No. _____

IN THE
Supreme Court of the United States

ALAN WOFSY AND ALAN WOFSY & ASSOCIATES,

Petitioners,

v.

VINCENT SICRE DE FONTBRUNE; LOAN SICRE DE FONTBRUNE; ADELE SICRE DE FONTBRUNE; ANAIS SICRE DE FONTBRUNE, IN THEIR CAPACITY AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF YVES SICRE DE FONTBRUNE,

Respondents.

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

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Richard J. Mooney
RJM LITIGATION GROUP
505 Montgomery St. #1100
San Francisco, CA 94111
(415) 874-3711
richard.mooney@rjmlitigation.com

Counsel for Respondents

Question Presented

Notwithstanding Petitioners' inaccurate suggestion to the contrary, the *only* question at issue in this case involving jurisdiction predicated solely upon diversity is purely a question of State law. Specifically, the dispute involves solely the question is whether a concededly valid judgment affirmed by France's highest civil court (the "French Judgment") is properly recognized in California under California's version of the Uniform Foreign-Country Money Judgment Recognition Act (the "California UFCMJRA" or the "Act"). The particular sub-issue relevant to petition here is whether the unanimous Ninth Circuit Panel incorrectly held that the French Judgment should be denied recognition under California's UFCMJRA because it should be considered "repugnant to the public policy of this state or the United States" under California Code of Civil Procedure Section 1716(c)(3).

Introduction

Petitioner presents an esoteric question of California state law – whether a judgment entered by the courts of France should not be recognizable in California because it is based on copyright violations that might have been not actionable in the United States because of the fair use doctrine, on the theory that any judgment for copying deemed fair use is "repugnant" under the law of California. Of course, this question of California law is not one appropriate for

resolution in this Court, even if it were a common question that would be likely to arise often. Petitioner therefore attempts to paint the Ninth Circuit's decision as resting on – rather than involving – that court's fair use analysis. Yet any divergence in application of the fair use doctrine between the Ninth and other Circuits (even if it exists) is not reasonably resolved in a case in which the Ninth Circuit did not even reach a firm conclusion on whether the fair use doctrine would have applied in a suit brought in the United States regarding conduct that occurred in the United States. Rather, the court held that "[b]ecause it is at least highly debatable – if not absolutely clear – that a fair use defense would not protect the conduct underlying the judgment," the judgment could not be considered repugnant under California law. App at 26-27.

There is no dispute that Petitioner intentionally copied more than 1,000 creative and artistic works (photographs of works by Pablo Picasso, who was Spanish by birth but lived most of his life in France) and used them as part of publications that it sold for more than $100 each to both educational institutions and private collectors, and that Petitioner was properly found liable for that theft of intellectual property by the courts of an advanced democratic country with a fair and impartial judicial (France). Because Petitioner refused to pay the judgment and apparently has no assets in the European Union, Respondents sought to have the judgment recognized by the courts of California, where Petitioner resides and

holds assets. Because Petitioner is a citizen of California and Respondents are citizens of France, Petition was able to remove the state-court action to the United States District Court for the Northern District of California.

The action, filed in 2013, was based on the California UFCMJRA, promulgated by the California Legislature as California Code of Civil Procedure §§ 1715 *et seq.* Petitioner first defended the action by arguing that the judgment was not subject to recognition because it constituted a "fine or other penalty" under Cal. C.C.P. § 1715 – an argument that was accepted by the District Court but then unanimously rejected by a three-judge panel of the Ninth Circuit. After discovery, Petitioner moved for summary judgment on multiple bases; the District Court was unpersuaded by all but one of the arguments, but was persuaded that the French judgment should be denied recognition because it was "repugnant to the public policy" of California or United States under Cal. C.C.P. § 1716. The resulting judgment in Petitioner's favor was vacated by a unanimous three-judge panel of the Ninth Circuit, which remanded the matter for trial.

The principal issue in this petition, therefore, is whether holding Petitioner liable for French copyright violations is so "repugnant" to the public policy of California or the United States that our courts should refuse to recognize the French judgment in a significant departure from international comity. With due respect to the learned District Judge, the Court of Appeals correctly held that

the answer to that question is most certainly "no". Even if the District Judge were correct that this blatant commercial copying would be protected by the "fair use" doctrine under U.S. law, the fact that France – like most advanced democracies in the world – does not recognize a defense with the precise contours of the U.S. "fair use" defense does not make French law "repugnant."

Relevant Statutory Provisions

The statutory provisions directly relevant to this issue are set out here:

> (a) Except as otherwise provided in subdivision (b), this chapter applies to a foreign-country judgment to the extent that the judgment both:
>
> (1) Grants or denies recovery of a sum of money.
>
> (2) Under the law of the foreign country where rendered, is final, conclusive, and enforceable.
>
> (b) This chapter does not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is any of the following:
>
> (1) A judgment for taxes.
>
> (2) A fine or other penalty.
>
> . . .

California Code of Civil Procedure § 1715. And:

> (a) Except as otherwise provided in subdivisions (b) and (c), a court of this state shall recognize a foreign-country judgment to which this chapter applies.
>
> (b) A court of this state shall not recognize a foreign-country judgment if any of the following apply:
>
> (1) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.
>
> (2) The foreign court did not have personal jurisdiction over the defendant.
>
> (3) The foreign court did not have jurisdiction over the subject matter.
>
> (c) A court of this state is not required to recognize a foreign-country judgment if any of the following apply:
>
> (1) The defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend.
>
> (2) The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case.

(3) The judgement or the cause of action or claim for relief on which the judge is based is repugnant to the public policy of this state or the United States.

(4) The judgment conflicts with another final and conclusive judgment.

(5) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court.

(6) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

(7) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment.

