No. 13-712

IN THE

Supreme Court of the United States

CLIFTON E. JACKSON, CHRISTOPHER M. SCHARNITZKE, on behalf of themselves and all other persons similarly situated,

Petitioners,

v.

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., COCA-COLA ENTERPRISES, INC., foreign corporations, DR. PAUL DROUILLARD, jointly and severally,

Respondents.

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

PETITIONERS' REPLY

JEFFREY T. STEWART
BENJAMIN WILENSKY
SEIKALY & STEWART, P.C.
30300 Northwestern Hwy.
Suite 200
Farmington Hills, MI 48334
(248) 785-0102

MARSHALL LASSER
Counsel of Record
MARSHALL LASSER, P.C.
P.O. Box 2579
Southfield, MI 48037
(248) 647-7722
mlasserlaw@aol.com

Attorneys for Petitioners

April 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

INTRODUCTION

This RICO action is not based on the work-related personal injuries petitioners suffered during their employment, but on respondents' subsequent wrongful acts (including RICO predicate offenses) that inflicted new and different injuries: deprivation of petitioners' statutory entitlements under Michigan's workers' compensation laws. The loss of these state-law-defined property interests constitutes injury to "business or property" under RICO, 18 U.S.C. § 1964(c).

Such claims are actionable under the law of the Ninth Circuit, which looks to state law to define property interests and recognizes that an injury to a property interest is cognizable under RICO even though its existence is traceable back to conduct by the defendant that also inflicted immediate personal injury. The decision below, in sharp conflict, disregarded the primary role of state law in defining property interests and adopted a novel rule that a property interest that is related to underlying personal injuries does not qualify under RICO.

The conflict was strikingly evidenced when, nearly simultaneously with the filing of the petition for certiorari, the U.S. District Court for the District of Arizona held that it was bound by the principal Ninth Circuit precedent cited in the petition to reject the Sixth Circuit's decision in this case. *Miller v. York Risk Servs. Group*, 2013 WL 6442764 (D. Ariz. Dec. 9, 2013). *Miller* held that allegations that defendants conspired to interfere with statutory entitlements under state workers' compensation law state a RICO claim. Following the Ninth Circuit's approach of looking to state law to define property interests, *see id.* at

*3, the court held that interference with an entitlement to workers' compensation benefits constitutes an injury to property under RICO. The court concluded that Ninth Circuit precedent rejects the Sixth Circuit's proposition that "an injury to property is not recoverable under RICO simply because it originated from or relates to a personal injury." *Id*. at *4. And the court expressly stated that the reasoning of the Sixth Circuit "do[es] not find support under Ninth Circuit law which is binding on this court." *Id*.

Particularly in light of *Miller*, respondents' efforts to deny the conflict between the decisions of the two circuits ring hollow. Their defense of the correctness of the decision below reflects both a distortion of Michigan law establishing a property interest in the statutory entitlement to workers' compensation benefits and a fundamental failure to recognize that "[a] federal RICO claim and a state claim for worker's compensation are legally distinct, even though they share factual underpinnings." *Id*. (quoting Judge Moore's dissent below). And respondents' efforts to suggest that this case does not present a proper vehicle for resolution of the conflict overlooks that the decision below rests solely on the en banc court's holding, as a matter of law, that the claims here are not based on injury to property. This case presents the ideal vehicle for resolving that purely legal issue.

I. The Conflict Is Real.

Respondents contend that because courts agree that RICO claims must be based on injuries to business or property rather than personal injuries, there is no intercircuit conflict. But agreement at such a general level does not negate conflict over the legal question of how to draw the line between injuries to

property and personal injuries. This Court has long reocgnized that stating legal principles at too high a level of generality may misleadingly mask significant judicial disagreements. *See, e.g., Nevada v. Jackson*, 133 S. Ct. 1990, 1993 (2013).

Indeed, it would be astonishing if courts did not agree that RICO requires injury to business or property because that is what the statute says. *See* 18 U.S.C. § 1964(c). Moreover, this Court long ago established that the statutory phrase "injured in his business or property" does not include personal injuries but has a "naturally broad and inclusive meaning" encompassing injury to any form of property. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979).

