Cal. Mar. 9, 2021) (applying *RJR Nabisco* to hold that "damage to reputation and goodwill" was suffered abroad); *Mussnich v. Teixiera*, 2021 WL 1570832, at *2 (C.D.

is no reason to think that future courts will be unable to apply a rule developed in the context of one form of intangible property to other such assets, either.

And even if this Court uses this case to set a rule that is limited to the context of RICO claims founded in injuries to judgments, that will *still* be a productive use of this Court's resources. As CMB Monaco's petition establishes, there is an irreconcilable split in the three circuits that have addressed the specific question of whether a foreign plaintiff can bring a RICO claim by alleging only harm to a U.S. judgment. That three circuits have addressed the application of *RJR Nabisco* to the specific form of intangible property at issue is strong evidence that this case presents an important issue, not an esoteric circuit split of mainly academic interest.

Cal. Feb. 23, 2021) (injury related to damage to reputation felt in Brazil even though "the purported racketeering scheme too place, at least in part, in the United States"); *Ramiro Aviles v. S & P Global, Inc.*, 380 F. Supp. 3d 221, 267 (S.D.N.Y. 2019) (applying *Humphrey* and *Armada* to hold that plaintiffs suffered "economic injury when the shares they held in three non-United States funds lost their value" abroad); *Unigestion Holdings, S.A. v. UPM Tech., Inc.*, 412 F. Supp. 3d 1273, 1291-92 (D. Or. 2019) (citing *Humphrey* and *Armada*, and holding that losses to Haitian business were felt in Haiti); *Uthe Tech. Corp. v. Harry Allen & Aetrium, Inc.*, 2016 WL 4492580, at *3 (N.D. Cal. 2016) (loss of business opportunity felt abroad).

And without this Court's intervention, there will be more cases like this one. It is trivially easy for a foreign plaintiff to "domesticate" a foreign judgment – so long as the plaintiff can make a colorable showing of jurisdiction over any one defendant, it can confirm a foreign award in the U.S. CMB Pet. at 20-21. And with that award in hand, the decision below permits such a foreign plaintiff to bring sweeping RICO litigation claims, dragging in defendants without any connection to the U.S. (like CMB Monaco) to face RICO's potential penalties. CMB Pet. at 21-23. The Court should grant review to correct the Ninth Circuit's erroneous practical expansion of RICO's scope.

C. Smagin's Unpersuasive Defense Of The Decision Below Confirms That Certiorari Is Necessary.

With no other persuasive argument, Smagin devotes the bulk of his Opposition to the proposition that this Court should decline review because the decision below was correct. Opp'n at 8-15.

CMB Monaco disagrees with Smagin's contention that his injury was felt in California because of the "conduct directed to and from California" alleged in his complaint, *id.* at 8-10, and likewise disputes that the *Armada* should be abandoned in the RICO context, *id.* at 10-15. But setting aside these merits questions, Smagin's Opposition establishes that all parties agree that at least one of the Circuits has set out the wrong domestic injury test – in CMB Monaco's telling, the Third and Ninth Circuits and in Smagin's, the Seventh. Smagin's defense of the ruling below reaffirms that it is common ground that at least one of the Circuits has applied the *Humphrey* rule

incorrectly when presented with the same facts: in CMB Monaco's telling, the Ninth Circuit, and in Smagin's, the Third Circuit.

As noted above, these errors will multiply without this Court's review. If Smagin is correct, a denial of *certiorari* will result in courts within the Seventh Circuit continuing to bar foreign plaintiffs with potentially-meritorious RICO claims from U.S. court simply because of their residence. If CMB Monaco is correct, on the other hand, the courts within the Third and Ninth Circuits will continue to entertain spurious claims by litigants with no real connection to the U.S., subjecting those foreign defendants to substantial and unjustified litigation risks (as happened here). This division will be particularly stark in claims based on injury to U.S. court judgments – in Smagin's framing, without this Court's intervention, the Ninth Circuit will properly allow them, the Third Circuit will bar them on an incorrect grounds, and the Seventh Circuit will bar them on a different incorrect grounds.

Smagin's belief that the decision in his favor below is correct is not a good reason for this Court to allow the disagreements that have developed among the Circuits to metastasize. This Court should grant *certiorari* and clarify the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL C. TU
Counsel of Record
PETER J. BRODY
COOLEY LLP
355 South Grand Avenue,
Suite 900
Los Angeles, CA 90071
(310) 883-6550
mctu@cooley.com

Counsel for Petitioner
CMB Monaco

December 6, 2022