(8) The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

(9) The judgment includes recovery for a claim of defamation unless the court determines that the defamation

> law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions.

California Code of Civil Procedure § 1716.[1]

Reasons for Denying Certiorari

The Decision Below Does Not Create or Reflect a Circuit Split

Although Petitioner asserts that *certiorari* is appropriate because the decision below is in conflict with decisions of other Courts of Appeals, this assertion is incorrect. As an initial matter, there is no dispute that the Ninth Circuit correctly stated the legal test governing fair use analysis in U.S. copyright matters – noting that "[t]he fair use defense under U.S. copyright law requires the analysis of four statutory factors. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)." App. at 19. The court then addressed each of those factors, in each instance relying on statutory and Supreme Court authority regarding the application of the factors, along with long-standing precedent from the Ninth, Second, and Sixth Circuits. App. at 19-26. Nowhere in the discussion is there any

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[1] The California Legislature slightly amended section 1716 effective January 1, 2018. Because the California Court of Appeal has held that the amendment is not retroactive, *Alfa-Bank v. Yakovlev*, 21 Cal.App.5th 189, 198 (2018), *as modified on denial of rehearing*, Respondents refer to the statute as operative from 2010 through 2017.

indication that the court is choosing or must choose between competing legal theories – rather the entire section is based on the court assessing the *facts* and applying them to an undisputed set of legal standards.

This Case Is a Poor Vehicle for Addressing Fair Use Standards

As the decision below noted, "[Petitioner's] public policy defense rests on two assertions: first, that the fair use doctrine of U.S. copyright law – a feature that France's copyright scheme lacks – would have protected the copying of the photographs at issue; and second, that a judgment imposing copyright liability based on copying that would qualify as fair use is repugnant to our public policy." App. at 19. The second question, of course, is a matter of California law, and Petitioner therefore focuses only on the first question and asks this Court to determine that issue.

Notably, the decision below did not even make a decision regarding the only issue Petitioner offers to this Court. Rather, the decision – after seven pages of detailed analysis regarding the agreed-upon four factors, the court concluded its analysis of the "fair use" dispute only by saying "we have serious doubts that a fair use defense would protect the copying of the photographs at issue . . . ." App. at 26. Notably, the court did not resolve the "fair use" dispute precisely because it did not have to, because that was not the question facing the court. Rather the question was whether the French Judgment is "repugnant", and

the decision below held that it was not, at least when the "fair use" dispute was "highly debatable" as it is here. App. at 26-27. In particular, the court held that "[Petitioner's] inability to urge a fair use defense in France does not place the French judgment in 'direct and definite conflict with fundamental American constitutional principles.'" App. at 26-27 (quoting the Ninth Circuit's standard for "repugnant" under the California UFCMJRA as set out in *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 1004 (9th Cir. 2013)).

Thus, even if this Court were to conclude that the decision below slightly mischaracterized the proper framework for evaluating the one or two of the four fully agreed-upon "fair use" factors, nothing in this dispute would or could change unless this Court further held that the Ninth Circuit's long-standing interpretation of the California UFCMJRA was wrong and that in effect any foreign judgment not obtainable in the U.S. courts is repugnant to public policy. That has never been the interpretation of the "repugnant to the public policy" clause in any State's version of the UFCMJRA. *See, e.g.*, App. at 18 (standard for repugnancy under the California UFCMJRA is not simply whether it is "contrary to public policy", quoting *Ohno* at 1002; rather, it is whether judgment is "'so offensive to our public policy as to be prejudicial to recognized standards of morality and to the general interests of the citizens", quoting *Hyundai Securities Co. v. Lee*, 182 Cal. Rptr. 3d 264, 272 (Ct. App. 2015)).

The Decision Below Correctly Held That the "Fair Use" Question Is Highly Debatable"

The decision below properly concluded that the "fair use" question, if it had been presented in a case brought in the United States rather than a case brought in France based on conduct that occurred in France would have been "highly debatable", on its way to concluding that the French Judgment was not repugnant to public policy.

First, there is no dispute that the decision below properly held that the fair use defense under U.S. copyright law requires the analysis of the four factors discussed in *Campbell v. Acuff-Rose Musis, Inc.*, 510 U.S. 569, 578 (1994). App. at 19 (purpose and character of use; nature of copyrighted work; amount / substantiality of the portion used; and impact on potential market).

Second, the court correctly held that the analysis of those four factors made it "at least highly debatable" that Petitioner could have established the defense in a U.S. court. In particular:

> (1) Petitioner conceded that his project utilizing the purloined photographs "is a commercial venture." App. at 21.
>
> (2) Petitioner conceded that the purloined photographs had been published, in the "catalogue raisonné" of Picasso's works known as the *Zervos Catalogue*, and there is no real

dispute that photographs are properly considered creative works. App at 23 (citing cases).

(3) There is no dispute that every one of the 1,492 purloined photographs was copied in its entirety. App. at 25.

(4) The court below properly found that Petitioner had provided no evidence that the market for the purloined photographs had not been harmed, and further properly applied long-standing circuit precedent that a presumption of market harm arises from copying that is both commercial and non-transformative. App. at 26 (citing cases).

In short, even if this Court were to review the evidence and arguments and apply or weight the factors slightly differently, there is effectively no chance this Court could conclude that the court below was incorrect in finding the potential applicability of the fair use doctrine to be "highly debatable."

Conclusion

The petition for a writ of *certiorari* should be denied.

Dated: January 9, 2023

Respectfully Submitted,

/s/ Richard J. Mooney

Richard J. Mooney
RJM LITIGATION GROUP
505 Montgomery St. #1100
San Francisco, CA 94111
(415) 874-3711
richard.mooney@rjmlitigation.com

Counsel for Respondents