These principles mark only the beginning of the inquiry into whether there is a conflict, not its endpoint. Although courts agree that a RICO claim requires injury to property rather than personal injury, they disagree fundamentally on how to distinguish the two. The Ninth Circuit's decisions in *Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005) (en banc), and *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353 (9th Cir. 2005), reveal sharply different approaches to that issue from that employed by the court below.

Respondents try to obscure the conflict by pointing to factual differences between petitioners' claims and those in *Diaz* and *Living Designs*. They point out, for example, that the plaintiff in *Diaz* alleged loss of employment opportunities as opposed to the deprivation of statutory entitlements to workers' compensation benefits, and that the underlying product liability claims that were at issue in *Living Designs* did not involve bodily injury. But those factual differences do

not alter the conflicting legal principles applied by the Ninth Circuit in *Diaz* and *Living Designs*.

Specifically, in both *Diaz* and *Living Designs*, the court looked to whether the plaintiffs' asserted interest constituted property under state law, *see Diaz*, 420 F.3d at 899, *Living Designs*, 431 F.3d at 364, while the Sixth Circuit in this case discounted the importance of state law and adopted its own characterization of the nature of the entitlements at issue. *See* Pet. App. 18a.

In *Diaz*, the court further held that although the defendant's alleged misconduct (false imprisonment) inflicted personal injuries in the first instance, a RICO claim could nonetheless be asserted when, as a result, the plaintiff was also deprived of a state-recognized property interest. *See* 420 F.3d at 900–01. The Sixth Circuit below, by contrast, held that because the harms petitioners initially suffered (job-related injuries) were personal injuries, they were barred from seeking a RICO recovery for subsequent injuries to distinct property interests (workers' compensation claims under state law) that were ultimately derived from those personal injuries.

In *Living Designs*, the court recognized that interference with a legal claim arising under state law and recognized by state law as a property interest was injury to property, even though the mere pecuniary losses that the plaintiff sought to recover through that claim would not otherwise constitute injury to property. *See* 431 F.3d at 364. The Sixth Circuit, however, declined to recognize interference with a state-recognized legal entitlement as injury to property on the ground that the recovery sought in the underlying claims would merely reflect "pecuniary losses," *see*

Pet. App. 20a—precisely the reasoning rejected in *Living Designs*.

That these clear differences in the legal standards applied by the Sixth and Ninth Circuits are outcome-determinative here is confirmed by the recent decision in *Miller*. There, the district court, in an action involving facts and claims remarkably similar to those here, discussed the decision below at length and expressly held that Ninth Circuit precedent, and *Diaz* in particular, required rejection of the Sixth Circuit's reasoning and holding. *See* 2013 WL 6442764, at *2–*4. The district court's holding that, under Ninth Circuit precedent, a claim based on interference with the plaintiff's state-law entitlement to workers' compensation benefits may proceed under RICO because it is based on an injury to property confirms that the conflict is a genuine one and is squarely presented by the circumstances of this case. As *Miller* illustrates, such claims may proceed in district courts in the Ninth Circuit, but they are barred throughout the Sixth Circuit by the en banc ruling in this case. This Court should grant certiorari to restore uniformity in the law applied in such actions.[1]

---

[1] The Seventh Circuit's recognition in *Evans v. City of Chicago*, 434 F.3d 916, 928–30 & n.26 (7th Cir. 2006), that injuries to property interests recognized by state law can support RICO claims, coupled with its simultaneous criticism of the result in *Diaz*, only underscores the lower courts' need for guidance. Respondents' reliance on nonprecedential decisions of other circuits does nothing to negate the conflict, and in any event their leading example, *Magnum v. Archdiocese of Philadelphia*, 253 Fed. App. 224 (3d Cir. 2007), rested on the court's conclusion that unliquidated tort claims were not property interests *under state law*. *Id.* at 228.

Respondents suggest, however, that review by this Court is unnecessary because there is no direct conflict among the circuits over the Sixth Circuit's secondary assertion that the "clear statement" principle of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), supports its narrow reading of RICO—a question not discussed in *Diaz* or *Living Designs*. That the Ninth Circuit did not mention *Gregory*, however, does not alter the fact that its decisions would require a directly opposite result in this case. Moreover, that the Ninth Circuit felt no need to discuss *Gregory* is hardly surprising because, under the Ninth Circuit's reasoning, which applies the straightforward language of RICO to protect property interests created by state law, there is neither any displacement of state law nor any lack of clarity in federal law that would implicate *Gregory*. *See Pa. Dept. of Corrections v. Yeskey*, 524 U.S. 206, 209–12 (1998). Thus, as the district court in *Miller* recognized, the Sixth Circuit's invocation of *Gregory* cannot be reconciled with the result commanded by *Diaz*. *See* 2013 WL 6442764, at *4.

II. Respondents' Attempt to Avoid the Conflict and Defend the Decision Below Rests on Mischaracterization of Michigan Law.

It is well established that individuals have property interests both in the continued receipt of statutory benefits, *see Goldberg v. Kelly*, 397 U.S. 254 (1970), and in claims for statutory entitlements. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982). Given RICO's "inclusive" definition of "property," *Reiter*, 442 U.S. at 338, the Sixth Circuit's search for an unexpressed congressional intent to exclude claims based on injury to such property from RICO cannot be squared with the statutory language, which demon-

strates not ambiguity, but "breadth." *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985); *see also Yeskey*, 524 U.S. at 212.

Nonetheless, respondents contend that even if injury to state-law entitlements that create property interests suffices to support a RICO claim, Michigan's workers' compensation laws create no property interests. Respondents' arguments, however, fly in the face of the Sixth Circuit majority's own description of Michigan law. As the court explained, Michigan's workers' compensation law "reflects a complex set of bargains" entitling employees to defined compensation for "lost wages, rehabilitation services, and medical expenses" while simultaneously entitling employers to defenses against liability for such compensation. Pet. App. 20a.

The Sixth Circuit majority did not contest the dissent's demonstration that such entitlements are property interests both under Michigan law and federal due process analysis, *see id.* at 44a, but expressly assumed "that an employee has a 'legal entitlement' to such benefits." *id.* at 20a. The court held that even if the employees had a property interest under state law, it did not qualify under RICO because the interest ultimately rested on an underlying personal injury. *See id*.

Contrary to respondents' suggestion, nothing in the court's analysis reflects a construction of state law contrary to that advanced by petitioners. Thus, resolving the question posed by the petition would not require this Court to delve into the correctness of a lower court's construction of state law. There is no doubt that, as the Sixth Circuit itself recognized, state law creates an entitlement to benefits under the cir-

cumstances it defines; the question is whether interference with that state-defined entitlement constitutes an injury to property under RICO—an issue that requires no decision on any genuinely disputed matter of state law.

Respondents' assertions that Michigan precedent does not support the characterization of the statutory entitlements at issue as property interests are likewise groundless. In *Williams v. Hofley Manufacturing Co.*, 424 N.W.2d 278 (Mich. 1988), the Michigan Supreme Court expressly held that the claims and defenses created by Michigan's workers' compensation laws are property interests triggering procedural due process protections. *See id*. at 282–83, 288.

Respondents' contention that *Williams* held that there is a property interest only in the *procedures* for adjudicating workers' compensation claims, and not in the substantive statutory entitlements themselves, has it exactly backwards. As *Williams* recognized, procedural entitlements are not property interests; a party has a right to procedural due process only when some underlying substantive property (or liberty) interest is implicated. *See id*. at 281–82; *see also*, *e.g.*, *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."). Thus, *Williams* expressly holds that "[l]itigants in workers' compensation proceedings under Michigan law have a cognizable property interest *in their claims*[.]" 424 N.W.2d at 288 (emphasis added).

Respondents' assertion that *Franks v. White Pine Copper Division, Copper Range Co.*, 375 N.W.2d 715, 723 (Mich. 1985), holds that the entitlements created

by Michigan's workers' compensation laws are not property interests is also wrong. The language respondents cite does not say workers' compensation benefits are not property interests, but that they are not the type of property "protected by the Due Process Clause, the Contract Clause, or the Takings Clause *from substantive change by subsequent legislation*." *Id*. at 255 (emphasis added). That holding merely reflects the well-established principle that, although a substantive statutory entitlement is a property interest protected by the Due Process Clause, such protection does not prohibit legislation prospectively altering or eliminating the entitlement. *See*, *e.g.*, *Saxon v. Dept. of Social Servs.*, 479 N.W.2d 361, 367 (Mich. App. 1991) (citing, *inter alia*, *Atkins v. Parker*, 472 U.S. 115 (1985)).

III. This Case Is an Ideal Vehicle for Resolving the Conflict.

Respondents' contention that this case would be a poor vehicle for addressing the question presented because of the existence of supposed alternative grounds for affirmance is untenable. The Sixth Circuit's en banc decision rests solely on the holding that claims based on the denial of state-law statutory entitlements under workers' compensation laws do not allege an injury to property for RICO purposes. It binds courts throughout the Sixth Circuit to reject RICO claims on that basis, when similar claims may be brought in courts within the Ninth Circuit. The possibility that respondents might eventually prevail in this case on other grounds should not deter this Court from addressing the conflict created by the lower court's chosen ground of decision.

Moreover, the alternative grounds for affirmance posited by respondents are particularly weak. The panel opinion addressed respondents' ripeness argument and rejected it, explaining that under Michigan's workers' compensation system, employees suffer an immediate injury when employers fraudulently deny or cut off benefits, and thus "the plaintiffs' claims in this case were ripe at the time they filed their lawsuit." Pet. App. 71a.[2] The same reasoning refutes respondents' newly minted argument that petitioners lack Article III standing. Petitioners have asserted a redressable injury-in-fact attributable to respondents' misconduct.

Similarly, the panel addressed and rejected each of respondents' other assertions that petitioners failed to allege a RICO claim, including arguments that petitioners had not adequately alleged mail fraud, a pattern, or an enterprise. If this Court were to reverse the Sixth Circuit's holding that petitioners' claims are not based on injury to property, there is no reason to think that, on remand, the panel would change its views on respondents' other challenges to the pleading of the RICO claims, as the en banc decision does not call them into question. And although respondents theoretically could assert those defenses as alternative grounds for affirmance in this Court, the Court typically does not address fact-bound arguments on issues that did not form the basis of the lower court's ruling and do not in themselves merit review. *Matsu-*

---

[2] The en banc Sixth Circuit's observation that an employer need not pay benefits when a claim is disputed is not to the contrary, as an employer that engages in a fraudulent scheme to deny benefits does not genuinely dispute the claim.

shita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.5 (1996).

Coca-Cola's McCarran-Ferguson Act argument is not even a potential alternative basis for affirmance. Coca-Cola made the McCarran-Ferguson argument only in the *district court* and did not argue it on appeal as a basis for affirmance. Coca-Cola's brief mentioned the Act only once, in describing the case's procedural history. Coca-Cola thus failed to preserve the argument as an alternative ground for affirmance not only in the Sixth Circuit, but also in this Court, which generally considers only alternative grounds for affirmance that were properly raised below. *See*, *e.g.*, *Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988); *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988).

Moreover, the McCarran-Ferguson argument cannot prevail on remand because it is foreclosed by Sixth Circuit precedent. In *Brown v. Cassens Transport Co.*, 546 F.3d 347 (6th Cir. 2008), the court held that Michigan's workers' compensation law does not regulate the business of insurance for McCarran-Ferguson purposes and that RICO claims would not "invalidate, impair, or supersede" Michigan law in any event. *See id.* at 357–63. *Brown* thus knocks out both legs of Coca-Cola's McCarran-Ferguson argument. And although the decision below overrules a *later* decision in the *Brown* case concerning the injury-to-property issue, *see* Pet. App. 4a (overruling *Brown v. Cassens Transp. Co.*, 675 F.3d 946 (6th Cir. 2012)), it neither addresses nor calls into question the earlier *Brown* decision concerning McCarran-Ferguson, which remains binding Sixth Circuit precedent.

As for respondent Drouillard's contention that his claimed witness-immunity defense provides a reason

for denial of the petition, none of the courts below saw fit to address that issue. That an unadjudicated defense potentially applicable to only one respondent lurks in the background provides no reason for sidestepping an issue actually decided below that creates a significant intercircuit conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY T. STEWART
BENJAMIN WILENSKY
SEIKALY & STEWART, P.C.
30300 Northwestern Hwy.
Suite 200
Farmington Hills, MI 48334
(248) 785-0102

MARSHALL LASSER
Counsel of Record
MARSHALL LASSER, P.C.
P.O. Box 2579
Southfield, MI 48037
(248) 647-7722
mlasserlaw@aol.com

Attorneys for Petitioners

April 2014